COURT OF APPEAL FILE NO. CA45559

COURT OF APPEAL

BETWEEN:

BERND WALTER

APPELLANT
(PETITIONER)

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT
(RESPONDENT)

AND:

DEMOCRACY WATCH and COMMUNITY LEGAL ASSISTANCE SOCIETY

INTERVENERS

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OPENING STATEMENT

Democracy Watch's contribution to this appeal concerns the question of whether the constitutional principle of judicial independence extends along functional lines and attaches to administrative justice adjudicators tasked with adjudicating serious justiciable issues for which a reasonable person has an expectation that they will be decided independently and impartially.

Democracy Watch submits that the sphere of influence of the constitutional principle of judicial independence, rooted in the preamble to the Constitution and guaranteed by the rule of law, extends implicitly not only to judges appointed under section 96 and provincial court judges, but also to statutory adjudicators of justiciable issues who are not called judges or courts but in regard to whose functions any informed citizen would reasonably expect the principle's influence to be strong. While the courts have been highly accommodating of the transfer of adjudicative jurisdictions to the administrative justice system, it cannot be constitutionally correct that legislatures may without limit arbitrarily erode the sphere of influence of the judicial-independence principle by means of such transfers, leaving the arbiters called judges and courts – which the Respondent claims are the only arbiters of justiciable issues protected by the independence principle – with increasingly little to decide.

Instead, where administrative justice encroaches into adjudication of rights and interests that the reasonable person would expect to be decided by a truly independent decision maker, those legislative schemes should be found to attract, by degree, components of constitutional judicial independence in proportion to the gravity of the decision making. Recognizing this aspect of the principle of judicial independence protects the interests of Canadians from an unfettered erosion of that principle's foundational influence.

PART 1 - STATEMENT OF FACTS

1. Democracy Watch is a not-for-profit organization founded and incorporated in 1993. It advocates for democratic reform, citizen participation in public affairs, government and corporate accountability, and ethical behaviour in government and business in Canada.

2. Democracy Watch adopts the appellant's statement of facts.

PART 2 - ISSUES ON APPEAL THAT THE INTERVENER WILL ADDRESS

3. The issue that Democracy Watch addresses below relates to whether the British Columbia Review Board, the administrative body that has concurrent jurisdiction with the courts to determine the fate of individuals found unfit to stand trial or "not criminally responsible" for reasons of mental illness, is entitled to a constitutional protection of independence through the unwritten principle of the Constitution.

PART 3 - ARGUMENT

A. *Ocean Port* is Not Determinative

4. The appellant and respondent debate in their factums the question of whether *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R 781, 2001 SCC 52 ("*Ocean Port*"), is determinative of the question of whether administrative tribunals can attract elements of the constitutional principle of judicial independence.

5. The respondent relies on the language in paragraphs 23-24 in *Ocean Port* in which the Court draws a distinction between courts and administrative tribunals, the latter characterized as being, "created precisely for the purpose of implementing government policy"[1]. The respondent's view is that the independence of administrative decision makers is limited to common law procedural fairness, including protection for litigants from a decision maker who can be said to have a reasonable apprehension of bias.

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[1] *Ocean Port*, para 24.

6. Like the appellant, Democracy Watch contends that *Ocean Port* is not determinative and points in particular to paragraph 33, where the Court said it found no basis to extend the constitutional guarantee of judicial independence to the Liquor Appeal Board because it "is not a court, nor does it approach the constitutional role of the courts". The appellant says that this statement invites the question of what would be the result if the tribunal in question was not a policy implementation body, but rather a tribunal that does approach the constitutional role of the courts.

7. In *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36 ("*Bell*"), the respondent to a human rights complaint by female employees brought an application alleging the independence and impartiality of the Canadian Human Rights Tribunal ("CHRT") were compromised by the power of the Canadian Human Rights Commission to issue binding guidelines affecting the CHRT and by the Commission's power to extend CHRT members' terms in ongoing inquiries. The Court considered the functions of the CHRT and said this at para. 24:

> The fact that the Tribunal functions in much the same way as a court suggests that it is appropriate for its members to have a high degree of independence from the executive branch. A high degree of independence is also appropriate given the interests that are affected by proceedings before the Tribunal — such as the dignity interests of the complainant, the interest of the public in eradicating discrimination, and the reputation of the party that is alleged to have engaged in discriminatory practices.

8. However, the Court, after closely considering the statutory scheme and the extent to which policy related to the CHRT's adjudicative functions, found that the legislative scheme had accorded an appropriate degree of institutional independence to the CHRT to "the common law standard". While Bell Canada had advanced arguments under the *Bill of Rights* and the unwritten principle of Judicial Independence, the Court's finding that the extent of institutional independence in the legislation was appropriate, there was no conflict between the legislation and the common law that brought the constitutional element into focus. Thus at para. 29, the Court wrote:

> As an administrative tribunal subject to the supervisory powers of s. 96 courts, the Tribunal does not have to replicate all features of a court. As discussed above, the legislature has conferred a high degree of independence on the Tribunal, stopping short of constituting it as a court, but nevertheless supporting it by safeguards adequate to its function.

9. Democracy Watch submits that *Bell* did not foreclose the potential for a constitutional principle coming into focus where legislation creates an office of an administrative justice adjudicator who decides issues of fundamental importance to private parties, but where the legislation expressly denies such a decision maker sufficient institutional independence.

10. Moreover, in *Ell v. Alberta*, [2003] 1 S.C.R. 857 ("*Ell*") the Court indicated that the principle of judicial independence could extend in part or in whole to decision makers who were not judges. In that case, Justices of the Peace were recognized to have some, but not all, of the features of judicial independence extended to them. The Court drew support from Lamer C.J.'s majority reasons in *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R 3 ("*Reference re: Provincial Court*"), writing at para. 20:

> Historically the principle of judicial independence was confined to the superior courts. As a result of the expansion of judicial duties beyond that realm, it is now accepted that all courts fall within the principle's embrace.
>
> [emphasis added]

11. Thus the concept of an extension of the principle of judicial independence can be traced from *Reference re: Provincial Court* through *Ocean Port* and through *Ell*. Its extension to administrative tribunals has not been foreclosed, and instead, Democracy Watch submits that the prospect was expressly contemplated when the Court referred to tribunals that "approach the constitutional role of the courts" in *Ocean Port* and referred to the expansion of judicial duties in *Ell*. Further, Professor Hogg has noted ambiguity in the decision of McLachlin C.J. in *Ocean Port* may leave the door open to further expansion. He wrote as follows:

> ...while McLachlin C.J. seemed categorical that the opinion in *Re Remuneration of Judges* applied only to courts, she also stated without elaboration that "tribunals may sometimes attract *Charter* requirements of independence". Since the unwritten constitutional principle is not a *Charter* requirement (the *Charter* being a written instrument), it is not clear what she had in mind in this statement. In any event, the reasoning does leave some room for the Court in a subsequent case to impose independence requirements on an administrative tribunal that is very similar to a court. However, for the general run of administrative tribunals, including those with power to inflict penalties on individuals for breaches of a statute, there is no constitutional requirement of independence from the executive branch of the government.[2]

12. Accordingly, Democracy Watch submits *Ocean Port* has not closed the door on the extension of judicial independence to administrative decision makers.

B. Judicial Independence and the Separation of Powers

13. Judicial independence was identified in *Reference re: Provincial Court* as a constitutional principle rooted in the preamble to the *Constitution Acts* with Lamer C.J. writing at para. 83:

> I am of the view that judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*. The existence of that principle, whose origins can be traced to the *Act of Settlement* of 1701, is recognized and affirmed by the preamble to the Constitution Act, 1867.

14. As summarized by the Court in *The Queen v. Beauregard*, [1986] 2 S.C.R. 56 at paras. 23-24:

> There is, therefore, both an individual and a collective or institutional aspect to judicial independence. As stated by Le Dain J. in *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, at pp. 685 and 687:

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[2] Peter W Hogg, *Constitutional Law of Canada*, 5th ed Supplemented (Toronto: Thomson Reuters, 2007) vol 2 (loose-leaf updated 2016, release 1) ("*Constitutional Law of Canada*") at 7-27. Professor Hogg footnotes this paragraph to R. Ellis, *Unjust by Design* (2013), 70, 218-228, 233 stating that the article argues forcefully that the unwritten constitutional requirements of judicial independence should apply to administrative tribunals that exercise judicial functions, including the "adjunct judicial functions exercised by regulatory agencies" (p.228).

> [Judicial independence] connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees...
>
> It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government.
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> The rationale for this two-pronged modern understanding of judicial independence is recognition that the courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it--rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important. In other words, judicial independence is essential for fair and just dispute-resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies.

15. In *Reference re: Provincial Court*, Lamer C.J. specifically discussed the important relationship between the constitutional principle of judicial independence to the constitutional convention of separation of powers of the legislative, judicial and executive branches of government (see paras. 138-146).[3] The separation of powers, he explained, "depoliticizes" the relationship between the branches, ensuring that the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary.

16. Separation of powers in the Canadian context is intended to be expressed in relationships of cooperation and mutual respect as between the three branches of

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[3] It should be noted, however, that the separation of powers in the Canadian context is not an isolationist model. As Professor Hogg explained in *Constitutional Law of Canada* at 7-37 to 7-38.1, there is no general "separation of powers" in the *British North America Act*, 1867. (see also *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 15.).Our Constitution does not separate the legislative, executive, and judicial functions and insist that each branch of government exercise only its own function. Thus a provincial legislature may confer non-judicial functions on the courts of Ontario and, subject to section 96 of the Constitution, confer judicial functions on a body which is not a court. However, each branch still has its separate constitutional role to play which ensures the principles of our democracy remain robust.

government;[4] respect that ensures Canadians are not deprived of the fundamental democratic rights embodied in each branch. The democratic process can quickly be brought to a head when the legislative branch and judiciary conflict: one striking legislation, the other stripping functions or invoking the *Charter*'s notwithstanding clause. Such instances are a race to the bottom.

C. The Judicial Core and Inherent Powers

17. Judicial independence describes the individual and institutional protections afforded to the judiciary, but it doesn't tell us much about what disputes and matters judges and courts are responsible for deciding. Sections 96 – 101 of the *Constitution Act* identify courts and judges but don't explain what they do. The terms, "courts" and "judges" obviously had meaning to the parties drafting and enacting the *Constitution*, so when confronted with the question of what is the core functioning of the judiciary, the court has looked to what courts and judges decided when the *Constitution* was enacted.

18. This question has arisen in challenges to the jurisdiction of administrative tribunals on the basis that they are infringing on a "core" jurisdiction that belongs solely to the Courts. That core was outlined in *Reference re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714 as being identifiable through the application of a three part test:

(a) Does the power or jurisdiction broadly conform to a power or jurisdiction exclusively exercised by a superior, district or county court at the time of Confederation?

(b) If so, is it a judicial power?

(c) If so, is the power either subsidiary or ancillary to a predominantly administrative function or necessarily incidental to such a function?

19. In relation to the second element, the Court explained what "judicial powers" are comprised of as follows:

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[4] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paras. 136 and 137.

> ...the question of whether any particular function is 'judicial' is not to be determined simply on the basis of procedural trappings. The primary issue is the nature of the question which the tribunal is called upon to decide. Where the tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then, normally, it is acting in a 'judicial capacity'. To borrow the terminology of Professor Ronald Dworkin, the judicial task involves questions of 'principle', that is, consideration of the competing rights of individuals or groups. This can be contrasted with questions of 'policy' involving competing views of the collective good of the community as a whole. (See Dworkin, Taking Rights Seriously (Duckworth, 1977) pp. 82-90.)
>
> [emphasis added]

20. It may be seen that language captures what many administrative tribunals and decision makers do.[5]

21. *Re: Residential Tenancies* establishes that s. 96 protects a core set of judicial functions.[6] This was reinforced by *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, wherein Lamer, C.J., for the majority, stated that even if the conferral of jurisdiction satisfies the three-step test analysis, one must also assess whether it breaches the guaranteed "... core jurisdiction of superior court powers which cannot be removed by either level of government in the absence of a constitutional amendment" (at para. 18). Similarly, in *Reference Re Young Offenders Act*, [1991] 1 S.C.R. 252 (*Re: Young Offenders*") at para. 24, the Court said this:

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5 The reference to "private" litigation by Dickson J. in this passage would not preclude the Crown as litigant, as he had traced (p. 730) the definition of a judicial power through the Privy Council decision of *Labour Relations Board of Saskatchewan v. John East Iron Works, Limited*, [1949] A.C. 134, wherein Lord Atkins had written:

> "the conception of the judicial function is inseparably bound up with the idea of a suit between parties, whether between Crown and subject or between subject and subject, and that it is the duty of the court to decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the proceedings".

6 See: *Court of Unified Criminal Jurisdiction, Re*, [1983] 1 S.C.R. 704 and *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 - see paras. 29 and 33.

> Section 96 of the *Constitution Act*, 1867 is regarded as a means of protecting the "core" jurisdiction of the superior courts so as to provide for some uniformity throughout the country in the judicial system. The case law has developed principles to ensure that s. 96 would not be rendered meaningless through the use of the provincial competence to constitute, maintain and organize provincial courts staffed with provincially appointed judges having the same jurisdiction and powers as superior courts. (See to this effect, *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, and *Sobeys Stores Ltd. v. Yeomans, supra*, which have already reviewed in depth the case law relating to this issue.)

D. Accommodating the Expansion of Administrative Justice

22. It was also recognized by the Court in *Re: Residential Tenancies,* however, that the three part test to protect the judicial core was in fact an opening of the gates to the growing administrative justice system. Dickson J. wrote:

> I do not think it can be doubted that the courts have applied an increasingly broad test of constitutional validity in upholding the establishment of administrative tribunals within provincial jurisdiction. In general terms it may be said that it is now open to the provinces to invest administrative bodies with 'judicial functions' as part of a broader policy scheme. There will still be situations, however, as in *Attorney General of Quebec et al. v. Farrah* [[1978] 2 S.C.R. 638], where a s. 96 'judicial function' is isolated from the rest of the administrative structure of the relevant legislation. In *Farrah*, a Transport Tribunal was given appellate jurisdiction over the Quebec Transport Commission. The Tribunal performed no function other than deciding questions of law. Since this function was normally performed by s. 96 courts and divorced from the broader institutional framework of the Act, the impugned sections were held to be unconstitutional. Subject to this type of situation, s. 96 can no longer be construed as a bar to a province seeking to vest an administrative tribunal with ancillary 'judicial' powers formerly exercised by s. 96 courts.
>
> [emphasis added]

23. The troubling aspect of this accommodation by the courts was that it was a great benefit for the executive branch, without a burden. Judicial functions performed by the court came with judicial independence, and a lack of influence by the executive. Take those functions and put them into an administrative body where the decision maker could

be hired and fired, and the executive was given a whip, if not the reins. The losers in this exchange, were, and are, the litigants, particularly those in a dispute with the very government that created and oversees the adjudicative administrative decision-maker.

24. The most striking part of the concession in the test from *Re: Residential Tenancies* is in the interpretation of the first element – whether the power or jurisdiction broadly conforms to a power or jurisdiction exclusively exercised by the courts at Confederation. The Court chose to apply that test in a narrow way. This may be seen in its application in *Re: Young Offenders*. Lamer C.J., writing for the majority, characterized the question as whether at Confederation the courts had "jurisdiction over young persons charged with a criminal offence". He then held that because the scheme of a different approach to criminal justice for young persons was not in existence at the time of Confederation and if it had been, it would have been entrusted to inferior courts, the legislation did not infringe on the judicial core and the challenge failed against the first component of the test.

25. The concurring reasons of Justices La Forest and L'Heureux Dube took a similar view asking only whether the scheme existed at the time of Confederation. The reasons of Wilson J. also concurred in the result, but applied the test differently. In the first part of the test, Wilson J. asked not whether the scheme existed, but rather which court adjudicated the offences that had been taken up into the scheme. Finding that "the vast majority of offences now covered by the Act were required to be tried before the superior courts of the province" (para. 51), Wilson J. held that the first element of the test was satisfied and carried on the analysis under the second and third parts of the test. After determining that the function was plainly judicial, Wilson J. observed that the scheme was "indeed a new and different approach which focuses on rehabilitation rather than punishment and stigmatization" and on that basis conceded that the new administrative justice regime did not offend the judicial core protected by s. 96.

26. Wilson J.'s approach has not gained ground, however, and the result has been a narrow application of the test and the unchecked proliferation of all manner of administrative justice schemes, adjudicated by decision makers who are accountable in various ways to the executive.

27. It is noteworthy that the *Re: Residential Tenancies* test establishes no bright line divide for what is described as an inalienable core. This is because the third part of the test allows for administrative tribunals to be given judicial powers so long as those powers are among other, more policy related powers and functions. For this reason, it is not difficult for the legislative branch to avoid offending the *Re: Residential Tenancies* test when moving decision-making into administrative bodies. Drafters of legislation can avoid it by simply ensuring the legislation is supported by some policy rationales that a new approach is being taken, and ensure that along with adjudicative functions, the decision maker is given some advisory or policy making functions as well so as not to offend the s. 96 core.

28. The same accommodating approach to the expansion of administrative justice can be seen by the courts in the evolution of the test for judicial review to require substantial deference being paid to administrative decision makers. In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 31, the Court described the source of the judicial review power as follows:

> The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate of Minister of Finance*, [1973] S.C.R. 120, at p. 127). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act*, 1867: *Crevier*. As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits.
>
> [emphasis added]

29. The Court has, however, limited the inherent power of review[7] to require only that there be *a method* by which the court can ensure tribunals keep to their mandate. That judicial review is available does not preclude the legislature dictating a high threshold for review on the merits, such as is found in the *Administrative Tribunals Act*, SBC 2004, c. 45 or restricting its availability to matters of law, as though the *Arbitration Act*, RSBC 1996, c. 55. Meanwhile, the court's standard of review has bowed to the point of giving administrative decision makers deference on interpretation of their home statutes, and the notion of a pure question of jurisdiction is, at best, on life support. Interim stages of appeal by further administrative bodies are also permitted, placing before a litigant a series of time consuming appeals to navigate before they can appear before "a real judge".[8] If the trend continues, it appears judicial review may apply only to gross excesses of jurisdiction, bad faith and procedural unfairness by administrative decision makers.

E. Erosion of Independent Decision Making

30. The test set out in *Re: Residential Tenancies* is something of an anomaly in being anchored to the jurisdiction of the courts at a historical point in time, whereas the statutory laws, common law and constitutional law continually develops and evolves. The result is that the judiciary as a branch of government is receding in significance in the administration of justice.

31. This scheme of delivering justice may work well in a great many cases, but where it doesn't is when litigants are faced with administrative decision makers adjudicating matters that are of a nature that any reasonable person would want to have them determined by someone who is bestowed with meaningful guarantees of independence and impartiality. This is particularly the case for those litigants who come into conflict with

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[7] In *Manz v. Sundher*, 2009 BCCA 92, in oral reasons for the court, Saunders J.A. quoted from para 31 of *Dunsmuir* which uses that term, but also wrote at para. 26, "I am not at all persuaded that judicial review is properly characterized as part of inherent jurisdiction of superior courts. Rather, modern judicial review (in British Columbia under the *Judicial Review Procedure Act* R.S.B.C. 1996 c. 241) is a restatement of the law of prerogative writs whereby the Sovereign called on the tribunal to ensure compliance with its mandate, using the court as the medium..." In *Northstar Lumber v. United Steelworkers of America, Local No. 1-424*, 2009 BCCA 173, Justice Saunders returned to the subject in paragraph 99, adopting the characterization that judicial review was a "hallmark" of a superior court.

[8] *Northstar Lumber v. United Steelworkers of America, Local No. 1-424, supra.*

significant government interests, and must convince a decision maker to rule against the government that appointed, pays and can dismiss him or her. As modern life evolves, government expands, and new rights and interests are recognized, the erosion of access to independent arbiters to adjudicate fundamentally important conflicts and issues in people's lives is a loss for democracy.

32. In this vein, it should be noted that when the expansion of the scope of administrative tribunal justice occurs under governments that are generally respectful of the separation of the judicial branch, it can seem relatively innocuous. However, the democratic system in an age of growing populism must withstand swings of favour on that subject, and the precedents set today must stand firm for more volatile periods in Canadian democracy that may lie ahead.

F. Recognizing the Full Extent of the Constitutional Dimension

33. Judicial independence is a constitutionally protected democratic right belonging to Canadians. Democracy Watch says that the constitutional right to an independent arbiter should be recognized to attach not simply to people holding judicial positions and the courtrooms over which they preside, but also to matters to be adjudicated regardless of whether they are historic rights or new ones. This is what is implied in the language referenced above from *Reference re: Provincial Court Judge*, *Ocean Port* and *Ell*, where the court refers to the extension of the principle to decision makers who are not s. 96 appointed judges. The principle is extending along functional lines.

34. The necessity and ramifications of this extension were recognized by McEwan J. in *McKenzie*, a decision over the termination of a residential tenancy arbitrator. McEwan J. reasoned:

> [144] In *Ocean Port*, as we have seen, the Court stated quite firmly that "courts" in the *PEI Reference* meant only those courts referred to by that name in the *Constitution Act, 1867*.
>
> [145] In *Ell*, on the other hand, the court broadened that limitation by the extension, on a <u>functional</u> basis, of the principle of independence to a position that is not that of a judge. The Ontario Court of Appeal in *Ontario Deputy Judges' Assn.* extended the unwritten constitutional principle applied in the *PEI*

> *Reference* to the incidental civil and family jurisdiction of courts exercising s. 11(d) authority to occasional judges having only those responsibilities. It now seems clear that essentially anything broadly labelled a "court" or with at least one foot within the "judicial branch" of government will attract constitutional protection.
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> [underlining in original]

35. Following through with this reasoning, Justice McEwan addressed the question of whether the Legislature could create tribunals with no credibility as adjudicative bodies:

> [148] I do not think it is elevating the principles of natural justice to constitutional status to say that the rule of law must imply, fundamentally, not merely the abstract supremacy of law but some minimum standard in its administration. That, I think, is at the heart of the notion that it is "appropriate" for legislatures to vest tribunals that adjudicate private disputes with certain indices of independence (see: the discussion of *Bell Canada*, above, at paras. 132-135). It cannot be merely abstractly "inappropriate" but within the competence of legislatures to utterly fail to do so. The power of legislatures to oust the principles of natural justice in the design of administrative tribunals must be rationally connected to the purpose and function of the tribunal. It cannot be that this power to modify common law principles can be used to offer private disputants a binding arbitral process with no credibility, simply because budgetary or other pressures make it convenient to do so.

36. A further observation that might be made in that vein is that it is entirely appropriate that the legislative body should not be able to dictate results of what facially appears as an adjudicative process. Instead, it is appropriate that the legislature and executive bear the political consequences of policy making. In any event, Justice McEwan concluded his reasoning by holding that the answer must be that the constitutional principle of judicial independence extends functionally into adjudicative administrative decision-making to protect the integrity of those processes and the reasonable expectations of those who come before them:

> [151] The principles of natural justice are rules developed by judges that may be modified or ousted by a clear expression of legislative intent. There is surely a distinction between such rules, however, and natural justice itself, by whatever rubric or rationale it is described. The fundamental principles upon which justice and democracy rest must infuse both judge-made law and legislation. The rules of natural justice are drawn from a wellspring of fundamental principles. Any modification or ouster of those rules by legislatures must logically tap into the same

> sources in order to be constitutional. Legislation ousting the rules of natural justice must, in other words, still comport with the fundamental premises, written in some contexts, unwritten in others, infusing the concept of the rule of law.
>
> [152] A tribunal, constituted to try issues of law as between private citizens that is equipped with none of the indicia of independence required to ensure impartiality or to engender public confidence or respect, must necessarily run afoul of the unwritten principle of independence identified in the *PEI Reference* and in *Ell*.

37. Democracy Watch's submission here reaches the same conclusion, but outlined within a structural model. It submits that the judicial core should be seen not to be a bright line divide between what is and what is not in s. 96, but rather a graduated sphere of influence over adjudicative decisions which, based on a functional analysis, including the subject matter, significance and the nature of the decision to be made, attracts elements of the principle of constitutional independence by degree as they move deeper into the judicial sphere of influence.

38. Accordingly, legislators can choose to expand the role of administrative justice into the judicial sphere, but will do so knowing that such regimes will need to incorporate elements of institutional independence that accord with the extent of the incursion into the judicial sphere. Such a finding would be consistent with *Ocean Port* (where the tribunal would be seen not to extend far enough into the judicial sphere to attract the principle) and with *Ell* (where the principle extended along functional lines, but not so far as to preclude the educational requirement for the officers that was at issue). Drafters of legislation will be careful when drafting into areas that may attract independence because they may lose some of the benefits that they are intending from the scheme and will incur duplication of costs and resources already expended on the s. 96 courts that are ready, willing and able to perform their independent adjudicative functions.

39. Similarly, the recognition of the extension of components of judicial independence along functional lines will serve as a caution to the executive branch not to use its administrative powers over adjudicative tribunals in a manner that improperly seeks to influence or control the outcome of adjudicative proceedings that impact the government, or in which the government is a party.

40. In this way, a balance is restored between the three branches of government that is consistent with the reasonable expectations of Canadians that there will be a proportionate degree of independence and impartiality in the administrative decision makers tasked with adjudicating serious issues and legal rights, particularly when the dispute is against the government itself.

41. Here, the appellant will argue that the British Columbia Review Board is tasked with making significant decisions that impact the *Charter* rights of individuals in our society and as a result should have the tribunal's remuneration independently determined. Democracy Watch will not take a position on that subject, but suggests that if an analysis of to what degree and what components of the principle of judicial independence might extend to his position, the court ought to consider factors such as (a) whether legal rights and interests are engaged, (b) whether Constitutional rights or values are to be determined, (c) whether the government is an adverse party, and (d) whether the nature of the dispute is predominantly adjudicative. If the principle of independence is found to apply, then the court will need to consider the range of reasonable institutional protections that are appropriate to protect the proper functioning of the decision maker.

All of Which is Respectfully Submitted,

Dated: February 20, 2019

per Solicitor for Democracy Watch
Sean Hern

LIST OF AUTHORITIES