

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***McKenzie v. Minister of Public Safety  
and Solicitor General et al.***,  
2006 BCSC 1372

Date: 20060908  
Docket: L051335  
Registry: Vancouver

Re: An Order of the Minister of Public Safety and Solicitor General  
dated April 14, 2005, made under s. 14.9(3) of the  
*Public Sector Employers Act*, R.S.B.C. 1996, c. 384, as amended.

Between:

**Mary E. McKenzie**

Petitioner

And:

**The Minister of Public Safety and Solicitor General, The Minister of  
Forests and Range and Minister Responsible for Housing  
and The Attorney General of British Columbia**

Respondents

And:

**British Columbia Council of Administrative Tribunals**

Intervener

Before: The Honourable Mr. Justice McEwan

## **Reasons for Judgment**

Counsel for the Petitioner

P.J. Pearlman Q.C.

Counsel for the Respondents

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Counsel for the Intervener

F. Falzon

Date and Place of Trial/Hearing:

January 17-20 & 24, 2006  
Vancouver, B.C.

I

**INTRODUCTION**

[1] On April 14, 2005, the Minister of Public Safety and Solicitor General rescinded, without notice, the appointment of the Petitioner as an arbitrator under the **Residential Tenancy Act** and the **Manufactured Home Park Tenancy Act**. This brought a sudden and unexpected end to a career that had begun on December 16, 1994, when Ms McKenzie was first appointed as a result of a merit based competition. At the time of her termination, the Petitioner was in the midst of a five year term that had commenced on January 1, 2004 and would have run until December 31, 2008.

[2] Shortly after the Petitioner’s termination, responsibility for the Residential Tenancy Branch passed from the Minister of Public Safety and Solicitor General to the Minister of Forest and Range and Minister Responsible for Housing. Certain subsequent events, including a purported “reconsideration,” dictated that the latter Minister be joined as well. Both Ministries are referred to in these reasons, along with the Attorney General, as “the Respondents”.

[3] The Petitioner’s termination was in the purported exercise of s. 14.9(3) of the **Public Sector Employers Act**, R.S.B.C. 1996, c. 384 (as amended). Section 14.9 reads:

**Members of tribunals**

- 14.9 (1) Division 3 of this Part does not apply to
  - (a) a coroner under the *Coroners Act*,

- (b) the fire commissioner under the *Fire Services Act*,
- (c) an arbitrator under the *Residential Tenancy Act*,
- (d) a governor or director of the Workers' Compensation Board under the *Workers Compensation Act*, or
- (e) a person who is a member of a tribunal designated in the Schedule, when the person is acting in his or her capacity as a member of the tribunal.

(2) The Lieutenant Governor in Council may, by regulation, add a tribunal to the Schedule.

(3) The appointment of a person referred to in subsection (1) may be terminated without notice before the end of the term of their appointment on payment of the lesser of

- (a) 12 months' compensation, or
- (b) the compensation in an amount equal to the remuneration otherwise owing until the end of the term.

(4) An amount paid under subsection (3) must be in the form of periodic payments unless the employer, in its sole discretion, considers a lump sum payment to be more appropriate.

(5) For greater certainty, the Lieutenant Governor in Council may, for the designated tribunals referred to in the Schedule, prescribe further employment termination standards that are not inconsistent with this section.

[4] The Respondents' position is that this provision, which applies to appointments under a number of statutes, authorized the Petitioner's termination without notice upon payment of the compensation specified in s. 14.9(3). The purpose, they submit, is to bring consistency to the compensation paid to terminated public employees or appointees.

[5] The Petitioner challenges the rescission of her appointment on three grounds:

1. That there was a lack of procedural fairness in the decision-making process leading to her termination;

2. That the Respondents' interpretation of s. 14.9(3) is incorrect, and that it does not authorize mid-term revocation of appointments of Residential Tenancy Arbitrators; and
3. That if it does, s. 14.9(3) is unconstitutional.

[6] The Respondents concede that the summary manner in which the Petitioner's termination was effected was procedurally unfair. They have consented to an order quashing the decision of the Minister, and quashing the subsequent reconsideration decision of the Associate Deputy Minister of the Ministry Responsible for Housing, on the basis that:

- (a) The requirements of procedural fairness were not met with respect to the Minister's decision, in that insufficient information was provided to the Petitioner of the reasons for proposed termination to allow her a meaningful opportunity to respond.
- (b) These requirements of procedural fairness were also not met with respect to the reconsideration decision, in that certain evidence of facts, circumstances and submissions material to that decision was inadvertently not part of the record considered by the Associate Deputy Minister in making that decision.

[from the Respondents' submission]

[7] The Respondents submit that this renders all issues respecting the process undertaken by the Minister and the Associate Deputy Minister moot, although they do not raise mootness or lack of standing as grounds for opposing further proceedings on the interpretation of s. 14.9(3). They submit, however, that if the court finds that s. 14.9(3) does not authorize the Petitioner's summary dismissal, that should be the end of the matter, and it would then be unnecessary to go on to decide the constitutional issue.

[8] For reasons I will amplify as I proceed, I think it necessary, to provide context and to illustrate concerns material to the statutory interpretation and constitutional arguments, to briefly review the history of this matter and the circumstances surrounding the Petitioner's termination, notwithstanding the Respondents' concession.

[9] Following that, I will turn to the question of what s. 14.9(3) means, in light of s. 86(3) of the **Residential Tenancy Act**, and in the context of the series of legislative changes that were coming about in the period leading up to the Petitioner's termination.

[10] Lastly, for reasons I will explain, I will address the constitutional dimensions of this case before returning to the question of remedy.

## II

### BACKGROUND

(a) The relevant statutes

[11] Disputes between residential landlords and tenants in British Columbia are subject to a scheme of arbitration found in the **Residential Tenancy Act**, S.B.C. 2002, c. 78 ("**RTA**"), and a companion statute, the **Manufactured Home Park Tenancy Act**, S.B.C. 2002, c. 77 ("**MHPTA**"). The **RTA** includes the following provisions:

## **Definitions**

1 In this Act:

“**arbitrator**” means an arbitrator appointed under section 86 (1) [appointment of arbitrators];

...

“**director**” means the director appointed under section 8 [appointment of director];

...

## **This Act cannot be avoided**

5(1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

## **Enforcing rights and obligations of landlords and tenants**

6(1) The rights, obligations and prohibitions established by or under this Act are enforceable between a landlord and tenant under a tenancy agreement.

(2) A landlord or tenant may apply for arbitration if the landlord and tenant cannot resolve a dispute referred to in section 58 (1) [arbitration of disputes].

(3) A term of a tenancy agreement is not enforceable if

(a) the term is inconsistent with this Act or the regulations,

(b) the term is unconscionable, or

(c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

...

## **Appointment of director**

8 A director must be appointed in accordance with the *Public Service Act* for the purposes of this Act.

## **Director’s responsibilities**

9(1) The director is responsible for the administration and management of all matters and persons appointed under this Act.

(2) The director may delegate any of his or her powers or duties under this Act.

(3) The director may establish rules of procedure for the conduct of arbitrations and arbitration reviews.

(4) The director may do one or more of the following:

- (a) provide information to landlords and tenants about their rights and obligations under this Act;
- (b) help landlords and tenants resolve any dispute that can be or has been referred to arbitration;
- (c) publish, or otherwise make available to the public, arbitration decisions or summaries of them.

...

### **Arbitration of disputes**

**58(1)** Except as restricted under this Act, a dispute between a landlord and tenant in respect of any of the following may be resolved by applying for arbitration:

- (a) rights, obligations and prohibitions under this Act;
- (b) rights and obligations under the terms of a tenancy agreement that
  - (i) are required or prohibited under this Act, or
  - (ii) relate to
    - (A) the tenant's use, occupation or maintenance of the rental unit, or
    - (B) the use of common areas or services or facilities.

(2) Except as provided in subsection (4), a dispute about a right, obligation or prohibition referred to in subsection (1) that cannot be resolved between the landlord and tenant must be submitted to arbitration unless

- (a) the claim is for more than the monetary limit for claims under the *Small Claims Act*,
- (b) the application was not filed within the applicable period specified under this Act, or
- (c) the dispute is linked substantially to a matter that is before the Supreme Court.

(3) Except as provided in subsection (4), a court does not have and must not exercise any jurisdiction in respect of a matter that must be submitted to arbitration under this Act.

- (4) The Supreme Court may
  - (a) on application, hear a dispute referred to in subsection (2) (a) or (c), and
  - (b) on hearing the dispute, make any order that an arbitrator may make under this Act.
- (5) The *Commercial Arbitration Act* does not apply to an arbitration under this Act.

...

### **Arbitrator's authority**

- 62(1)** An arbitrator has authority to arbitrate
- (a) a dispute referred by the director to the arbitrator, and
  - (b) any matters related to that dispute that arise under this Act or a tenancy agreement
- (2) An arbitrator may make any finding of fact or law that is necessary or incidental to making a decision or an order under this Act.
- (3) An arbitrator may make any order necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a landlord or tenant comply with this Act, the regulations or a tenancy agreement and an order that this Act applies.
- (4) An arbitrator may dismiss all or a part of an application if
- (a) there are no reasonable grounds for the application or the part,
  - (b) the application or part does not disclose a dispute that may be arbitrated under this Act, or
  - (c) the application or part is frivolous or an abuse of the arbitration process.
- (5) If the director designates a different arbitrator under section 61 (2) [*change in arbitrator*] to arbitrate a dispute, the arbitrator to whom the dispute was previously referred ceases to have authority in relation to the matter.

...

### **Application of *Administrative Tribunals Act***

**78.1** Sections 1, 30, 44, 48, 56 to 58 and 61 of the *Administrative Tribunals Act* apply to an arbitration and an arbitrator.

...

**Exclusive jurisdiction of arbitrator**

**84.1(1)** An arbitrator has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an arbitration proceeding under Division 1 of this Part or a review under Division 2 of this Part and to make any order permitted to be made.

(2) A decision or order of an arbitrator under this Act on a matter in respect of which the arbitrator has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

...

**Appointment of arbitrators**

**86(1)** The minister may appoint individuals as arbitrators for the purposes of this Act.

(2) An arbitrator may be appointed to hold office for an initial term of 2 to 4 years and may be reappointed for additional terms of up to 5 years.

(3) An individual is not eligible for appointment as an arbitrator unless

(a) he or she has successfully completed a merit based process established or approved by the director, or

(b) he or she has previously been appointed as an arbitrator under this Act.

(4) An arbitrator must be

(a) paid fees in the amount and manner specified by the director, and

(b) reimbursed for reasonable travelling and out of pocket expenses necessarily incurred in the performance of duties or exercise of powers under this Act.

(5) An arbitrator is not an employee of the government.

...

**Termination for cause**

**86.3** The minister may terminate the appointment of an arbitrator for cause.

### **Compulsion protection**

**87(1)** An arbitrator must not be required to testify or produce evidence in any proceeding, other than a criminal proceeding, about records or information obtained in the discharge of duties under this Act.

### **Transitional: arbitrators appointed under former Act**

**102(1)** On January 1, 2004, the appointment of each arbitrator appointed under the former Act is rescinded.

(2) For the purposes of section 86 (2) and (3) (b) *[appointment of arbitrators]* of this Act, an arbitrator appointed under the former Act is deemed to have been previously appointed under this Act.

[Emphasis added.]

[12] The **MHPTA** mirrors these provisions (see ss. 1, 5, 6, 8, 9, 51, 55, 71.1, 77.1, 79, 79.3, 80 and 94). The **RTA** and the **MHPTA** will hereinafter be collectively referred to as “the **RTA**”.

[13] The **Administrative Tribunals Act**, S.B.C. 2004, c. 45 (“**ATA**”) is an act of more general application. Relevant provisions include:

### **Definitions**

1 In this Act:

“**applicant**” includes an appellant, a claimant or a complainant;

“**application**” includes an appeal, a review or a complaint but excludes any interim or preliminary matter or an application to the court;

“**appointing authority**” means the person or the Lieutenant Governor in Council who, under another Act, has the power to appoint the chair, vice chair and members, or any of them, to the tribunal;

“**constitutional question**” means any question that requires notice to be given under section 8 of the *Constitutional Question Act*;

“**court**” means the Supreme Court;

“**decision**” includes a determination, an order or other decision;

“**dispute resolution process**” means a confidential and without prejudice process established by the tribunal to facilitate the settlement of one or more issues in dispute;

“**intervener**” means a person who is permitted by the tribunal to participate as an intervener in an application;

“**member**” means a person appointed to the tribunal to which a provision of this Act applies;

“**privative clause**” means provisions in the tribunal’s enabling Act that give the tribunal exclusive and final jurisdiction to inquire into, hear and decide certain matters and questions and provide that a decision of the tribunal in respect of the matters within its jurisdiction is final and binding and not open to review in any court;

“**tribunal**” means a tribunal to which some or all of the provisions of this Act are made applicable under the tribunal’s enabling Act;

“**tribunal’s enabling Act**” means the Act under which the tribunal is established or continued.

...

### **Termination for cause**

**8** The appointing authority may terminate the appointment of the chair, a vice chair or a member for cause.

### **Tribunal duties**

**30** Tribunal members must faithfully, honestly and impartially perform their duties and must not, except in the proper performance of those duties, disclose to any person any information obtained as a member.

...

### **Tribunal without jurisdiction over constitutional questions**

**44(1)** The tribunal does not have jurisdiction over constitutional questions.

(2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

### **Maintenance of order at hearings**

**48(1)** At an oral hearing, the tribunal may make orders or give directions that it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any order or direction, the tribunal may call on the assistance of any peace officer to enforce the order or direction.

(2) A peace officer called on under subsection (1) may take any action that is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.

(3) Without limiting subsection (1), the tribunal, by order, may

(a) impose restrictions on a person's continued participation in or attendance at a proceeding, and

(b) exclude a person from further participation in or attendance at a proceeding until the tribunal orders otherwise.

...

### **Immunity protection for tribunal and members**

**56(1)** In this section, "**decision maker**" includes a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a dispute resolution process.

(2) Subject to subsection (3), no legal proceeding for damages lies or may be commenced or maintained against a decision maker, the tribunal or the government because of anything done or omitted

(a) in the performance or intended performance of any duty under this Act or the tribunal's enabling Act, or

(b) in the exercise or intended exercise of any power under this Act or the tribunal's enabling Act.

(3) Subsection (2) does not apply to a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.

### **Time limit for judicial review**

**57(1)** Unless this Act or the tribunal's enabling Act provides otherwise, an application for judicial review of a final decision of the tribunal must be commenced within 60 days of the date the decision is issued.

(2) Despite subsection (1), either before or after expiration of the time, the court may extend the time for making the application on terms the court considers proper, if it is satisfied that there are serious

grounds for relief, there is a reasonable explanation for the delay and no substantial prejudice or hardship will result to a person affected by the delay.

**Standard of review if tribunal's enabling Act has privative clause**

**58(1)** If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

(2) In a judicial review proceeding relating to expert tribunals under subsection (1)

(a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,

(b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and

(c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

(3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

...

[14] Section 14.9 of the **Public Sector Employers Act**, R.S.B.C. 1996, c. 384 ("**PSEA**"), was added to the **PSEA** pursuant to section 54 of the **Administrative Tribunals Appointment and Administration Act**, S.B.C. 2003, c. 47 ("**ATAAA**"), effective May 28, 2003, which was the date on which the **ATAAA** was given first reading.

[15] Section 56 of the **ATAAA** added section 86.3 to the **RTA** at the same time.

[16] At the heart of the statutory interpretation issue is the question of if and how s. 86.3 of the **RTA** and s. 14.9(3) of the **PSEA** can be reconciled.

[17] Before addressing that issue, however, two aspects of the history of residential tenancy law in British Columbia should be addressed. The first is to briefly review the origin and past development of the law. The second is to describe recent developments in connection with what the government called the “Administrative Justice Project”.

(b) History

[18] Up until 1973, when the Law Reform Commission undertook a comprehensive review of the law, landlord and tenant law in British Columbia was largely derived from English law, and the **Landlord and Tenant Act** was essentially a consolidation of English statutes as they stood in 1897.

[19] George B. Klippert, **Residential Tenancies in British Columbia**, (Toronto, Ont.: Carswell, 1976) at 5, succinctly summarizes the law before the introduction of a new **Landlord and Tenant Act** in 1974:

Before the 1974 Act, only the courts had jurisdiction to make binding decisions between parties to a landlord-and-tenant dispute. Administrative tribunals such as the Vancouver Rental Accommodation Board were held to possess “no judicial powers, and any orders made [had] no force and effect at law.”

[20] In 1974, a new **Landlord and Tenant Act** was enacted and a new office, that of the “Rentalsman”, was created. The appointment was for a five year term and the holder of that office could not be dismissed except for cause:

The Rentalsman was appointed by the Cabinet. He was appointed for a five year term, to hold office during “good behaviour”. Unlike an appointment “at pleasure”, the use of this term meant that the Rentalsman could not be dismissed unless he had given cause. Consequently, he had some protection from inappropriate interference. He could not be dismissed just because the government of the day did not like his decisions. (B.C. Office of the Ombudsman Public Report No. 27, “The Administration of the Residential Tenancy Act”, October 1991, p. 2).

[21] The office evolved such that in 1980 the Rentalsman was given concurrent jurisdiction with the Provincial Court up to the monetary level provided in the **Small Claims Act**. The parties could choose either forum.

[22] In 1983, the government discontinued the Office of the Rentalsman. Although it was originally intended that this jurisdiction would return to the courts, the government has ultimately persuaded to retain an arbitration model. A new **Residential Tenancy Act** was proclaimed, effective July 1, 1984. It stated explicitly that the arbitrators appointed under it may exercise the jurisdiction of a court “in certain circumstances”, and that in those circumstances they had concurrent jurisdiction with the courts.

[23] Jurisdiction over monetary disputes remained in the Supreme and Provincial Courts until 1989, when the arbitrators were granted jurisdiction up to \$10,000 by virtue of the **Residential Tenancy Amendment Act**, S.B.C. 1989, c. 60. Actions within that limit had to be brought to the Residential Tenancy Office.

[24] In 1991, the Ombudsman reviewed the operation of the residential tenancy arbitration system and issued a report entitled “The Administration of the *Residential Tenancy Act*”, Public Report No. 27, October 1991. The Report recognized the importance of independence at p. 30:

Our system of law has recognized for centuries that judges should be independent and impartial decision-makers. Essentially, this concept means that we believe justice is better served by judges who are free from inappropriate interference. In order to achieve this goal, we give judges security of tenure. This reflects the belief that a decision-maker who has job security will not make decisions which are compromised by the fear of dismissal.

The Report went on to note some deficiencies in the manner in which independence had been recognized. In doing so, the Report described at p. 30-1 the legal context in which arbitrators operate:

Not all decisions which determine the rights of citizens are made by judges. In this century, both the federal and provincial governments have established various kinds of boards, agencies, commissions, and tribunals which make decisions that affect our lives. These government-appointed bodies are known generally as “administrative tribunals”. A tribunal may be a group or an individual. Some of these regulate industries: for example, the communications industry is regulated by the Canadian Radio-Television and Telecommunications Commission. Another familiar example is the B.C. Utilities Commission, which regulates aspects of the way we use energy in B.C.

Other government-appointed bodies make decisions on the rights of parties involved in private disputes where a direct public interest is not necessarily involved, but where the adjudicative function is part of a broader administrative policy. Such bodies often make decisions which once were made by judges. Administrative tribunals which make these kinds of decisions are exercising “quasi-judicial” functions. In doing so, these tribunals must conform to the rules of “natural justice”. This means that they are generally required to hold a hearing in order to give the parties to the dispute an opportunity to present evidence and argument. The degree of formality of the hearing will

depend upon a number of factors, including the extent of the judicial or quasi-judicial function exercised by the tribunal. We refer to tribunals exercising these functions as “quasi-judicial” tribunals.

[Emphasis added.]

The Report alluded to a number of other reports and then at p. 32 noted that despite differences of opinion:

[t]here is a general recognition that quasi-judicial decision-makers should be free from inappropriate interference and should be impartial when they make decisions. The public right to a decision arrived at impartially and without interference can be protected both through structural mechanisms and through the “rules of natural justice”. The rules of natural justice are legal rules which govern tribunals.

[25] In its summary of recommendations the Report concludes at p. 63-4:

Whether a decision-making process is called arbitration or is given another name, it is important that the system protect the independence of the decision-makers. At the same time, the public must be assured that the system contains appropriate mechanisms to ensure a high quality.

We recommend that decision-makers be selected on the basis of merit, receive adequate training, be compensated in a way which does not have a negative effect on the quality of service the public receives, be retained for a term which reflects the value and importance of experience and the need for independence, and be evaluated fairly and accurately. Decision-makers should not be dismissed during their term of appointment except for cause.

[26] In 1994, in the aftermath of this Report, the Ministry responded with, among other things, a merit based selection process. Applications were solicited through advertisements. The Petitioner was one of about 30 appointees selected from a group of 500 who applied. There were no further selection processes during the Petitioner’s tenure as an arbitrator.

(c) The Current Legislation

[27] In July 2001, the government of British Columbia embarked on a comprehensive review of administrative agencies that it called the “Administrative Justice Project”. In an address to a Canadian Bar Association conference held in Ottawa on November 23, 2002, entitled “*The Administrative Justice Project in B.C., or Do Governments Take Tribunals Seriously?*”, the then-Attorney General, The Honourable Mr. Geoff Plant, made the following remarks:

The Administrative Justice Project sets out a number of initiatives that will support greater independence in decision-making in administrative tribunals. For example:

- We are trying to move from appointments “at pleasure” to appointments for fixed terms with express provisions for tenure, termination and reappointments so that everyone understands what the terms are and when the terms will expire. This will foster the independence of administrative tribunals by protecting tribunal members from arbitrary terminations. ...

[28] In connection with the Administrative Justice Project, the Residential Tenancy Office was specifically examined. On February 5, 2002 a document was issued called “*Restructuring Administrative Justice Agencies: Core Services Review – Phase 1 Report and Results*”, online: Administrative Justice office [http://www.gov.bc.ca/ajo/down/restructure\\_aj\\_agencies.pdf](http://www.gov.bc.ca/ajo/down/restructure_aj_agencies.pdf). It struck a slightly different note, and included the following observations at p. 33:

**Mandate and Operations:**

- The Residential Tenancy Office (RTO) and the Manufactured Home Park Dispute Resolution Committee (Committee) provide information, early dispute resolution support and, where necessary, arbitration to settle disputes between landlords and tenants.

- The RTO has 33 appointed members and 94 FTEs. The Committee has five appointed members and three FTEs.
- In 2000/2001, the agencies responded to about 200,000 requests for information and conducted close to 20,000 arbitration hearings.

**Shortcomings:**

- The adjudicative function in the RTO serves a compelling public purpose by facilitating the early and timely resolution of disputes between landlords and tenants. The unlimited tenure of the arbitrators limits the opportunities for organizational renewal and the effective management of resources.
- A separate dispute resolution process for mobile home park owners and tenants is unnecessary. This function can be integrated with the other responsibilities of the RTO.

**Pending Improvements:**

- The ministry is completing a comprehensive review of its residential tenancy legislation with a view to providing a modern and more streamlined set of rules and practices for landlords and tenants.
- Appointments to the RTO will be made for set terms, as opposed to the current practice of open-ended appointments. This will improve the selection process and address concerns about capacity and independence. ...

[Emphasis added.]

[29] On May 28, 2003, the **ATAAA** was introduced in the Legislature by the Attorney General, who made the following remarks:

I'm pleased to introduce the Administrative Tribunals Appointment and Administration Act. This bill flows from the administrative justice project, the first system-wide review of administrative tribunals in the history of British Columbia. The bill is the first in a series of legislative reforms that will ensure British Columbia has an administrative justice system that is accountable, relevant, affordable, citizen-focused, accessible and fair.

The two principles that underlie this bill are independence and accountability, and in this bill we give effect to those principles by

focusing on the appointment and the tenure of tribunal members and on the role of tribunal chairs in overseeing effective tribunal operations. This bill establishes the principle of merit as the basis for tribunal appointments and recognizes the role of tribunal chairs not only in the appointment of members but also in the overall management and operation of the tribunal itself. These measures will strengthen the independence of administrative tribunals, foster greater public confidence in their impartiality and enhance the public accountability to and through government.

While the bill is intended to apply to all administrative tribunals, we recognize that one size does not fit all. Accordingly and where appropriate, the provisions of the act have been modified to meet the unique circumstances of individual tribunals. Under the bill, tribunal chairs and members will be given fixed-term appointments, replacing the current practice of at-pleasure appointments which create uncertainty of tenure. This change will strengthen tribunal independence.

(B. C., Legislative Assembly, *Hansard*, 16 (28 May 2003) at 7038.)

[30] When the Bill was introduced at second reading, he said the following:

This bill is a first in many ways. It is the first in a series of legislative changes that will reform and modernize British Columbia's system of administrative justice so that it remains strong, independent and fair and so that it continues to be accountable, affordable and accessible to the citizens of our province.

It is also the first time that British Columbia has undertaken a comprehensive, systemwide review of administrative justice. This bill marks the start of a series of legislative changes that will streamline and simplify the tribunal process and place British Columbia at the forefront of administrative justice reform in Canada.

Administrative tribunals are a vital part of our justice system. The decisions they make affect everyday life in profound ways. For many citizens, their only encounter with our system of justice is an encounter with an administrative tribunal.

Since British Columbia's first administrative tribunal, then called the Workmen's Compensation Board, was established in 1916, the jurisdiction, the importance, the caseloads and the variety of tribunals have grown immensely. They are today an essential component of our system of justice.

Like courts, administrative tribunals resolve disputes of vital importance to the people who participate in their proceedings. Administrative tribunals act as an affordable alternative to courts. They are intended to be less formal, less costly and more accessible. The administrative tribunals that are part of our system of justice in British Columbia help resolve disputes between employees and employers, tenants and landlords, citizens and their government – to name but a few. Administrative tribunals have developed, over time, specialized expertise in a variety of important areas of public policy: human rights, environmental protection, labour relations, job safety, social welfare, economic regulation and much, much more. In short, they are an essential part of our system of justice and our system of government.

This bill is specifically targeted to enhance the independence, efficiency and accountability of British Columbia's administrative tribunals. The reforms in this bill address tribunal appointments and tribunal governance – in other words, how tribunals are constituted and how they operate. Importantly, this bill does not change any laws that govern the rights of those who seek to have their disputes resolved by the tribunal.

As I've said before in this chamber when we had occasion to debate changes to the human rights machinery in British Columbia, the fact is that while this chamber often makes laws that create rights and responsibilities across a wide range of human activity, we also create the institutions through which those laws, those rights, become real in the lives of the people that we are elected to serve. So among our obligations, it seems to me, is the duty to ensure that these institutions are designed and administered so they, in fact, achieve the purposes they were and are intended to fulfil.

To properly fulfil their essential role in our system of civil justice, administrative tribunals must have qualified decision-makers who are free to make fair and impartial decisions. Administrative tribunals must also be given the legislative tools they require to operate efficiently and responsibly.

[...]

Let me say something about term appointments and the principle of independence. Having established the principle of attracting and retaining qualified tribunal members, it is also essential, in my view, that once they are appointed, tribunal members be able to make impartial decisions in an atmosphere free from concerns about the terms of their appointments. This bill creates the conditions for independent decision-making by giving tribunal members tenure for fixed terms as opposed to tenure at pleasure. This legislation will end

that time-honoured practice of at-pleasure appointments, because that is a practice which can create uncertainty for tribunal members and thereby potentially undermine their decision-making independence. Under this bill, tribunal chairs and members will now have the certainty of fixed-term appointments.

[...]

The Public Sector Employers Act. As a corollary to the amendments the bill makes with respect to tribunal appointments and governance, it also makes amendments to the Public Sector Employers Act. These amendments will bring administrative tribunals into the government's general scheme for the compensation of what are called "exempt employees". At the same time, the bill includes specific legislative provisions that will foster the independence of administrative tribunals and protect the security of tenure of tribunal members.

(B. C., Legislative Assembly, *Hansard*, 16 (7 October 2003) at 7211-12, emphasis added.)

[31] As a consequence of this initiative (legislatively, s. 102 of the *RTA* and s. 94(1) of the *MHPTA*), the appointment of the Petitioner and that of every other arbitrator under the former *Residential Tenancy Act* were rescinded, effective January 1, 2004. The Petitioner and all the other arbitrators who had been appointed since 1994 were required to reapply. In due course, the Respondent, Minister of Public Safety and Solicitor General, reappointed the Petitioner pursuant to Ministerial Order M 468. She was advised in a letter from the Minister that her term would begin January 1, 2004 and extend to December 31, 2008.

(d) Summary

[32] In summary, landlord and tenant law in British Columbia is common law. It was first consolidated into a statute in 1879 that remained the law for almost a century. Over the last thirty years or so, it has been the subject of significant legislative changes. These have brought about tribunals that initially had

concurrent jurisdiction with the courts, and that now exercise exclusive jurisdiction within the limits defined by the current *RTA*. The utility of such a reorganization in this area of law is manifest in the number of disputes the Residential Tenancy Office is reported to have addressed using a relatively small number of arbitrators (see paragraph 28 above). The legislation as amended from time to time may be said to reflect evolving administrative policy, in the sense that the balance struck by the common law may have been altered to reflect changing circumstances or other social objectives. The same is true of the enabling legislation of some other boards or agencies (one thinks of the oscillations over the years in labour relations policy, for example). Such changes to the rules that must be applied to disputes between landlords and tenants have not, however, disturbed the core function of such adjudicators, which is to apply those rules to the facts arising out of private disputes.

[33] The fact that a jurisdiction that would otherwise remain with the courts is amenable to the efficiencies of a specialized tribunal does not alter the character of the fundamental task of the tribunal. Nor does the fact that there is a social need for an inexpensive forum for the resolution of such disputes, because the issues are often repetitive and the amounts involved are often low, alters the fundamental importance of the work of arbitrators. This was explicitly recognized by the Attorney General in the Legislature when he spoke of the “profound” effect tribunal decisions have on the everyday lives of citizens.

[34] The need to strengthen the independence of tribunals was a clearly identified, stated objective of the most recent round of legislative reform of

administrative law generally. I think that that intention must be taken to inform the consequential amendments to the *RTA* and the *MHPTA*.

### III

#### THE FACTS OF THIS CASE

[35] At the same time that changes were underway in connection with the Administrative Justice Project at the legislative level, things were changing within the Residential Tenancy Office itself. In 2004, a new director, Ms Mary Duffy, was appointed to run the Residential Tenancy Office.

[36] The Respondents' supplemental submission sets the scene:

8. At all material times, the Ministry was moving toward a new approach to service delivery. The new approach was driven in considerable measure by the requirement to observe Treasury Board directive 3/04.

9. The most dramatic development toward the new model was the revisions proposed to the manner in which arbitrators would be assigned work and remunerated for it, ... as set out in Ms. Duffy's letters to Allan Wotherspoon dated November 18, 2004, and January 27, 2005.

[37] That letter set out new limitations that would be placed on annual remuneration and the number of hearing days arbitrators would be permitted to work. They would no longer be paid per case, but on a per client basis. Treasury Board Directive 3/04 set out a series of classifications for various tribunals and was a feature of the review of administrative law brought about by the Administrative Justice Project.

[38] The Respondents' submission explains:

10. Ms. Duffy had only recently been promoted to the position of director. She considered that the Treasury Board directive was mandatory and should have been implemented much earlier. She considered she had the statutory power under the Act to implement change, as part of her responsibility for the administration and management of all matters and persons appointed under the Act (s. 9(1)), and indeed the duty to do so.

[Emphasis added.]

[39] On January 27, 2005, an explanatory letter from Ms Duffy was sent around to all arbitrators. It included the following:

Before laying out the proposal, I want to make several things clear. First, I have no choice but to follow the Treasury Board Directive. The Directive should have been implemented much earlier. Second, I recognize that, by and large, we have a group of very experienced and competent arbitrators who do an extraordinary amount of work for the people of this Province. I very much hope that most of the arbitrators will agree to continue working as arbitrators for RTO. Finally, I have attempted to balance the interests of the arbitrators with the constraints imposed by the Directive. I do recognize that this represents a significant change in how arbitrators are compensated for their work.

[Emphasis added.]

[40] There was clearly a "new broom" in the office. "Significant change" not surprisingly, meant adverse consequences for the Petitioner. Over the course of her service as a Residential Tenancy Arbitrator, the Petitioner's arbitration practice had evolved to the point that it was essentially a full time occupation, involving three sitting days per week with two to write judgments. There were mandated expectations, including a 30-day time limit for the filing of decisions, that the Petitioner invariably met. She had an unblemished service record.

[41] The Petitioner's situation had also evolved such that she divided her work between Nanaimo and Burnaby. This arrangement had originated as an accommodation to the Branch but had come to suit her personal circumstances.

[42] On January 31, 2005 the Petitioner wrote to comment on Ms Duffy's January 27 letter:

It was good to hear that you have completed the lengthy negotiations that were so time-consuming for you over the past many weeks. I hope that you have arrived at an outcome that is beneficial from your perspective, and that will assist you in implementing the transition that is currently taking place throughout the residential tenancy system in B.C.

Thank you for your letter dated January 27, 2005 clarifying the information provided in your earlier letter of November 18, 2004, with regard to the implementation of the Treasury Board Directive 3/04 for arbitrators. I appreciated your statement in your second letter that recognized the experience and competence that many arbitrators bring to this work, and your comment that you hope that most of us will agree to stay on under the new system. I also appreciated your acknowledgment that the contents of these letters represent a significant change in how arbitrators are compensated for their work. It is my belief that the management of change is most successful when those who have been committed to the work of the organization are recognized and acknowledged for that commitment, and then they are invited to "buy in" to the planned solutions. I feel that your most recent letter invites me to "buy in" in that way, and I deeply appreciate the recognition and acknowledgments that are contained in your January 27, 2005 letter.

The Petitioner reviewed the history that led to her current arrangement and set forth the reasons why the potential loss of one third of her work, which the new scheme seemed to entail, would be difficult for her:

The history of why I work on Mondays in Nanaimo is this. I moved to Nanaimo from the Lower Mainland in 1995, within the first year of being appointed as an arbitrator. The RTO management leadership at

that time made it clear that my choice of home location was entirely personal, and that no accommodation of my move would or could be made at that time. I recognized that RTO arbitration work on the Island was minimal at that time, and I chose, **at my own expense**, to travel to whatever RTO location needed me to conduct arbitration hearings. Although I was then based in Burnaby office, my choice thereafter was to make myself available to any and every RTO manager who needed me, to travel to whatever Lower Mainland office required me, to work extra time in summers, Christmas holidays, spring breaks, and whenever else I was needed, and to build a thriving RTO arbitration practice in that manner. It was at all times my clearly stated goal to work three days per week as an RTO arbitrator. My efforts to accommodate the needs of RTO managers were extremely successful, and within five years, I had built a steady three day per week RTO arbitration practice, divided for a period of time between the Burnaby, Surrey, and Vancouver offices, and later, in the Burnaby office alone, after the Vancouver office closed.

In late 2002, Hugh McCall, a long-time Vancouver Island arbitrator, who for many years had regularly worked 11 arbitration days per month on Vancouver Island, chose to move his family from Lantzville to the Lower Mainland. I was approached by RTO management to enquire whether I would be willing to help them to accommodate Mr. McCall in his move. Since there was little excess work available to give to him in Burnaby, they conceived of the idea of trading some of his Island work for some of my Burnaby work. They had some Surrey work open for him then as well, which did not involve me. After much time and discussion, an agreement that was acceptable to all concerned was achieved and put into practice. It was agreed that Hugh McCall's regular Nanaimo day each week, which was Monday, would be transferred to me, and in return, a portion of my Burnaby work would be transferred to him. In that manner, I would still work three days per week, which I had by then done for some time, and he would have the opportunity to build his RTO arbitration practice on the Lower Mainland, through working in both Surrey and Burnaby offices. My understanding is that he has been very successful in establishing himself in that regard.

Since the beginning of 2003, I have conducted arbitrations on Mondays in Nanaimo, and on Tuesdays and Thursdays in Burnaby. My own arbitration practice is also very successful, and I am very happy with it.

I should note that from the date of his move onwards, the remainder of Hugh McCall's former Vancouver Island work, approximately seven days per month, has been divided equally between the other previously existing Vancouver Island arbitrators.

When Marilyn Morrow suggested on December 16, 2004 that RTO management could, without any negotiation, discussion, or cause, and without any regard to the impact of that action on me, simply breach its agreements and contracts with me, by taking away my regular weekly Monday in Nanaimo, I experienced a number of physical symptoms associated with major stress. It is for that reason that I consulted with my medical doctor. My medical practitioner has said that she does not find my reaction unusual in the circumstance. I must emphasize that I am simply not in a position to give up almost 1/3 of my income, nor am I prepared to consider incurring an additional third day of travel each week to Burnaby at my own expense. Having found a balance between my time in Burnaby and my time in Nanaimo, and having given up work to Hugh McCall in return for this arrangement, and having done so at the behest of management, I am not prepared to, nor do I see it as possible to, return to the former arrangements. Should there be any return to the former arrangements, this would seriously disrupt both myself and Hugh McCall and our respective families, and, in doing so, cause an overall loss of work for the other Vancouver Island arbitrators.

My request is that you immediately clarify this situation, and confirm that there will be no arbitrary change to my Monday schedule in Nanaimo. In this regard, I emphasize that I am a dependent contractor at law, and that I do not have any other income at this time.

[43] The Respondents' position, as set out in their supplemental submission, is as follows:

21. Ms. McKenzie may have thought she had legal rights with respect to the proposed changes and their potential effect on her; and certainly she was entitled to assert her position in that regard. However, her view of the situation, and willingness to stand on her rights, is difficult to reconcile with the Ministry's view of the statutory scheme, the director's responsibility for the management of arbitration work and arbitrators, and Ms. McKenzie's status as a "dependent contractor" on a one-year services agreement, renewable at the director's discretion.

[Emphasis added.]

[44] The matter of one-year service agreements should be explained. Although the Petitioner had been reappointed to a five-year term, the relationship was subject to the negotiation of a new contract annually. It is certainly arguable that

this, in itself, undermines the concept of a “term” appointment, although the matter was not the subject of submissions and it is not necessary to address it in the result.

[45] The Ministry dealt swiftly with the Petitioner’s concerns. On February 16, 2005, Ms Duffy requested a meeting with the Petitioner. They met on February 18, in the presence of the Assistant Deputy Minister, Gary Martin. Ms Duffy presented the Petitioner with a letter in the following terms:

This is to advise you that, after careful consideration, I have decided not to renew your Services Agreement as a Residential Tenancy arbitrator. As you know, the term of your present contract expires March 31, 2005. Accordingly, the Residential Tenancy Office will ensure that you are not assigned work that extends beyond that date. Pursuant to paragraph 6b) of the Schedule of Payments to that Agreement, you are required to submit a final statement of account for all fees and expenses claimed or claimable during the term of the Agreement no later than March 31, 2005.

I have also recommended to the Minister of Public Safety and Solicitor General that your appointment as a Residential Tenancy arbitrator be terminated, effective March 31, 2005, pursuant to the *Public Sector Employers Act*, R.S.B.C. 1996, c. 384 (the “PSEA”). The Minister has accepted this recommendation, and will be confirming the termination via separate correspondence.

Meanwhile, I have been authorized to disclose to you the details of the compensation that the Province of British Columbia is able to provide. As you may know, Division 3 of the PSEA speaks to the compensation of “exempt employees.” However, Division 5 provides for “tribunal exclusions.” The relevant provision, section 14.9, is included within Division 5, and provides, in part, as follows:

- (1) Division 3 of this Part does not apply to ...
  - (c) an arbitrator under the *Residential Tenancy Act*...
- (3) The appointment of a person referred to in subsection (1) may be terminated without notice before the end of the term of their appointment on payment **of the lesser of:**
  - (a) 12 months’ compensation, or

- (b) the compensation in an amount equal to the remuneration otherwise owing until the end of the term.

In calculating the compensation owed to you, we have reviewed the remuneration you have received for arbitrations performed over the past 3 years. On average, you have been paid, in fees, **\$76,761.66** per year during that period. Therefore, in accordance with section 14.9(3)(a) of the PSEA, this is the amount of compensation we are able to pay you.

You may also be aware of section 14.9(4) of the PSEA, which provides as follows:

An amount paid under subsection (3) **must be in the form of periodic** payments unless the employer, in its sole discretion, considers a lump sum payment to be more appropriate.

I am prepared to consider a lump-sum payment, as opposed to a series of periodic payments, in consideration of your more than 10 years' service to the Province of British Columbia as a Residential Tenancy arbitrator. Please contact me, by telephone or in writing, by no later than February 28, 2005 to respond to this or to address any other aspect of my letter.

[46] The Petitioner requested reasons for this decision but the Director and the Assistant Deputy Minister refused.

[47] The Petitioner sought legal advice. On February 25, 2005 her counsel sought deferral of the Director's decision until he had had an opportunity to assess the situation.

[48] On March 2, 2005 the Petitioner's counsel wrote, taking the position that the Director's recommendation to terminate the Petitioner's appointment was contrary to s. 86.3 of the *RTA* and the interpretation of s. 14.9(3) of the *PSEA* found in *Re Farmer Construction Ltd.*, [2004] B.C.L.R.B.D. No. 214 (QL), a decision of the British Columbia Labour Relations Board.

[49] On March 8, 2005, the Respondents replied through a solicitor, Lois Toms.

She set out the Respondents' position as follows:

The Ministry management has lost confidence in Ms. McKenzie, having found that her behaviour towards other arbitrators and staff has not been conducive to a positive work environment. This has become especially critical as the Residential Tenancy Office moves forward to new technology and a new approach to service delivery.

The Ministry is not alleging cause, but has recommended revocation of Ms. McKenzie's appointment as Arbitrator on the basis of s. 14.9 of the *Public Sector Employers Act (PSEA)*, with 12 months compensation.

[50] On April 14, Ministerial Order M 109 issued, rescinding the Petitioner's appointment as an arbitrator under the ***RTA*** and the ***MHPTA***. No reasons were given in connection with this decision.

[51] The Petitioner filed the petition for judicial review that commenced this proceeding on May 31, 2005.

[52] On August 12, 2005, counsel for the Minister of Forests and Range and Minister Responsible for Housing wrote to the Petitioner's lawyer:

I am instructed to write to you on behalf of our client, the Residential Tenancy Branch, now part of the Ministry of Forest and Range and Ministry responsible for Housing.

Further to these instructions and as a consequence of our agreement to quash Ministerial Order M109 as set out in our Response to the petition brought by Mary McKenzie, the Assistant Deputy Minister responsible for the Residential Tenancy Branch, Gary Martin, will be forwarding the following recommendation to the Minister of Forest and Range and Minister responsible for Housing (formerly the Minister of Public Safety and Solicitor General): that the appointment of Mary McKenzie as a residential arbitrator pursuant to Ministerial Order M468 be rescinded for the reasons as set out in this letter.

Gary Martin and the Director of the Residential Tenancy Office (“RTO”), Mary Duffy, have lost confidence in Ms. McKenzie as a result of a number of exchanges between the Director and Ms. McKenzie and between staff of the RTO and Ms. McKenzie. These exchanges include Ms. McKenzie’s disproportionate response concerning a matter of desk space in the Nanaimo office, her loud display of anger towards the current Director in a very public incident at the March 2004 arbitrators’ conference, her ongoing complaints about matters to do with her contract and the availability, amount and scheduling of arbitrations. All of the foregoing exchanges have contributed to management’s loss of confidence in Ms. McKenzie’s willingness to be part of a positive work environment and in her ability to support the fiscal and organizational changes that are being made within the RTO.

Gary Martin intends to forward this recommendation to the Minister with a copy of this letter and any response from Ms. McKenzie by September 2, 2005. Ms. McKenzie is invited to respond to this letter and to provide any submission to the Minister by September 1, 2005. If no response is provided by that date, we will assume that Ms. McKenzie does not wish to make any submission. The reasons provided in this letter are not intended to allege cause; the recommendation is made for the above reasons which are being provided to Ms. McKenzie in order to provide her with an opportunity to respond and for this response to be put before the Minister when considering the recommendation.

[53] Counsel for the Petitioner replied:

I am writing in response to your letter of August 12, 2005. You state that as a consequence of an “agreement” to quash Ministerial Order M109, Assistant Deputy Minister Gary Martin intends to make a second recommendation to the Minister for the rescission of our client’s appointment as a residential tenancy arbitrator. You advise that Mr. Martin intends to forward his recommendation to the Minister by September 2, 2005, and you “invite” submissions from Ms. McKenzie by September 1, 2005.

At the outset, I wish to state that my client has not, and does not agree to your intended course of action.

As you know, by her Petition, Ms. McKenzie has challenged the Minister’s original decision to rescind her appointment on the primary ground that section 14.9(3) of the *Public Sector Employers’ Act* does not authorize the termination, mid-term, and without cause, of individual tribunal adjudicators. The Petition also puts in issue the constitutional applicability of section 14.9(3), on the basis that if that

section does provide for the termination, without cause, of tribunal members such as the Petitioner, it contravenes the constitutional principle of adjudicative independence, and is of no force or effect, and is inapplicable to the Petitioner.

In our submission, the issues raised in Ms. McKenzie's Petition relating to both the proper interpretation of section 14.9(3) of the *Public Sector Employers' Act*, and its constitutionality, must be determined before the Minister purports to invoke jurisdiction under that section to reconsider the rescission of her appointment. If, as our client contends, the Minister acted in excess of his jurisdiction in terminating Ms. McKenzie's appointment in April 2005, that error will not be cured by the Minister reconsidering Mr. Martin's recommendation for a second rescission of her appointment in September 2005.

This letter also addressed the substance of the "reasons" offered for the Petitioner's termination, which drew the following response on September 7, 2005:

[W]e note from your letter that your client is apparently having difficulty understanding the stated reasons for the Ministry's recommendation that her appointment be terminated. She appears to be focussing on the incidents which occurred, and attempting to re-characterize them and/or justify her conduct as if this were a termination for cause in respect of which a court or arbitrator might be called upon to make evidence-based findings.

What is relevant for present purposes, however, are not the incidents themselves but the loss of confidence they helped to engender. The incidents are examples of the ongoing friction between Ms. McKenzie and the Branch which ultimately resulted in management's loss of confidence that she would ever become reconciled to management's organizational responsibility for residential tenancy arbitrations or the implementation of its fiscal goals. Management concluded that she was not and would never be prepared to allow her own personal goals and interests (legitimate or otherwise) to be made subject to organizational goals and interests as management considered necessary.

We take this opportunity to reiterate and emphasize that the loss of confidence has nothing to do with your client's conduct of arbitrations of landlord-tenant disputes. We are well aware that the statutes give arbitrators, and not Branch management, the authority to arbitrate disputes and all matters relating to them. However, as you also know, the statutes give the director responsibility for the administration and

management of all matters and persons appointed under the Acts. The loss of confidence arises in that latter connection.

We provide this explanation of the reasons set out in Ms. Poole's letter of August 12, 2005, not because those may be insufficient or incomplete, but out of an abundance of caution, to ensure that your client is able to understand them better and have the opportunity to respond. In that regard, we will extend the deadline for any further submissions from your client to September 13, 2005.

[54] The letter also reiterated the Minister's intention to proceed with a reconsideration. Counsel for the Petitioner reiterated her objection:

All of the reasons why we say that the Minister ought not to proceed with a reconsideration of the rescission of Ms. McKenzie's appointment before the Court hears and decides the issues raised in her Petition regarding the proper construction of section 14.9(3) of the *Public Sector Employers Act*, and the constitutional validity of that section, are set out in our letter to Ms. Poole of August 31, 2005. We stand by those submissions.

As you know, the Petition is now set down for hearing on November 23-25, 2005. With respect we fail to see why the Minister would not await the results of that hearing before purporting to invoke his jurisdiction under section 14.9(3) again.

Should, despite the points made in our August 31, 2005 letter, the Minister proceed with the process outlined in Ms. Poole's letter, we will, as you anticipate, make any necessary amendments to our Petition. We are, in any event, considering what amendments may be necessary to the Petition as a result of events since the filing of the Petition on May 31, 2005. We will, of course, provide you with notice of any amendments sought to the Petition, and deliver any further Affidavit material upon which we intend to rely, well in advance of the hearing date.

[55] There was more back-and-forth about the "reasons" for the termination. On September 14, 2005, counsel summarized the Respondents' position:

We have also noted your reference to and quotation from Mary McKenzie's letter dated January 25, 2005. You characterize that letter as evidence of her clear acceptance of changes being implemented by management.

In our view, the January 31 letter illustrates that Ms. McKenzie's willingness to "buy in" to management's planned changes was conditional on her being able to continue "to earn the full \$77,000.00 per fiscal year ... [by] conducting arbitrations three days per week ... in both Nanaimo and Burnaby."

In the letter, Ms. McKenzie also sets out lengthy submissions and "formal" positions in response to certain immediate funding and work allocation issues, suggesting that it either was or would be arbitrary, unfair, and contrary to her legal rights if management did not immediately accede to her views and rectify the situation so she could continue to achieve those goals.

Further, the January 31 letter is only the latest example of Ms. McKenzie's expressions of concern about funding, work allocation, and work location issues. We understand that Ms. McKenzie's apprehensions, in early 2004, about the possible impact of planned changes to arbitrator contracts and administration on her ability to achieve her own goals may have been part of what contributed to her loud, public display of anger at the March, 2004, arbitrators' conference. We also understand that the Nanaimo desk space incident may have been rooted, in part, in the anomalous situation of Ms. McKenzie working out of two offices.

In sum, and to reiterate, whether or not Ms. McKenzie's goals were legitimate, we consider that her ongoing resistance to having her own goals and interests become subject to management's fiscal and organizational goals and interests, and the way she conducted herself in that regard, is an ample substantive foundation for management's loss of confidence in her and its recommendation that her appointment be terminated.

To ensure that the decision-maker can properly consider this point, we will bring to her attention a copy this exchange of correspondence, as well as a copy of January 31 letter and the letters dated November 18, 2004, and January 27, 2005, referred to therein (enclosed).

[56] On September 30, 2005 Lori Wanamaker, Associate Deputy Minister of the Respondent Minister of Forests and Range and Minister Responsible for Housing issued a reconsideration decision in the following terms:

Re: Appointment of Mary Elizabeth McKenzie as arbitrator under the Residential Tenancy Act and Manufactured Home Park Tenancy Act:

Ministerial Order M 109 terminating that appointment; and  
Further recommendations of the Ministry respecting that  
appointment

WHEREAS:

- A. Ms. McKenzie has been a long-time residential tenancy arbitrator;
- B. Her appointment as such was terminated in April, 2005, without cause and with payment of an amount equal to 12 months pay;
- C. Ms. McKenzie accepted the payment without prejudice to her ability to challenge the termination through judicial review;
- D. On May 31, 2005, Ms. McKenzie did commence judicial review proceedings in that regard, seeking to have the court quash and set aside the Ministerial Order M 109, which terminated her appointment, including on the grounds of alleged lack of procedural fairness;
- E. It is appropriate in the circumstances for me to reconsider the decision leading to Ministerial Order M 109.

NOW THEREFORE, on reading the memorandum of Gary R. Martin, Assistant Deputy Minister, Ministry of Forests and Range and Ministry Responsible for Housing, including all the materials attached to the memorandum, a copy of all of which is attached to this decision, and without any further briefing from the Ministry on the matter, I, Lori Wanamaker, in my capacity as Associate Deputy Minister of the Ministry of Forests and Range and Ministry Responsible for Housing, have made the following decision, for the following reasons:

*THAT, on the basis of Ministry management's loss of confidence in Ms. McKenzie as and for the reasons stated in the letter dated March 8, including as explained and particularized in the letters dated August 12, September 7 and September 14, 2005, and having considered and weighed anew all the facts, circumstances and submissions set out those letters and in Mr. Pearlman's letters, the petition and Ms. McKenzie's affidavit, I have concluded it is in the public interest, in order to allow for the effective administration and management by the director of all matters and persons appointed under the Residential Tenancy Act and Manufactured Home Park Tenancy Act, that it was appropriate and necessary that Ms. McKenzie's appointment be terminated, and I hereby confirm the decision which led to Ministerial Order M 109.*

[Emphasis added.]

[57] At this stage, matters descended into farce. Despite the fact that the reconsideration decision asserted on its face that the Petition and Affidavit, both extensive, detailed, documents setting out the Petitioner's position, had been considered, they had not even been placed before Ms Wanamaker.

[58] I will return to the words of the Respondents' submission on this subject

27. The initial refusal to provide any reasons for management's decisions did not meet the requirements of procedural fairness. ... Further, without conceding that the reasons eventually provided were inadequate, they were unfortunately obscure, as were the ongoing attempts to clarify them. Use the term "loss of confidence" implies some sort of fault or misbehaviour on Ms. McKenzie's part. That implication was compounded by the initial references to Ms. McKenzie's "behaviour toward other arbitrators and staff", and the examples given. The implication of misbehaviour was not removed in the later iterations of the reasons for her termination. **Here there is no evidence of fault going to confidence; and all the allegations of misbehaviour are rebutted.** "Loss of patience" would have been a more accurate term, based on a combination of the new director's mandate for change; management's unwillingness or inability to accommodate Ms. McKenzie's needs within the new model; Ms. McKenzie's apparent ongoing unwillingness to give up her status quo; and the friction that caused.

28. Turning to the reconsideration process, the Respondents' attempt voluntarily to address the lack of procedural fairness did not help the situation: see written argument, paras. 250-253, affidavit of Hugh Trenchard #2, *Clare v. British Columbia* (vol.1, Tab 23). In particular, the fact that the stated reasons continued to imply fault on Ms. McKenzie's part naturally caused her to focus on the veracity and/or substance of the incidents, rather than the "loss of confidence" they helped to engender.

[Emphasis in original.]

[59] Paragraphs 251-253 of the "Written Argument" alluded to in this part of the submission read as follows:

251. Unfortunately, there was an error made in the process which renders the reconsideration decision a nullity. Specifically, the petition

and affidavit of Mary McKenzie #1, which contained evidence of facts, circumstances and submissions material to the reconsideration decision, were inadvertently not included in the documentary record placed before the Associate Deputy Minister and that evidence was not otherwise available to her.

252. Further, there is an error on the face of the decision note signed by the Associate Deputy Minister in that regard.

253. On the basis of those errors, the Respondents consent to the quashing and setting aside of the decision of the Associate Deputy Minister confirming the decision which led to Ministerial Order M109, and to the quashing of that Ministerial Order.

[60] Despite the temporizing language of these submissions, it is manifest that the Petitioner was terminated simply for having the temerity to stand up for herself. Notwithstanding the Respondents' concessions, I think the term "loss of patience" inapt. The Respondents simply had no regard for the Petitioner or her concerns and perceived her to be an obstacle to the implementation of their plans. These included a unilateral alteration of her terms of employment within her five-year term that, in an employment context, might well have amounted to constructive dismissal.

[61] When the Respondents were "called" on this treatment, they embarked on a relentless and disgracefully specious personal attack on the Petitioner. Moreover, in their rush to "reconsideration" over the objections of the Petitioner's solicitor, they betrayed an even more serious disrespect for due process itself. It is evident that the point of the "reconsideration" was not, in fact, to look at the matter anew, but to cover what the Respondents were determined to do, with the appearance of due process.

[62] It is important to appreciate that ultimately, despite the multiple aspersions cast against the Petitioner in the various communications from the Respondents and regrettably, their lawyers, there was nothing to their assertions that she had ever behaved inappropriately in any context. The Respondents may have the last word:

41. To summarize the Petitioner's experience in this matter, it has included termination for "mere displeasure"; lack of any warning; the way Ministry management communicated its intentions; the refusal to give reasons or sufficient particulars; the persistent implication of misconduct on her part; the delay, uncertainty and ultimate futility of the reconsideration process.

42. Part of the purpose of these submissions is to address Ms. McKenzie's experience, to explain (without excusing) what happened and how it happened, and in particular to confirm that there is no evidence of misconduct on her part and that the termination process was unfair. The submissions are made with the expectation that they will be reflected in the reasons, as the Court considers appropriate.

[Respondents' supplemental submission]

[63] It is more than regrettable that servants of the public could behave so badly in their treatment of anyone.

[64] I have taken some time to trace what happened to illustrate how utterly vulnerable a person in the Petitioner's position is to arbitrary or whimsical removal if the Respondents' view of their powers is correct. As we turn to the statutory interpretation and constitutional issues it is important to remember that the Respondents' position is, to this day, that they were absolutely entitled to do what they did. The only error they concede, apart from bad manners, is that they did not give the Petitioner a chance to talk them out of it.

IV

**THE STATUTORY INTERPRETATION ISSUE**

[65] This brings this matter around to the question of whether s. 14.9(3) of the **PSEA** actually bears the interpretation the Respondents have placed on it.

[66] From the brief review of the history of landlord and tenant law in British Columbia developed earlier in these reasons it is clear that, functionally, residential tenancy arbitrators perform work that courts used to do and that courts would otherwise do if the arbitration system did not exist. It is not difficult to accept the efficiencies that justify the system both from the standpoint of a government allocating scarce resources, and of the advantage to the public of a low-cost, expert tribunal.

[67] The history demonstrates that certain policy objectives have been reflected in the amendments to the legislation from time to time. All legislation, in this sense, reflects public policy objectives. The residential tenancy arbitration system is not however, an administrative instrument applying policy as between the government and those with whom it deals, but an adjudicative mechanism serving private individuals whose disputes require the application of the law to the facts. This is essentially a judicial function, which only bears the more common label, quasi-judicial, to distinguish it institutionally, not functionally, from the work of the courts.

[68] The fact that residential tenancy arbitrators perform work that was once performed by the courts (albeit not exclusively by s. 96 courts) was addressed in

**Reference re Amendments to the Residential Tenancies Act (N.S.)**, [1996] 1

S.C.R. 186, a case in which the constitutionality of a Nova Scotia statute creating a dispute resolution mechanism for residential tenancies was challenged. In assessing whether a “novel” jurisdiction had been created, the majority, per McLachlin J. (as she then was), said the following (at para. 97):

The legislation here at issue codifies the existing law and establishes an impartial dispute resolution mechanism for landlords and tenants. Both the Director and the Board decide disputes between the parties. The parties present evidence and make submissions. Appeals are allowed and orders can be enforced by the parties as orders of the court. This is exactly the sort of work courts have traditionally done in relation to residential tenancy disputes. One looks in vain for the additional powers that may serve to make new soup of this old broth. Unlike the Director of Labour in *Sobeys*, the Director here does not have “carriage of the action” before the Board. The Director does not enforce standards or advocate on behalf of a group that the legislation protects. The Act proclaims no new policy aims to guide the Director or Board in interpreting and enforcing the Act. Nor does it consolidate and unify a disparate assemblage of statutes in order to present a comprehensive and principled new scheme of protection. Indeed, the 1992 amendments removed the Board’s previous authority under s. 18(4) of the Act to “provide and disseminate information concerning rental practices, rights and remedies” and to “give advice and direction to landlords and tenants in disputes”: *An Act to Amend Chapter 401 of the Revised Statutes, 1989, the Residential Tenancies Act*, s. 8(2).

[Emphasis added.]

[69] In ***Bell Canada v. Canadian Telephone Employees Assn.***, [2003] 1 S.C.R.

884, a case involving issues concerning the independence and impartiality of the Canadian Human Rights Commission, the Supreme Court of Canada spoke of a “spectrum” of tribunals (at paras. 21-22):

The requirements of procedural fairness—which include requirements of independence and impartiality—vary for different tribunals. As Gonthier J wrote in *IWA v. Consolidated Bathurst-Packaging Ltd.*, [1999] 1 S.C.R. 282, at pp. 323-24: “the rules of natural justice do not

have a fixed content irrespective of the nature of the tribunal and of the institutional constraints it faces”. Rather, their content varies. As Cory J. explained in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at p. 636, the procedural requirements that apply to a particular tribunal will “depend upon the nature and the function of the particular tribunal” (see also *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 82, and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 21-22 *per* L’Heureux-Dubé J.). As this Court noted in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52, administrative tribunals perform a variety of functions, and “may be seen as spanning the constitutional divide between the executive and judicial branches of government” (para. 24). Some administrative tribunals are closer to the executive end of the spectrum: their primary purpose is to develop, or supervise the implementation of, particular government policies. Such tribunals may require little by way of procedural protections. Other tribunals, however, are closer to the judicial end of the spectrum: their primary purpose is to adjudicate disputes through some form of hearing. Tribunals at this end of the spectrum may possess court-like powers and procedures. These powers may bring with them stringent requirements of procedural fairness, including a higher requirement of independence (see *Newfoundland Telephone*, at p. 638, *per* Cory J., and *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.)).

To say that tribunals span the divide between the executive and the judicial branches of government is not to imply that there are only two types of tribunals – those that are quasi-judicial and require the full panoply of procedural protections, and those that are quasi-executive and require much less. A tribunal may have a number of different functions, one of which is to conduct fair and impartial hearings in a manner similar to that of the courts, and yet another of which is to see that certain government policies are furthered. In ascertaining the content of the requirements of procedural fairness that bind a particular tribunal, consideration must be given to all of the functions of that tribunal. It is not adequate to characterize a tribunal as “quasi-judicial” on the basis of one of its functions, while treating another aspect of the legislative scheme creating this tribunal—such as the requirement that the tribunal follow interpretive guidelines that are laid down by a specialized body with expertise in that area of law—as though this second aspect of the legislative scheme were external to the true purpose of the tribunal. All aspects of the tribunal’s structure, as laid out in its enabling statute, must be examined, and an attempt must be made to determine precisely what combination of functions the legislature intended that tribunal to serve, and what procedural

protections are appropriate for a body that has these particular functions.

[Emphasis added.]

[70] The purpose of residential tenancy arbitrators is to hear and decide cases. While it may be inferred from the number of matters heard in the course of a year that many of the disputes involve small amounts or repetitive types of issues, it is obvious that issues respecting the occupancy of residential premises may be of great importance to the people the system is designed to serve. Assessed in terms of function and in the context of the spectrum alluded to in *Bell Canada*, the residential tenancy arbitrator's function clearly rests at the "high end", as that term is used.

[71] As I have noted, the importance of independence was a matter of considerable emphasis in the 1991 Ombudsman's Report. Strengthening independence was also identified by Attorney General Plant as an important objective of the Administrative Justice Project. The residential tenancy arbitration system was specifically mentioned.

[72] Given that functionally, a residential tenancy arbitrator adjudicates at the "high end" of the *Bell Canada* spectrum, requiring a greater degree of independence than decision making tribunals closer to the executive end of the spectrum, and given that the stated intention of the recent amendments was to strengthen this independence, it seems reasonable to approach the issue of the meaning of the amendments that were consequential to the Administrative Justice

Project, on the basis that section 14.9(3) cannot have been intended to weaken the independence of residential tenancy arbitrators.

[73] This accords with the basic approach to statutory interpretation articulated in **Rizzo & Rizzo Shoes Ltd. (Re)**, [1998] 1 S.C.R. 27. Iacobucci J., for the Court, adopted Driedger's modern principle of statutory interpretation (at para. 21): "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Elmer A. Driedger, **The Construction of Statutes**, 2d ed. (Toronto: Butterworths, 1983) at 87.

[74] In **Chieu v. Canada (Minister of Citizenship and Immigration)**, [2002] 1 S.C.R. 84, Iacobucci J. noted (at para. 28) that the interpretive factors enumerated by Driedger provide a framework, and that they are interrelated and interdependent. In **Chieu** and other cases, the Supreme Court has approached statutory interpretation in two steps: first, examining the grammatical and ordinary meaning; and second, examining the broader context. In **Chieu**, Iacobucci J. stated (at para. 34) that the inquiry into the broader context involves:

examining the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and Parliament's intent both in enacting the Act as a whole, and in enacting the particular provision at issue.

[75] Although the use of extrinsic evidence was once controversial, it is now widely accepted as integral to the process of statutory interpretation. In **Reference**

**re Firearms Act (Can.)**, [2000] 1 S.C.R. 783, 2000 SCC 31, the Court, *per curiam*, observes (at para. 17):

A law's purpose is often stated in the legislation, but it may also be ascertained by reference to extrinsic material such as Hansard and government publications: see [*R. v. Morgentaler*, [1993] 3 S.C.R. 463] at pp. 483-484. While such extrinsic material was at one time inadmissible to facilitate the determination of Parliament's purpose, it is now well accepted that the legislative history, Parliamentary debates, and similar material may be quite properly considered as long as it is relevant and reliable and is not assigned undue weight: see *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, at para. 25; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 35; and *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, at para. 14.

[76] The Petitioner submits that s. 14.9(3) of the **PSEA**, properly understood, does not authorize the mid-term rescission of the Petitioner's appointment as a residential tenancy arbitrator. The Petitioner essentially adopts the analysis of s. 14.9(3) found in ***Re Farmer Construction Ltd.***, [2004] B.C.L.R.B.D. No. 214 (QL), a decision of the Labour Relations Board.

[77] The intervener, British Columbia Council of Administrative Tribunals, submits that adjudicative independence is a fundamental principle of natural justice that can only be legislatively ousted "by express statutory language or necessary implication": ***Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)***, [2001] 2 S.C.R. 781 at para. 22). It submits that the ultimate issue of statutory interpretation in this case is whether s. 14.9(3) of the **PSEA** has "clearly and unequivocally" displaced the common law principle of adjudicative independence.

[78] The Respondents submit that the legislative intention is clear: to bring consistency to the payment of compensation to terminated public employees, including tribunal appointees. It submits that this is harmonious with s. 86.3 of the **RTA** which permits termination “for cause”, and that **Farmer Construction** was wrongly decided.

[79] It may help, notwithstanding previous iterations in these reasons, to put the two statutory provisions side by side:

Section 86.3 of the **RTA** reads:

The minister may terminate the appointment of an arbitrator for cause.

Section 14.9 of the **PSEA** reads:

- (1) Division 3 of this Part does not apply to
  - (a) a coroner under the *Coroners Act*,
  - (b) the fire commissioner under the *Fire Services Act*,
  - (c) an arbitrator under the *Residential Tenancy Act*,
  - (d) a governor or director of the Workers' Compensation Board under the *Workers Compensation Act*, or
  - (e) a person who is a member of a tribunal designated in the Schedule, when the person is acting in his or her capacity as a member of the tribunal.
- (2) The Lieutenant Governor in Council may, by regulation, add a tribunal to the Schedule.
- (3) The appointment of a person referred to in subsection (1) may be terminated without notice before the end of the term of their appointment on payment of the lesser of
  - (a) 12 months' compensation, or
  - (b) the compensation in an amount equal to the remuneration otherwise owing until the end of the term.

(4) An amount paid under subsection (3) must be in the form of periodic payments unless the employer, in its sole discretion, considers a lump sum payment to be more appropriate.

(5) For greater certainty, the Lieutenant Governor in Council may, for the designated tribunals referred to in the Schedule, prescribe further employment termination standards that are not inconsistent with this section.

[80] The contrast between the conciseness of the **RTA** provision and the ramshackle structure of the **PSEA** provision is rather stark. The **RTA** is a statute of specific application, while the **PSEA** is, on its face, intended to apply to an array of statutes. The Respondents submit that a harmonious reading may be achieved by simply recognizing that a “with cause” termination is distinct from a “without cause” termination, which is what is implied by the mention of “notice” in s. 14.9(3) of the **PSEA**. The Respondents refer to principles of employment law as informing the correct interpretation:

An employer may terminate an employment contract for just cause without giving notice to an employee. In cases where the employment contract is terminated without cause, the employer must give reasonable notice or provide pay in lieu of reasonable notice.

*Canadian Encyclopedic Digest (Western)*, 3<sup>rd</sup> ed., vol. 35  
(Agincourt, Ont: Carswell, 1978) “Wrongful Dismissal”, §131

[81] This, it seems to me, is to argue that a principle embedded in the common law—essentially that you cannot be obliged to employ another, and that the only remedy upon termination is notice, or pay in lieu of notice—informs the relationship of appointees to offices established by government. This ignores certain implications arising out of the use of customary language in the **RTA**. The simplest way to describe a relationship to government wherein an office holder is subject to

dismissal at any time is to say that the appointee holds the office “at pleasure”.

This is exemplified by the statutory provision at issue in ***Ocean Port***.

[82] In my view, the customary usage of the term “for cause” clearly implies “but not otherwise”. If the Legislature had meant “at any time for any reason,” it would not have created fixed terms and it would have used the customary term “at pleasure”, or an equivalent, for such an appointment. The interpretation called for by the Respondents’ submission requires a literal rather than a customary reading of the phrase “for cause”. Such an interpretation requires the meaning of a specific phrase in a specific statute to be interpreted narrowly by virtue of a generalization in a more general statute. Read customarily, and in its ordinary meaning, the ***RTA*** provision is inconsistent with s. 14.9(3) of the ***PSEA***.

[83] I am fortified in this view of usage by the decision of Rosenberg J. in ***Murphy v. Ontario (Attorney General)*** (1996), 28 O.R. 3d 220 (Gen. Div.). There, the appointments of two directors of Ontario Hydro were rescinded in the face of a statutory provision in the following terms:

A Director appointed by the Lieutenant Governor in Council may be removed from office before the expiry of his or her term for cause and the Lieutenant Governor in Council may appoint any person in his or her stead for the remainder of his or her term.

[Emphasis added.]

[84] The reasoning, for present purposes, is found at p. 225-6:

The intention of the legislature was to give Hydro a certain amount of independence. The government in power could at the end of each term exert a certain amount of control by appointing Directors selected by them or by not appointing anyone at all. This is somewhat similar to

the situation of the government in power with regard to the Senate gradually having more and more impact on the composition of the Senate when vacancies occur. The same principle applies in many ways to the government's control over the composition of courts. However, from s. 3(10) it can be seen that the legislature did not intend the Lieutenant Governor in Council to be able to discharge any or all of the Directors or terminate their office during the currency of their term without cause.

The impugned orders-in-council state that the orders are made pursuant to the *Power Corporation Act* and accordingly they must be made with authority specifically provided in the Act. The Act by necessary implication provides that the Lieutenant Governor in Council may only terminate before the end of the term for cause. Legislative enactments are presumed to have legal effect. In this case there is a specific statutory provision which applies to the actions of dismissal. The section would not be necessary if the Lieutenant Governor in Council could dismiss at pleasure at any time.

Therefore, to avoid rendering the legislative provision redundant I infer that the common law rule of dismissal at pleasure was meant to be excluded: *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394 at pp. 410-411, *Reference re Bill C-62, An Act to Amend the Excise Tax Act (Canada)*, (sub nom, *Reference re Goods & Services Tax*) [1992] 2 S.C.R. 445 at pp. 477-478. In the case of *Reilly v. R.*, [1934] A.C. 176 (P.C.), the appellant had been appointed to a statutory office as a member of the Federal Appeal Board. The appointment was by virtue of the *Pensions Act*, S.C. 1923, c. 62, which provided that any member may be removed for cause at any time by the Governor in Council. The eventual decision was based on the fact that the position had been abolished; however, at p. 179 of the report Lord Atkin stated:

If the terms of the appointment definitely prescribe a term and expressly provide for a power to determine "for cause", it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded. This appears to follow from the reasoning of the Board in *Gould v. Stewart*, [1896] (A.C.) 575.

That is all that would be necessary to decide this case. However, I refer also to the legislative history argument. The provisions of Section 3(10) were introduced in 1973. The former s. 4 reads as follows:

Every person appointed to the Commission shall hold office during pleasure, and the Lieutenant Governor in Council, upon the death, resignation or removal from office of any member of the Commission may appoint some other person in his place.

In substituting Section 3(10) in the *Power Corporation Act* for the provision in the former *Power Commission Act*, the legislature must be intended (as I have held it did) to amend the provision providing for the holding of office during pleasure.

[Emphasis added.]

[85] In *Murphy*, the court was dealing with one statute. Here there are two; the first, as I have observed, specific (the **RTA**), and the second, general (the **PSEA**). The clauses at issue originate in the same statute, the **ATAAA**, as s. 54 and s. 56. Given the climate in which these amendments developed, exemplified by then-Attorney General Plant's avowed dedication to strengthening the independence of administrative tribunals, one cannot avoid attempting to read these provisions as complementary.

[86] In **Sullivan and Driedger on the Construction of Statutes**, 4<sup>th</sup> ed. (Markham, Ont.: Butterworths, 2002) at p. 273, one finds the following proposition:

When two provisions are in conflict and one of them deals specifically with the matter in question while the other is of more general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one. The specific prevails over the general ...

[87] Seen in this light, s. 14.9(3) of the **PSEA** can be read as a general provision limiting compensation where termination occurs without notice, wherever that is possible, but subject to any specific provisions in other statutes that would displace it. The structure of s. 14.9(3) itself hardly manifests a clear intention to create a blanket power of removal without notice, in the indirect way in which it referentially applies to a list of exceptions to another of its own Divisions, s. 14.9(1).

[88] Curiously, s. 14.9(3) is also, by virtue of s. 69 of the **ATAAA**, deemed to be a term of “contracts of employment”:

**69** On the date that section 14.9(3) to (5) of the *Public Sector Employers Act*, as enacted by section 54 of this Act, comes into force,

(a) section 14.9(3) to (5) of that Act is deemed, in respect of a member of a tribunal referred to in section 14.9(1) of that Act, to be included in all contracts of employment related to the member’s appointment, that are commenced, changed or renewed on or after that date, and

(b) any provision of an applicable contract of employment referred to in paragraph (a) that conflicts with or is inconsistent with section 14.9(3) to (5) of that Act is void to the extent of the conflict or inconsistency.

[89] Whatever this means, to the extent s. 14.9(3) finds its way into such “contracts of employment”, it would, I think, be subordinate to the governing statute, and could not lawfully truncate the protection offered by s. 86.3 of the **RTA** by this form of implication.

[90] Another guiding principle of statutory interpretation is that statutes on the same subject are presumed to be drafted with one another in mind. One finds in **Sullivan and Driedger** at 324:

In effect, the related statutes operate together as part of a single scheme. The provisions of each are read in the context of the others and consideration is given to their role in the overall scheme. The presumptions of coherence and consistent expression apply as if the provisions of these statutes were part of a single Act.

[91] Section 14.9 of the **PSEA** applies to an array of tribunals, some of which appear not to have provisions in their enabling statutes respecting termination “for

cause”. This would also tend to suggest that s. 14.9(3) is something of a residual clause into which tribunals fall if a higher standard has not been legislated.

[92] As I have noted, the meaning and purpose of s. 14.9(3) has been specifically considered by the British Columbia Labour Relations Board. In ***Farmer Construction***, the Board was faced with a preliminary objection by the Respondent unions in a case involving an application for consolidation of a number of bargaining units. The preliminary argument was that s. 14.9(3) had so undermined the security of tenure of the Board’s adjudicators that “the Board no longer [had] sufficient institutional independence to adjudicate the Employers’ applications” (at para. 1).

[93] It is interesting to note that what was “theoretical” in ***Farmer Construction*** is “actual” in the present case. The objection was described in terms manifestly similar to those before this court (at paras. 3-6):

When first raised, the institutional independence objection was based on a number of grounds. The grounds have since been narrowed to the question of whether, in light of s. 54 of the Administrative Tribunals Appointment and Administration Act, S.B.C. 2003, c. 47 (the “ATAAA”), Board adjudicators have sufficient security of tenure to continue to meet the legal test for institutional independence. Section 54 came into force by regulation on February 13, 2004 and, pursuant to other provisions of the ATAAA, has retroactive effect from May 28, 2003.

The Ironworkers/BCYT submit that, in order to meet the legal test for institutional independence, the appointments of Board adjudicators must not be revocable except for cause during the term of their appointments. They submit that since becoming subject to s. 54 of the ATAAA the Board’s adjudicators are no longer institutionally independent. They submit that under s. 54, the appointment of tribunal “members” (i.e., adjudicators) may be terminated before the end of the term of their appointment without notice and, the Ironworkers/BCYT

argue, without cause, on payment of a maximum 12 months' compensation.

The Employers and the Attorney General submit that it is for the Legislature to decide the degree of institutional independence that is appropriate for any given administrative tribunal. Specifically, they argue that it was open to the Legislature to decide that Board adjudicators may be removed without cause on payment of 12 months' compensation, regardless of whether this degree of security of tenure would meet the common law test for institutional independence. The Employers and the Attorney General rely in particular on the Supreme Court of Canada's decision in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)* (2001), 204 D.L.R. (4<sup>th</sup>) 33 ("Ocean Port").

The Ironworkers/BCYT also rely on *Ocean Port* to argue that the Board is subject to the exception enunciated in that decision for tribunals that are required by the Canadian Charter of Rights and Freedoms to be institutionally independent. The Employers and the Attorney General dispute the assertion that the Board falls within this exception.

[94] The Board first reviewed the law of institutional independence, quoting (at paras. 11-13) from *Valente v. The Queen* (1985), 24 D.L.R. (4<sup>th</sup>) 161 (S.C.C.):

In *Valente v. The Queen* (1985), 24 D.L.R. (4<sup>th</sup>) 161 ("Valente"), the Court noted that, broadly speaking, the test for institutional independence is "the one for reasonable apprehension of bias, adapted to the requirement of independence" (p. 168). The Court further noted that, although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements:

The word "impartial" ... connotes absence of bias, actual or perceived. The word "independent" in s. 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it 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. (pp. 169-70)

The Court in *Valente* further stated:

Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to

individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees. (pp. 172-3)

The Court then went on to state the three essential conditions of judicial independence: security of tenure, financial security, and administrative independence. With respect to security of tenure, the Court stated:

The essence of security of tenure for purposes of s. 11(d) [of the Charter] is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner. (p. 180)

[Emphasis added.]

[95] The Board noted (at paras. 14-15) that in **Canadian Pacific Ltd. v. Matsqui Indian Band** (1995), 122 D.L.R. (4<sup>th</sup>) 129 (S.C.C.) the Supreme Court of Canada held, *per* Lamer C.J., that the **Valente** principles applied to administrative tribunals:

I begin my analysis of the institutional independence issue by observing that the ruling of this court in *Valente*, *supra*, provides guidance in assessing the independence of an administrative tribunal.

...

This court has considered *Valente*, *supra*, in at least one case involving an administrative tribunal, *Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69* (1990), 68 D.L.R. (4<sup>th</sup>) 524, [1990] 1 S.C.R. 282, 42 Admin. L.R. 1, in which the independence of the Ontario Labour Relations Board was at issue. There, Gonthier J. stated at p. 561:

Judicial independence is a long-standing principle of our constitutional law which is also part of the rules of natural justice even in the absence of constitutional protection.

I agree and conclude that it is a principle of natural justice that a party should receive a hearing before a tribunal which is not only independent, but also appears independent. Where a party has a reasonable apprehension of bias, it should not be required to submit to the tribunal giving rise to this apprehension. Moreover, the principles for judicial independence outlined in Valente are applicable in the case of an administrative tribunal, where the tribunal is functioning as an adjudicative body settling disputes and determining the rights of parties. However, I recognize that a strict application of these principles is not always warranted. (paras. 75, 79 & 80)

Lamer C.J. concluded that the Valente principles apply to administrative tribunals on the basis of natural justice principles, but that the test for institutional independence may be less strict than for courts:

Therefore, while administrative tribunals are subject to the Valente principles, the test for institutional independence must be applied in light of the functions being performed by the particular tribunal at issue. The requisite level of institutional independence (i.e., security of tenure, financial security and administrative control) will depend on the nature of the tribunal, the interests at stake, and other indices of independence such as oaths of office.

In some cases, a high level of independence will be required. For example, where the decisions of a tribunal affect the security of the person of a party (such as the immigration adjudicators in Mohammad, supra) a more strict application of the Valente principles may be warranted. In this case, we are dealing with an administrative tribunal adjudicating disputes relating to the assessment of property taxes. In my view, this is a case where a more flexible approach is clearly warranted.

I would therefore apply this approach to the question of whether the members of the appellants' appeal tribunals are sufficiently independent. The Valente principles must be considered in light of the nature of the appeal tribunals themselves, the interests at stake, and other indices of independence, in order to determine whether a reasonable and right-minded person, viewing the whole procedure as set out in the assessment by-laws, would have a reasonable apprehension of bias on the basis that the members of the appeal tribunals are not independent. (paras. 83-85)

[Emphasis added.]

[96] Whatever the requisite level of independence required in any particular instance, the Board (at para. 16) noted that in **2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)** (1996), 140 D.L.R. (4<sup>th</sup>) 577 at 609 (S.C.C.), the Supreme Court observed that the removal of adjudicators must not simply be at the pleasure of the executive, a standard that would fall below the requisite level of independence:

In my view, the directors' conditions of employment meet the minimum requirements of independence. These do not require that all administrative adjudicators, like judges of courts of law, hold office for life. Fixed-term appointments, which are common, are acceptable. However, the removal of adjudicators must not simply be at the pleasure of the executive.

[97] The Board then turned to **Hewat v. Ontario** (1998), 156 D.L.R. (4<sup>th</sup>) 193 (Ont. CA.). There, three vice-chairs of the Ontario Labour Relations Board appointed for fixed terms of three years had their appointments revoked mid-term by Order-in-Council. The Ontario Court of Appeal observed, in the course of its decision (at para. 17):

Arguments were put to us about the need for independence and impartiality in tribunal members, particularly those performing quasi-judicial functions. There can be no doubt about the validity of these arguments and of the importance of enhancing and supporting the decision-making powers of tribunals which stand beside the courts, dealing with specialized areas of dispute and regulation. Much has been written in recent years on the subject, indicating that it is not just an interesting problem but a very live concern.

I pause to comment that these are very like the remarks made by the Attorney General in describing the effect intended by the legislative changes attendant upon the Administrative Justice Project.

[98] The Board noted (at para. 19) that the Court of Appeal in **Hewat** went on to say (at paras. 21-22):

I do not see the issues before this court as bringing into play constitutional safeguards against the conduct of government. Indeed, it would be intellectually naive not to recognize that elected governments must have room to make political decisions and to conduct themselves in a manner to assure that their political policies are implemented. We were told by counsel that, until recently, the practice over the past 25 years has been to make appointments to tribunals that have quasi-judicial functions for a fixed period of three years with the expectation gleaned from experience that in normal circumstances there would be repeated renewals of that term. There are many tribunals, agencies and boards in this province, each with different responsibilities, and it would be difficult to lay down any single rule or practice that would be suitable for all. That having been said, the Ontario Labour Relations Board in its quasi-judicial functions must of necessity maintain a public perception of independence from government if the public is to have any respect for its decisions. Indeed, it is difficult to imagine how any tribunal with quasi-judicial functions could maintain the appearance of integrity to those who appear before it, without some degree of independence.

The image of independence is undermined when government commitments to fixed term appointments are breached. The court should not, by its orders, encourage repetition of this conduct. Reinstatement at this stage, with one appointment expired, another about to expire, and the third position undoubtedly filled, is inappropriate. Therefore, it is my view that we should accede to the appellants' request that the sole order of this court be a declaration that the Order-in-Council dated October 2, 1996 was null and void at its inception. The consequences of that order can be left to the parties to resolve.

[99] In **Farmer Construction**, the Board summarized the principles it derived from its review of the case law as follows (at para. 24):

Independence, as distinct from impartiality, concerns the status or relationship of the tribunal to others, particularly to the executive branch of government, and rests upon objective conditions or guarantees of independence from government (Valente, pp. 169-170).

Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to public confidence in the administration of justice. It is therefore important that a tribunal be perceived as enjoying the essential objective conditions or guarantees of judicial independence in order to command the respect and acceptance that are essential to its effective operation (Valente, pp. 172-3).

The essential conditions for institutional independence are: security of tenure; security of remuneration; and administrative control or independence. Security of tenure means a tenure, whether for a fixed term or longer, that is secure against arbitrary or discretionary interference by the appointing authority (Valente, p. 180).

The Valente principles for institutional independence apply to administrative tribunals regardless of whether there is a constitutional need for institutional independence, because judicial independence is also a principle of natural justice. However, depending on the nature of the tribunal, the interests at stake, and other factors, the degree of institutional independence required of a tribunal may be less than that required of courts (Matsqui, paras. 75, 79 & 80).

The minimum requirements of independence do not require that all administrative adjudicators, like judges of courts of law, must hold office for life. Fixed-term appointments are acceptable. However, the removal of fixed-term adjudicators must not simply be at the pleasure of the executive, as this would allow for arbitrary interference by the executive during an adjudicator's term of office (Régie, paras. 67-68).

Vice-chairs of labour tribunals like the Ontario Labour Relations Board, which perform quasi-judicial functions, must maintain a public perception of independence from government if the public is to have any respect for their decisions. The image of independence is undermined when governments revoke fixed-term appointments arbitrarily (i.e., without alleging cause). Accordingly, orders-in-council purporting to revoke such appointments without cause are a legal nullity (Hewat, paras. 21-22).

The security of tenure requirement of institutional independence is met, with respect to a federal labour relations tribunal, like CIRB, when removal from office is subject to a cause requirement and a procedural fairness/due process requirement. In that way, members are protected from arbitrary interference or removal from office during the term of their appointments (Weatherill, BCT.Telus).

Appointments to the Ontario Labour Relations Board are not at pleasure but rather are for a fixed term and cannot be revoked arbitrarily or without just cause. If the appointments could be revoked on payment of three months' notice, that would undercut the principle

of tenure and might well be problematic for a tribunal like the OLRB, which regularly adjudicates cases involving the Crown (Ontario Premier) at paras. 132-33).

[100] The Board then went on (at paras. 25-28) to consider ***Ocean Port***:

In *Ocean Port*, the issue was whether the British Columbia Liquor Appeal Board, whose members held part-time, at pleasure appointments, was sufficiently independent from the provincial government to decide the matters that came before it. The lower courts, applying the Valente principles, concluded that it was not. However, the Supreme Court of Canada pointed out that, even if the tribunal did not meet the common law natural justice requirements for institutional independence, this was not fatal to its ability to function:

It is well-established that, absent constitutional constraints, the degree of independence required of a particular government decision-maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as a whole to determine the degree of independence the legislature intended. (para. 20)

The Court went on to note that, confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice:

In such circumstances, administrative tribunals may be bound by the requirement of an independent and impartial decision-maker, one of the fundamental principles of natural justice: *Matsqui*, supra (per Lamer C.J. and Sopinka J.); *Régie*, supra, at para. 39; *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405, 139 D.L.R. (4<sup>th</sup>) 575. Indeed, courts will not lightly assume that legislators intended to enact procedures that run contrary to this principle, although the precise standard of independence required will depend "on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make": *Régie*, supra, at para. 39.

However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. ... Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear

statutory direction. Courts engaged in judicial review of administration decisions must defer to the legislature's intention in assessing the degree of independence required of the tribunal in question. (paras. 21-22)

In *Ocean Port*, the Supreme Court of Canada found that the provincial legislature "spoke directly to the nature of the appointments to the Liquor Appeal Board"; under its enabling legislation, the chair and members of the Board were expressly stated to "serve at the pleasure of the Lieutenant Governor in Council" (para. 25). With respect to this language, the Court stated:

In my view, the legislature's intention that Board members should serve at pleasure, as expressed through s. 30(2)(a) of the Act, is unequivocal. As such, it does not permit the argument that the statute is ambiguous and hence should be read as imposing a higher degree of independence to meet the requirements of natural justice, if indeed a higher standard is required. ... Where the intention of the legislature, as here, is unequivocal, there is no room to import common law doctrines of independence, "however inviting it may be for a Court to do so": *Re W.D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129 at p. 137, 52 D.L.R. (3d) 161 (C.A.). (para. 27)

Thus, while institutional independence is a "fundamental" principle of natural justice, and courts will not lightly assume that legislators intended to enact procedures that run contrary to it, the degree of institutional independence necessary to meet common law standards may be ousted by express statutory language or necessary implication. It will not be ousted where the legislation, read as a whole, is ambiguous as to whether the legislature intended the tribunal in question to meet the natural justice requirement of independence.

[101] While accepting the principle that an unambiguous legislative ouster of the principles of natural justice will be effective, absent constitutional restraints, the Board in *Farmer Construction* after considering the further elaborations introduced in *Sekela v. British Columbia (Police Complaint Commissioner)* (2001), 206 D.L.R. (4<sup>th</sup>) 747 (B.C.C.A.) and *Ell v. Alberta*, [2003] 1 S.C.R. 857, concluded (at para. 32):

Thus, while *Ocean Port* makes it clear that as applied to administrative tribunals, the *Valente* principles may be subject to legislative constraint, it is also clear that the principles themselves have not been altered. In particular, the Supreme Court of Canada re-affirmed in *Elliott* that the essence of security of tenure is that members of a tribunal must be free from arbitrary or discretionary removal from office, and that removing individual members from office without cause would almost certainly be considered arbitrary removal. In *Elliott*, the Court drew a distinction between arbitrary or discretionary removal from office without cause and justified removal from office to accommodate necessary reform or restructuring of the tribunal. The former situation compromises institutional independence whereas the latter does not. Finally, in *Sekela*, the British Columbia Court of Appeal noted that it is irrelevant whether a reasonable person would think that the appointing authority would actually exercise its power to remove without cause in an arbitrary or improper manner; the mere existence of the power alters the relationship between the executive and the tribunal such that there is no longer institutional independence.

[102] The Board then went on to consider the requirement of institutional independence in light of its own functions (at paras. 37-44):

In *Bell Canada v. Communications, Energy and Paperworkers Union of Canada* (2003), 227 D.L.R. (4<sup>th</sup>) 193 (“*Bell*”), the Supreme Court of Canada considered the institutional independence and impartiality of the Canadian Human Rights Commission. The principles described in *Bell* apply to the functions carried out by the Board. In the course of its consideration, the Court reviewed previous decisions (at para. 21) and then noted that tribunals whose “primary purpose” is to adjudicate disputes through some form of hearing and who “possess court-like powers and procedures” fall nearer to the judicial end of the spectrum than those who merely “develop, or supervise the implementation of, particular government policies” (para. 21), and accordingly they will require a higher degree of independence.

It held that the main function of the Canadian Human Rights Tribunal is adjudicative, that it has many of the powers of a court, that it carried out no investigative or policy-making functions, and that serious interests are at stake or are affected by its proceedings (paras. 23-24). The Court further determined that there was no indication in the legislation that the legislature intended anything less than a high degree of independence, and found on the basis of all of these features of the statutory scheme that “the legislature intended the

Tribunal to exhibit a high degree of independence from the executive branch” (para. 24).

We find that the Board is required to exhibit a high degree of independence from the executive branch. Applying to the Bell analysis, we find that, like the Canadian Human Rights Tribunal in Bell, the main function of the Board is to resolve disputes by means of formal adjudication (as well as, where possible, by means of mediation). The Board has many of the powers of a court, and serious interests are at stake or are affected by its proceedings. There is nothing in the Code to suggest that the Legislature intended anything less than a high degree of independence for the Board.

While the Board has considerable scope to develop labour relations policy consistent with Code provisions and principles, we find this fact enhances rather than detracts from the need for institutional independence. In our view, the Board’s policy-making function in the area of labour relations is not the sort of policy implementation function which the Court in Bell indicated would cause a tribunal to require a lesser degree of institutional independence. Even if we are wrong on this point, we find that, on a consideration of the functions of the Board as a whole, the Board clearly falls at the high end of the spectrum for tribunal institutional independence.

...

Thus, applying the approach in both Bell and Matsqui for determining the requisite level of institutional independence, we conclude that, in order to exercise the powers granted to them and perform their duties under the Code in a manner consistent with Section 2 of the Code and the nature of labour relations tribunals generally, Board adjudicators must have at least the minimum level of security of tenure generally recognized as applying to fixed term appointments: they must not be subject to arbitrary or discretionary removal from office during the term of their appointments. Removal must be for cause. We find this to be the minimum security of tenure necessary for Board vice-chairs to meet the requirement of institutional independence at common law.

[103] The Board concentrated on finding a harmonious reading of s. 54 of the **ATAAA** (the provision that became s. 14.9(3)) with s. 8 of the **ATAAA** among other things. To do so, it considered the context in which the amendment was placed (the **PSEA**), and considered that it must be interpreted in terms of the need for institutional independence of adjudicators derived from its review of the law. It

found that it was possible to explain the provision as intended to apply to mid-term revocations of appointments for purposes of restructuring (at paras. 63-69):

Thus, on its face, s. 54 of the ATAAA amends s. 14.9 of the PSEA so that tribunal members are now subject to compensation-limiting provisions under PSEA in the event that their appointments are terminated before the end of their term. Given the statutory context in which the amended s. 14.9 appears – that is, Part 3.1 “Exempt Employee Compensation” of the PSEA – the focus of the amendment would appear to be on limiting the amount of compensation payable in the event of mid-term revocation of a tribunal appointment rather than on the power to revoke appointments mid-term *per se*.

The Ironworkers/BCYT argue that, however, for those tribunals like the Board that are subject to s. 54, these general conditions of appointment are modified such that adjudicators may be removed mid-term without cause. Although s. 54 does not use the words “without cause”, the Ironworkers/BCYT assume that the provision implicitly granted a power to revoke appointments not only without notice, but also without cause. The Employers and the Attorney General in their submissions make the same assumption. If this assumption is correct, then, as we have set out above, the institutional independence of the Board and other like tribunals is compromised by s. 54. If, however, this assumption is incorrect – and s. 54 does not empower the appointing authority to remove adjudicators mid-term without cause – then the provision would have no impact on the institutional independence of the Board. The independence issue arises only with the assumption that s. 54 provides the appointing authority with an ability to revoke tribunal appointments mid-term without cause.

Upon reviewing the whole circumstances of the need for institutional independence of Board adjudicators, we conclude that if the legislative intent had been to confer a general power on appointing authorities to terminate tribunal appointments mid-term without cause, one would expect to see such a provision appearing among the first 10 general provisions of the ATAAA, not within consequential amendments to other enactments. Furthermore, one would expect to see language reconciling such a provision with s. 8 of the ATAAA, which imposes a “cause” requirement for the termination of tribunal appointments. If, on the other hand, s. 54 is not interpreted as providing a power to dismiss without cause, then there would be no potential inconsistency with s. 8 of the ATAAA and no issue concerning institutional independence.

Given that s. 54 mandates payment of up to 12-months’ “compensation” for premature termination of appointment, the assumption advanced is that it implies a power to terminate without

cause. Compensation for lost wages is not normally paid where termination of employment is for cause. However, does this practice mean that the word “without cause” must necessarily be read into the amended s. 14.9? In our view, it does not. One possible explanation for why the Legislature would have intended to pay limited compensation for mid-term revocations of tribunal appointments is that revocations for cause are extremely rare, whereas mid-term revocations for tribunal re-structuring purposes, as occurred in *EI* and *BCT.Telus*, are not unheard of. It may be that the Legislature intended to limit the amount of compensation payable in the event that tribunal appointments were revoked mid-term in such circumstances. As indicated in *EI* and *BCT.Telus*, mid-term revocation of tribunal appointments for purposes of bona fide tribunal re-structuring or systemic reform is not arbitrary removal and therefore does not offend the principle of institutional independence.

Thus, it is possible to interpret s. 14.9 without having to read the words “without cause” into that provision. Reading the words “without cause” into s. 14.9 is inconsistent with the general provisions of the ATAAA (ss. 1-10), in particular with s. 2, s. 3 and s. 8. Those provisions recognize the need for an independent, arm’s length relationship between appointing authorities and adjudicators, including the common law institutional independence requirement for fixed term appointments with removal being subject to a cause requirement. By contrast, reading the amended s. 14.9 as implying an ability to terminate adjudicators mid-term without cause implies that the nature of the relationship between an appointing authority and a tribunal appointee as being simply an employment relationship, with the “employer” being able to terminate the appointment before the end of its term without notice or cause, on payment of compensation. The Ontario Court of Appeal rejected this characterization of the appointing authority-tribunal member relationship in *Hewat*.

In our view, the absence of the words “without cause” in the amended s. 14.9 renders it a least equivocal whether the Legislature intended to imply a power to terminate the appointments of tribunal adjudicators mid-term without cause, on payment of a maximum 12 months’ compensation. Applying the *Ocean Port* analysis that it should not lightly be assumed that the Legislature intended to breach the fundamental principle of institutional independence absent a clear and unequivocal expression of intention to do so, we find that s. 14.9 should not be read as implying an ability to revoke tribunal appointments mid-contract without cause.

69 Interpreted in this matter, s. 14.9 does not offend the common law principle of institutional independence. The security of tenure of Board adjudicators remains as before: subject to removal for cause or

in the event of a justified and bona fide systemic restructuring of the tribunal: Ell.

[104] The Respondents have criticized ***Farmer Construction*** on the basis that it is hypothetical:

123. The Labour Relations Board was dealing with a challenge to the jurisdiction of the Board based on its alleged lack of independence because of section 14.9(3). There was no member being terminated either with or without cause. There was only the hypothetical proposed by the union and the fear that termination of a member could be based on reasons relating to a particular decision, which therefore might create a reasonable apprehension of bias. The Labour Relations Board specifically refers to “arbitrary removal” and had no factual context in which to determine what might be considered arbitrary.

[Respondents’ submission]

[105] The facts in the present case answer that objection. While the Labour Relations Board was dealing with a theoretical possibility, the Petitioner’s experience provides a vivid factual example of a purely arbitrary dismissal.

[106] The Respondents further submit that ***Farmer Construction*** was wrongly decided and point to what they call the Board’s “ponderings” as an example of the difficulties that come about when legislative intention is addressed in a “factual vacuum”. Again, the Respondents’ treatment of the Petitioner has clearly eliminated that objection to this court considering the reasoning in ***Farmer Construction***.

[107] Lastly, the Respondents submit that the ***Farmer Construction*** is, in any event, distinguishable because the Labour Relations Board is at a higher end of the

spectrum for tribunal institutional independence. The factors the Respondents identify are the following:

- Labour Relations Board members are fulltime appointees, paid an annual salary set by the Lieutenant Governor in Council;
- The Labour Relations Board is “required to exhibit a high degree of independence from the executive branch (does not report to and is not supervised by a government employee as are residential tenancy arbitrators);
- The Labour Relations Board may decide questions outside the Board’s area of exclusive jurisdiction, including jurisdictional questions and constitutional questions including Charter challenges to Code provisions and other statutory provisions, as is evidenced by the issue raised before the LRB in *Farmer*;
- The Labour Relations Board has the power to determine its own practice and procedure;
- Vice-chairs of the Labour Relations Board have exceptionally broad remedial powers;
- The Government, in its role as an employer, is regularly the subject of complaints and applications under the Code and appears before the Labour Relations Board as a party;
- The Labour Relations Board adjudicates Charter challenges where the Attorney General appears on behalf of the government to defend the constitutionality of the legislation.

[108] Respecting the last two points, the Petitioner has made an uncontradicted submission that residential tenancy arbitrators do, in fact, adjudicate complaints that involve the government as landlord on occasion, although under the **ATA** they do not have **Charter** jurisdiction.

[109] The other distinctions between full-time appointment and the technical part-time of the Petitioner’s appointment, or between organizational models, are arguments that function follows form, which is, I think a misreading of **Ocean Port**.

The function of a residential tenancy arbitrator is, as I have observed elsewhere, to decide issues submitted by private parties by applying the law to the facts. There is no purer definition of the judicial function, or what is called the “high” or “quasi-judicial” end of the spectrum. The discharge of such a function requires an impartial adjudicator and an independent tribunal. The administrative characteristics of such a tribunal may vary, depending on the volume and complexity of the matters submitted to it, and no doubt, other factors. What is sufficient to create an adequate structure to support a particular adjudicative function will vary. The structure does not define the function, however.

[110] The Respondents’ submission on **Farmer Construction** concludes:

130 No single factor alone of the above would be sufficient to support the Labour Relations Board’s interpretation of section 14.9(3), but the combination of all of the above may be a basis for arguing that the Labour Relations Board, as evidenced by legislative intention, is entitled to greater trappings of judicial independence than residential tenancy arbitrators.

[111] In my view, the reasoning in **Farmer Construction** provides a plausible explanation for the apparently contradictory provisions of the **RTA** and the **PSEA**. These were manifestly unpersuasive to the Respondents, who, in dismissing the Petitioner and in “reconsidering” her dismissal, apparently gave no thought to the precedent the Board had established. What the respondents call “ponderings” strike me as simply the Board’s best efforts to read contradictory legislation harmoniously, as it was obliged to attempt to do.

[112] I do not think it possible, however, to endorse the Board’s view of the meaning of s. 14.9(3), beyond saying that in its attempt to identify a manner in which the two statutes can be read harmoniously, and in its thorough analysis of “independence”, it illustrates the interests at stake—interests the Respondents tellingly call the “trappings” of judicial independence—and the obvious ambiguity of the statutes taken together. Whatever else, the contortions required to make sense of s. 14.9(3) show that it does not satisfy the requirement that the rules of natural justice may only be ousted by language that is clear and unequivocal.

[113] In summary, the **RTA** is the particular, and the **PSEA** is the general statute. The **RTA** prevails in the case of ambiguity. The statutes can only be read harmoniously if one reads “for cause” in s. 86(3) of the **RTA**, as if s. 14.9(3) of the **PSEA** operates to limit the customary meaning of that phrase. The intention the Respondents submit is manifest in this legislation could be simply put in one place, for example:

The appointment of a residential tenancy arbitrator may be terminated at any time:

- (a) for cause, or
- (b) upon payment etc...

[114] The ambiguity created by legislative drafting involving two statutes of different status (specific and general), which requires the application of rules of statutory interpretation that, in fact, militate against an unforced, harmonious reading, does not amount to an unequivocal declaration of intention to oust the common law principles of natural justice. Read in light of the principles I must

apply, section 14.9(3) is inoperative, and the mid-term revocation of the Petitioner's appointment was unlawful.

[115] The fact that the legislative intention the Respondents attribute to s. 14.9(3) could be expressed in language that is clear and unambiguous and the fact that the Respondents are evidently committed to the view that they are absolutely entitled to do what they have done, leads to the last question, which is whether such an intention could, in any event, be expressed in terms that are constitutional.

## **V**

### **THE CONSTITUTIONAL QUESTION**

[116] The Petitioner submits that there are unwritten constitutional imperatives which include the rule of law, and that judicial independence is integral to the rule of law.

[117] The Petitioner further submits that because residential tenancy arbitrators fall at the "high end" of the spectrum of administrative tribunals, their function within those principles requires that they be independent.

[118] The Petitioner lastly submits that it follows that if s. 14.9(3) (or an amended version drafted to conform with the requirement of unequivocal intention) is interpreted to mean that members of such tribunals may be subject to arbitrary dismissal, it is unconstitutional as inimical to the unwritten constitutional principle of judicial independence, which is an essential incident of the rule of law.

[119] There is no suggestion that written constitutional provisions apply. It is accepted that these apply only to Superior Courts and to those inferior courts exercising jurisdiction engaging sections 7 or 11(d) of the **Charter**.

[120] The strongest and most cogent expression of the principle the Petitioner urges upon the court is found in **Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island et al.**, [1997] 3 S.C.R. 3. There, Lamer C.J. described (at para. 1) the “single” issue uniting the four appeals handed down in that case as:

whether and how the guarantee of judicial independence in s. 11(d) of the *Canadian Charter of Rights and Freedoms* restricts the manner by and the extent to which provincial governments and legislatures can reduce the salaries of provincial court judges. Moreover, in my respectful opinion, they implicate the broader question of whether the constitutional home of judicial independence lies in the express provisions of the *Constitution Acts, 1867 to 1982*, or exterior to the sections of those documents.

[121] Notwithstanding the narrower basis on which the case was argued, the Chief Justice directly addressed the unwritten basis of judicial independence (at paras. 82-83):

These appeals were all argued on the basis of s. 11(d), the *Charter’s* guarantee of judicial independence and impartiality. From its express terms, s. 11(d) is a right of limited application – it only applies to persons accused of offences. Despite s. 11(d)’s limited scope, there is no doubt that the appeals can and should be resolved on the basis of that provision. To a large extent, the Court is the prisoner of the case which the parties and interveners have presented to us, and the arguments that have been raised, and the evidence that we have before us, have largely been directed at s. 11(d). In particular, the two references from P.E.I. are explicitly framed in terms of s. 11(d), and if

we are to answer the questions contained therein, we must direct ourselves to that section of the Constitution.

Nevertheless, while the thrust of the submissions was directed at s. 11(d), the respondent Wickman in *Campbell et al.* and the appellants in the P.E.I. references, in their written submissions, the respondent Attorney General of P.E.I., in its oral submission, and the intervener Attorney General of Canada, in response to a question from Iacobucci J., addressed the larger question of where the constitutional home of judicial independence lies, to which I now turn. Notwithstanding the presence of s. 11(d) of the *Charter*, and ss. 96-100 of the *Constitution Act 1867*, 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*. The specific provisions of the *Constitution Acts, 1867 to 1982*, merely “elaborate that principle in the institutional apparatus which they create or contemplate”: *Switzman v. Elbling*, [1957] S.C.R. 285, at p. 306, *per* Rand J.

[122] He considered the tenability of the position that the written provisions of the Constitution are exhaustive, finding serious “gaps” if that were the case (at para. 86):

To some extent, the gaps in the scope of protection provided by ss. 96-100 are offset by the application of s. 11(d), which applies to a range of tribunals and courts, including provincial courts. However, by its express terms, s. 11(d) is limited in scope as well – it only extends the envelope of constitutional protection to bodies which exercise jurisdiction over offences. As a result, when those courts exercise civil jurisdiction, their independence would not seem to be guaranteed. The independence of provincial courts adjudicating in family law matters, for example, would not be constitutionally protected. The independence of superior courts, by contrast, when hearing exactly the same cases, would be constitutionally guaranteed.

[123] After further elaborating on the limitations of the written provisions of ss. 96-100 of the *Constitution Act, 1867*, he continued (at para. 89):

The point which emerges from this brief discussion is that the interpretation of ss. 96 and 100 has come a long way from what those provisions actually say. This jurisprudential evolution undermines the force of the argument that the written text of the Constitution is comprehensive and definitive in its protection of judicial independence. The only way to explain the interpretation of ss. 96 and 100, in fact, is by reference to a deeper set of unwritten understandings which are not found on the face of the document itself.

[124] Chief Justice Lamer found the source of these unwritten rules in the preamble to the ***Constitution Act, 1867***. He concluded (at paras. 106-109):

The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the *Act of Settlement* of 1701. As we said in *Valente, supra*, at p. 693, that Act was the “historical inspiration” for the judicature provisions of the *Constitution Act, 1867*. Admittedly, the Act only extends protection to judges of the English superior courts. However, our Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act, 1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.

I also support this conclusion on the basis of the presence of s. 11(d) of the *Charter*, an express provision which protects the independence of provincial court judges only when those courts exercise jurisdiction in relation to offences. As I said earlier, the express provisions of the Constitution should be understood as elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*. Even though s. 11(d) is found in the newer part of our Constitution, the *Charter*, it can be understood in this way, since the Constitution is to be read as a unified whole: *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, at p. 1206. An analogy can be drawn between the express reference in the preamble of the *Constitution Act, 1982* to the rule of law and the implicit inclusion of that principle in the *Constitution Act, 1867*: *Reference re Manitoba Language Rights, supra*, at p. 750. Section 11(d), far from indicating that judicial independence is constitutionally enshrined for provincial courts only when those courts exercise jurisdiction over offences, is proof of the existence of a general principle of judicial independence that applies to all courts no matter what kind of cases they hear.

I reinforce this conclusion by reference to the central place that courts hold within the Canadian system of government. In *OPSEU*, as I have mentioned above, Beetz J. linked limitations on legislative sovereignty over political speech with “the existence of certain political institutions” as part of the “basic structure of our Constitution” (p. 57). However, political institutions are only one part of the basic structure of the Canadian Constitution. As this Court has said before, these are three branches of government – the legislature, the executive, and the judiciary: *Fraser v. Public Services Staff Relations Board*, [1985] 2 S.C.R. 455, at p. 469; *R. v. Power*, [1994] 1 S.C.R. 601, at p. 620. Courts, in other words, are equally “definitional to the Canadian understanding of constitutionalism” (*Cooper, supra*, at para. 11) as are political institutions. It follows that the same constitutional imperative – the preservation of the basic structure – which led Beetz J. to limit the power of legislatures to affect the operation of political institutions, also extends protection to the judicial institutions of our constitutional system. By implication, the jurisdiction of the provinces over “courts”, as that term is used in s. 92(14) of the *Constitution Act, 1867*, contains within it an implied limitation that the independence of those courts cannot be undermined.

In conclusion, the express provisions of the *Constitution Act, 1867* and the *Charter* are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located. However, since the parties and interveners have grounded their arguments in s. 11(d), I will resolve these appeals by reference to that provision.

[Emphasis added.]

[125] These observations were the basis, in *Ocean Port*, for a submission before the Supreme Court of Canada that the unwritten principle of judicial independence said to be applicable to “all courts” in the *PEI Reference* should extend to an administrative tribunal, the B.C. Liquor Appeal Board, that also exercised adjudicative functions.

[126] In ***Ocean Port Hotel v. British Columbia (Liquor Control, General Manager)*** (1999), 174 D.L.R. (4<sup>th</sup>) 498, the British Columbia Court of Appeal heard an appeal from the Liquor Appeal Board which had affirmed the decision of a Senior Inspector. The Inspector had imposed a two-day suspension of the hotel's liquor licence for violations of the ***Liquor Act*** he found had taken place at its premises. On the appeal *de novo* the Liquor Appeal Board heard evidence from both sides and confirmed the decision. After reviewing the circumstances and the law, Huddart J.A. found that the Board members' security of tenure had failed to meet the ***Valente*** test. She concluded (at para. 37):

I have reached the conclusion the Supreme Court of Canada has decided that appointments at pleasure to administrative agencies such as the Quebec Régie d'alcool and the Liquor Appeal Board exercising the power to impose sanctions for violations of statutes comparable to that possessed by courts of law are not sufficient to satisfy the requirement of security of tenure and that for such agencies security of tenure is an essential requirement of independence. I cannot distinguish a fixed term appointment on a part-time basis from a full-time appointment at pleasure in its effect on the office holder as it would be regarded by a well informed and right minded observer.

[127] The Supreme Court of Canada overturned the British Columbia Court of Appeal on the basis that it had elevated a principle of natural justice to constitutional status. McLachlin C.J. found that this to be an error in law (at paras. 20-24):

It is well established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as a whole to determine the degree of independence the legislature intended.

Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice: *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495, at p. 503; *Law Society of Upper Canada v. French*, [1975] 2 S.C.R. 767, at pp. 783-84. In such circumstances, administrative tribunals may be bound by the requirement of an independent and impartial decision maker, one of the fundamental principles of natural justice: *Matsqui, supra* (per Lamer C.J. and Sopinka J.); *Régie, supra*, at para. 39; *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405. Indeed, courts will not lightly assume that legislators intended to enact procedures that run contrary to this principle, although the precise standard of independence required will depend "on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make": *Régie*, at para. 39.

However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. See generally: *Innisfil (Corporation of the Township of) v. Corporation of the Township of Vespra*, [1981] 2 S.C.R. 145; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *Ringrose v. College of Physicians and Surgeons (Alberta)*, [1977] 1 S.C.R. 814; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105. Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question.

This principle reflects the fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (the "*Provincial Court Judges Reference*"). Historically, the requirement of judicial independence developed to demarcate the fundamental division between the judiciary and the executive. It protected, and continues to protect, the impartiality of judges – both in fact and perception – by insulating them from external influence, most notably the influence of the executive: *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 69; *Régie*, at para. 61.

Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.

[128] After suggesting that the Court of Appeal may have been led into error in relying on the *Régie* case, which involved a statute subject to the Quebec *Charter of Human Rights and Freedoms*, which specifically provides the right to a “full and equal, public and fair hearing by an independent and impartial tribunal”, McLachlin C.J. went on to say (at paras. 29-30):

Nor is a constitutional guarantee of independence implicated in the present case. The respondent does not argue that the proceedings before the Board engage a right to an independent tribunal under ss. 7 or 11(d) of the *Canadian Charter of Rights and Freedoms*. Instead, it contends that the preamble to the *Constitution Act, 1867* mandates a minimum degree of independence for at least some administrative tribunals. In support, the respondent invokes Lamer C.J.’s discussion of judicial independence in the *Provincial Court Judges Reference*. In that case, Lamer C.J., writing for the majority, concluded that “judicial independence is at root an unwritten constitutional principle ... recognized and affirmed by the preamble to the *Constitution Act, 1867*” (para. 83 (emphasis in original)). The respondent argues that the same principle binds administrative tribunals exercising adjudicative functions.

With respect, I find no support for this proposition in the *Provincial Court Judges Reference*. The language and reasoning of the decision are confined to the superior and provincial courts. Lamer C.J. addressed the issue of judicial independence; that is, the independence of the courts of law comprising the judicial branch of

government. Nowhere in his reasons does he extend his comments to tribunals other than courts of law.

[129] McLachlin C.J. stated unequivocally (at para. 31) that “all courts”, as the phrase was used in the **PEI Reference**, cannot be read to extend to administrative tribunals:

These comments circumscribe the requirement of independence, as a constitutional imperative emanating from the preamble, to the provincial and superior courts.

[130] The Respondents submit that **Ocean Port** is authority for the proposition that “legislatures are only constrained by the rule of law (within the boundaries of the constitution) in the sense that they must clearly comply with legislated requirements as to manner and form.” They have referred to **British Columbia v. Imperial Tobacco Canada Ltd.**, [2005] 2 S.C.R. 473, a case in which certain provisions of a statute, the **Tobacco Damages and Health Care Costs Recovery Act**, S.B.C. 2000, c. 30, were challenged, unsuccessfully, on the grounds that the statute offended judicial independence and the rule of law. The Supreme Court reviewed the case law on judicial independence (at paras. 44-51):

Judicial independence is a “foundational principle” of the Constitution reflected in s. 11(d) of the *Canadian Charter of Rights and Freedoms*, and in both ss. 96-100 and the preamble to the *Constitution Act, 1867: Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 109. It serves “to safeguard our constitutional order and to maintain public confidence in the administration of justice”: *Ell v. Alberta*, [2003] 1.S.C.R. 857, 2003 SCC 35, at para. 29. See also *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 2004 SCC 42, at paras. 80-81.

Judicial independence consists essentially in the freedom “to render decisions based solely on the requirements of the law and justice”:

*Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at para. 37. It requires that the judiciary be left free to act without improper “interference from any other entity” (*Ell*, at para. 18) – i.e. that the executive and legislative branches of government not “impinge on the essential ‘authority and function’ ... of the Court” (*MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, at p. 828). See also *Valente v. The Queen*, [1985] 2 S.C.R. 673, at pp. 6860-87, *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at pp. 73 and 75, *R. v. Lippé*, [1991] 2 S.C.R. 114, at pp. 152-54, *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, 2002 SCC 57, at para. 57, and *Application under s. 83.28 of the Criminal Code (Re)*, at para. 87.

Security of tenure, financial security and administrative independence are the three “core characteristics” or “essential conditions” of judicial independence: *Valente*, at pp. 694, 704 and 708, and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, at para. 115. It is a precondition to judicial independence that they be maintained, and be seen by “a reasonable person who is fully informed of all the circumstances” to be maintained: *Mackin*, at paras. 38 and 40, and *Provincial Court Judges’ Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, [2005] 2 S.C.R. 286, 2005 SCC 44, at para. 6.

However, even where the essential conditions of judicial independence exist, and are reasonably seen to exist, judicial independence itself is not necessarily ensured. The critical question is whether the court is free, and reasonably seen to be free, to perform its adjudicative role without interference, including interference from the executive and legislative branches of government. See, for example, *Application under s. 83.28 of the Criminal Code (Re)*, at paras. 82-92.

The appellants submit that the Act violates judicial independence, both in reality and appearance, because it contains rules of civil procedure that fundamentally interfere with the adjudicative role of the court hearing an action brought pursuant to the Act. They point to s. 3(2), which they say forces the court to make irrational presumptions, and to ss. 2(5)(a), 2(5)(b) and 2(5)(c), which they say subvert the court’s ability to discover relevant facts. They say that these rules impinge on the court’s fact-finding function, and virtually guarantee the government’s success in an action brought pursuant to the Act.

The rules in the Act with which the appellants take issue are not as unfair or illogical as the appellants submit. They appear to reflect legitimate policy concerns of the British Columbia legislature regarding the systemic advantages tobacco manufacturers enjoy when claims for tobacco-related harm are litigated through individualistic common law tort actions. That, however, is beside the point. The question is not whether the Act’s rules are unfair or illogical, nor whether they differ

from those governing common law tort actions, but whether they interfere with the courts' adjudicative role, and thus judicial independence.

The primary role of the judiciary is to interpret and apply the law, whether procedural or substantive, to the cases brought before it. It is to hear and weigh, in accordance with the law, evidence that is relevant to the legal issues confronted by it, and to award to the parties before it the available remedies.

The judiciary has some part in the development of the law that its role requires it to apply. Through, for example, its interpretation of legislation, review of administrative decisions and assessment of the constitutionality of legislation, it may develop the law significantly. It may also make incremental developments to its body of previous decisions – i.e. the common law – in order to bring the legal rules those decisions embody “into step with a changing society”: *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 666. See also *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at paras. 91-92. But the judiciary's role in developing the law is a relatively limited one. “[I]n a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform”: *Salituro*, at p. 670.

[131] The Respondents submit that ***Ocean Port*** and the comments in this case are a “complete answer” to the Petitioner's submissions that there are unwritten constitutional principles engaged in this case, superseding the will of the legislature.

[132] The Petitioner, on the other hand, submits that ***Ocean Port's*** reading of “all courts” to mean only superior and provincial courts does not address the fact that there is no constitutionally relevant distinction between provincial courts exercising civil jurisdiction, and provincial quasi-judicial tribunals exercising comparable adjudicative jurisdiction. They submit that the apparent conclusiveness of ***Ocean Port*** must be tempered by a reading of two subsequent decisions, ***Bell Canada v.***

*Canadian Telephone Employees Assn.*, [2003] 1 S.C.R. 884 and *Ell v. Alberta*, [2003] 1 S.C.R. 857.

[133] In *Bell Canada*, Bell challenged the independence and impartiality of the Canadian Human Rights Tribunal which had been convened to hear complaints by two female Bell Canada employees. The court addressed the specific requirement of independence of the Human Rights Tribunal in terms of its place on a “spectrum”. At paragraphs 23-24, the Court observed:

The main function of the Canadian Human Rights Tribunal is adjudicative. It conducts formal hearings into complaints that have been referred to it by the Commission. It has many of the powers of a court. It is empowered to find facts, to interpret and apply the law to the facts before it, and to award appropriate remedies. Moreover, its hearings have much the same structure as a formal trial before a court. The parties before the Tribunal lead evidence, call and cross-examine witnesses, and make submissions on how the law should be applied to the facts. The Tribunal is not involved in crafting policy, nor does it undertake its own independent investigations of complaints: the investigative and policy-making functions have deliberately been assigned by the legislature to a different body, the Commission.

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. There is no indication in the Act that the legislature intended anything less than a high degree of independence of Tribunal members. Members’ remuneration is fixed by the Governor in Council, and is not subject to their performance on the Tribunal: s.48.6(1). Members hold office for a fixed term of up to five years (or up to seven years, in the case of the Chairperson and Vice-chairperson) (s. 48.2(1)); and their terms may only be extended to enable them to finish a hearing that they have already commenced. Further, the Chairperson is removable only for cause; and before a member is disciplined or removed, the Chairperson may request the Minister of Justice to look into the situation, who in turn may request

the Governor in Council to appoint a judge to conduct a full inquiry (s. 48.3). All of these features of the statutory scheme suggest that the legislature intended the Tribunal to exhibit a high degree of independence from the executive branch.

[Emphasis added.]

[134] **Bell Canada** appears to acknowledge a form of tribunal to which the characterization of administrative tribunals in **Ocean Port** simply does not apply. In **Ocean Port**, in the context of a tribunal constituted to adjudicate the policy laden question of whether, and to what degree, a licence holder had breached the conditions of a government administered privilege, the court used broad language that does not really describe the function of tribunals at the “high end” of the spectrum. The decision to grant or withhold a government licence or privilege, or the adjudication of a breach of such a licence or privilege, is a markedly different function from what is required of a tribunal constituted to try, as between citizens, issues arising in relation to a statute governing a realm of private law. As I have observed, the statute itself may reflect government policy in its terms, but adjudication as between private individuals is a judicial function, a point made in another fashion in **British Columbia v. Imperial Tobacco**.

[135] **Bell Canada** included a finding that the common law standard of independence had been met, but the Petitioner submits that the Court did not specifically foreclose the possibility of a constitutional principle mandating that a quasi-judicial tribunal meet a threshold of judicial independence. Indeed, in observing that a “high degree of independence is ... appropriate given the interests that are affected by proceedings before the Tribunal”, the Court made an implicitly normative statement. The ouster of the principles of natural justice in the creation

of such a tribunal would clearly, at some point, be so inimical to the function or purpose of the tribunal as to offend that sense of fitness or propriety. This must imply an unwritten constitutional principle that would limit any such legislative intention transgressing the rule of law, no matter how clearly expressed.

[136] In *EII*, the Supreme Court of Canada was called upon to consider the status of a number of Alberta Justices of the Peace who were removed from office in the context of a *bona fide* plan to improve the qualifications and independence of Justices of the Peace. The Court held that the principle of judicial independence applied to the position of Justices of the Peace. Major J., for the Court, explained at para. 9:

In a further effort to ensure that justices of the peace are qualified for the duties they perform, the amendments replace the office of non-sitting justices of the peace with the positions of presiding and non-presiding justices of the peace. In essence, presiding justices of the peace assume the judicial tasks that had previously been assigned to the non-sitting justices of the peace, and non-presiding justices of the peace are limited to their administrative tasks.

[137] In *EII*, the Supreme Court, per Major J., recognized that the justices of the peace did not fall within the written constitutional protection of judicial independence (s. 96-100 of the *Constitution Act, 1867*; or the *Charter of Rights and Freedoms*, s. 11(d)), but that they were nevertheless required to be independent because they exercise judicial functions related to the basis upon which the principle is founded. The court observed at paragraphs 17-20:

The primary issues in this appeal are whether the principle of judicial independence extends to the office of the respondents, and if so, whether the legislated removal of the respondents from office

contravenes that principle. I agree that the principle applies to the position of the respondents as a result of their authority to exercise judicial functions. However, I conclude that the amendments at issue do not violate the constitutional essence of the respondents' security of tenure, and so do not contravene the principle of judicial independence.

A. *The Scope of Judicial Independence*

Judicial independence has been recognized as “the lifeblood of constitutionalism in democratic societies”: see *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 70, *per* Dickson C.J. It requires objective conditions that ensure the judiciary's freedom to act without interference from any other entity. The principle finds explicit constitutional reference in ss. 96 to 100 of the *Constitution Act, 1867* and s. 11(d) of the *Canadian Charter of Rights and Freedoms*. The application of these provisions is limited: the former to judges of superior courts, and the latter to courts and tribunals that determine the guilt of those charged with criminal offences: see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (“*Provincial Court Judges Reference*”), at para. 84, *per* Lamer C.J. The respondents do not fall into either of these categories. Nonetheless, as this Court has recognized, the principle of judicial independence extends beyond the limited scope of the above provisions.

Judicial independence has been a cornerstone of the United Kingdom's constitutional structure back to the Act of Settlement of 1700, 12 & 13 Will. 3, c.2. See the comments of Lord Lane, cited in *Beauregard*, *supra*, at p. 71:

Few constitutional precepts are more generally accepted there in England, the land which boasts no written constitution, than the necessity for the judiciary to be secure from undue influence and autonomous within its own field (“Judicial Independence and the Increasing Executive Role in Judicial Administration”, in S. Shetreet and J. Deschenes (eds.), *Judicial Independence: The Contemporary Debate* (1985), at p. 525).

The preamble to the *Constitution Act, 1867* provides for Canada to have “a Constitution similar in Principle to that of the United Kingdom”. These words, by their adoption of the basic principles of the United Kingdom's Constitution, serve as textual affirmation of an unwritten principle of judicial independence in Canada. Lamer C.J. concluded as follows in *Provincial Court Judges Reference*, *supra*, at para. 109:

... it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundation principle is located.

The preamble acknowledges judicial independence to be one of the pillars upon which our constitutional democracy rests.

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. See *Provincial Court Judges Reference* supra at para. 106:

...our Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act, 1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.

The scope of the unwritten principle of independence must be interpreted in accordance with its underlying purposes. In this appeal, its extension to the office held by the respondents depends on whether they exercise judicial functions that relate to the bases upon which the principle was founded.

[Emphasis added.]

[138] The bases of judicial independence are identified as impartiality in adjudication, preservation of our constitutional order, and of public confidence in the administration of justice (at paras. 21-24):

The historical rationale for independence was to ensure that judges, as the arbiters of disputes, are at complete liberty to decide individual cases on their merits without interference: see *Beauregard, supra*, at p. 69. The integrity of judicial decision making depends on an adjudicative process that is untainted by outside pressures. This gives rise to the individual dimension of judicial independence, that is, the need to ensure that a particular judge is free to decide upon a case without influence from others.

In modern times, it has been recognized that the basis for judicial independence extends far beyond the need for impartiality in individual cases. The judiciary occupies an indispensable role in upholding the integrity of our constitutional structure: see *Provincial Court Judges Reference, supra*, at para. 108. In Canada, like other federal states, courts adjudicate on disputes between the federal and provincial governments, and serve to safeguard the constitutional distribution of powers. Courts also ensure that the power of the state is exercised in accordance with the rule of law and the provisions of our Constitution. In this capacity, courts act as a shield against unwarranted

deprivations by the state of the rights and freedoms of individuals. Dickson C.J. described this role in *Beauregard, supra*, at p. 70:

[Courts act 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.

This constitutional mandate gives rise to the principle's institutional dimension: the need to maintain the independence of a court or tribunal as a whole from the executive and legislative branches of government.

Accordingly, the judiciary's role as arbiter of disputes and guardian of the Constitution require that it be independent from all other bodies. A separate, but related, basis for independence is the need to uphold public confidence in the administration of justice. Confidence in our system of justice requires a healthy perception of judicial independence to be maintained amongst the citizenry. Without the perception of independence, the judiciary is unable to "claim any legitimacy or command the respect and acceptance that are essential to it": see *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at para. 38 *per* Gonthier J. The principle requires the judiciary to be independent both in fact and perception.

In light of these bases of judicial independence – impartiality in adjudication, preservation of our constitutional order, and public confidence in the administration of justice – it is clear that the principle extends its protection to the judicial office held by the respondents. Alberta's non-sitting justices of the peace exercised judicial functions directly related to the enforcement of law in the court system. They served on the front line of the criminal justice process, and performed numerous judicial functions that significantly affected the rights and liberties of individuals. Of singular importance was their jurisdiction over bail hearings. Justices of the peace are included in the definition of "justice" under s. 2 of the *Criminal Code*, R.S.C. 1985, c. C-46, and the respondents were thereby authorized to determine judicial interim release pursuant to s. 515 of the *Code*. Decisions on judicial interim release impact upon the right to security of the person under s. 7 of the *Charter* and the right not to be denied reasonable bail without just cause under s. 11(e). Professor Friedland commented upon the importance of bail hearings in *Detention before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (1965), at p. 172.

[Emphasis added.]

[139] In *EII*, the Court held that a class of adjudicators other than superior or provincial court judges were constitutionally required to be independent in the exercise of their duties. There is, it must be said, an obvious argument that justices of the peace remain within the term “courts” as that term was used in the *PEI Reference* or within the “judicial branch” of government as it was described in *Ocean Port*.

[140] A more recent case that may be considered a further extension of this principle in a somewhat different context is *Ontario Deputy Judges’ Assn. v. Ontario (Attorney General)* (2006), 210 O.A.C. 94. There, the constitutional status of Deputy Judges sitting in Small Claims Court was considered (at paras. 26-28):

The force of the rationale behind the institutional dimension of financial security is not diminished by the fact, emphasized by the AG, that Deputy Judges sit on a part-time basis and have limited jurisdiction. Deputy Judges, who preside in the busiest court in Ontario, are an integral part of the justice system. We recognize, of course, that the court’s caseload does not include criminal matters, the court possesses only a limited jurisdiction for committal, and it rarely hears Charter issues. Nevertheless, although the role of the Small Claims Court is more limited in the Canadian constitutional structure than that of the superior and provincial courts, that role is important in protecting the rule of law, preserving the democratic process, protecting the values of the Constitution and maintaining public confidence in the administration of justice. As the application judge stated at paras. 18 and 20:

Deputy Judges can hear a wide range of cases and have broad jurisdiction over proceedings involving the *Canadian Charter of Rights and Freedoms*, defamation, creditors’ rights, intellectual property claims, estate litigation, and medical practice, among others.

...

Deputy Judges carry out judicial functions for large numbers of litigants contesting significant sums of money. The Small Claims Court is the busiest court in Ontario and the court that citizens are most likely to encounter.

The caseload assumed by Deputy Judges is extensive both in quantum of cases and in jurisdiction of subject matter. Even though Deputy Judges sit part-time, when sitting, they fully assume the judicial role. They are perceived as judges by the many litigants who turn to the Small Claims Court for the resolution of their disputes. To those litigants, there is no apparent reason to distinguish between the Deputy Judge presiding over their case and a judge of the former Provincial Court (Civil Division). The protection of the independence of both types of judges is equally important in order to preserve public confidence in the system.

Accordingly, we do not accept that the part-time nature of Deputy Judges' judicial role or the nature of the Small Claims Court's jurisdiction diminishes the requirement for an independent body to address their remuneration.

[Emphasis added.]

[141] The court concluded, at para. 41, that “a constitutionally acceptable remuneration process must be established”.

[142] Looking back over the developments since the **PEI Reference**, it is difficult to follow the gleaming thread of constitutional protection the Petitioner and the Intervener discern in the pronouncements of the Supreme Court or in the lacunae between them. I am indebted to all counsel in this case for their thorough and helpful submissions, and find it somewhat daunting to attempt to give reasons worthy of their efforts. I am of the view that the correct analysis lies in taking a functional approach rather than in sifting and parsing the words of various judgments for some residue of authority for what is, in fact, a fairly straightforward proposition.

[143] The **PEI Reference**, on its face, appeared to leave open the possibility of elaboration on the basis that “courts” might very well include a class of tribunals that were court-like, or courts in all but name. It is clear that Lamer C.J. was saying, at a minimum, that an adjudicative tribunal created by a legislature whose responsibilities include those described in ss. 7 and 11(d) of the **Charter** (which is what provincial courts are) cannot be required constitutionally to be independent for some purposes, but not for others. The areas of adjudication outside the written provisions of the constitution to which this unwritten standard of independence were applied included the civil and family jurisdiction of the provincial courts. The jurisdiction of the residential tenancy arbitrators is carved straight out of this civil jurisdiction. The question then seems to be whether, if such jurisdiction is assigned to a tribunal that is not called a court, that means that the constitutional requirement for independence is lost, and the residual requirement of independence in accordance with the principles of natural justice is subject to ouster as long as the legislative intention to do so is clear.

[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 **EII**, on the other hand, the court broadened that limitation by the extension, on a functional 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.

[146] This brings the discussion around to the sort of functions that may be performed interchangeably by courts or tribunals. As we have seen, it is certainly within the competence and discretion of legislatures to transfer some realms of decision making from the courts to tribunals better adapted to address limited jurisdictions. It sometimes happens that such decision-making is moved back and forth. We have seen that in 1984 the return of the residential tenancy arbitrators’ jurisdiction to the courts was contemplated. A recent example in British Columbia is the winding up of the Expropriation Compensation Board and the reversion of its jurisdiction to the Supreme Court.

[147] The Respondents’ position is quite simply that when government removes an area of adjudicative jurisdiction from the courts it is liberated to constitute the tribunal in any manner it sees fit. As we have seen, this means, in the case of residential tenancy arbitrators, that it considers its responsibility to the public discharged by the assignment of arbitrators who may be terminated at any time simply for getting on the nerves of Ministry functionaries. It should not be forgotten that these arbitrators are sometimes called upon to adjudicate as between the government and its own tenants.

[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.

[149] The question left unanswered by **Ocean Port** was what to make of tribunals that are not “government” decision makers. In finding that tribunals such as the Liquor Appeal Board are not constitutionally required to be independent, the court was addressing a decision-making entity with functions that could not conceivably be folded straight back into the courts, owing to its nature. Its policy-making and policy-driven adjudicative responsibilities are of a type that could only ever be supervised, not performed, by courts.

[150] Tribunals that are assigned responsibilities lifted straight from the courts’ jurisdiction are obviously different. If the Respondents are correct, the same function, depending solely on whether it is located in a court or in a tribunal, may require the constitutional protection of a fair and independent arbiter, or may be left to whatever cowed or needy sycophant the government, in its absolute discretion,

thrusts into the judgment seat. This is such an affront to the notion of “a fair and public hearing by an independent and impartial tribunal,” guaranteed in writing elsewhere in the constitutional firmament, and is so fundamentally illogical and arbitrary, that it cannot be reconciled with the concept of the rule of law itself.

[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 **EII**. The work of residential tenancy arbitrators is a judicial function that “relates to the basis on which [that] principle is founded.”

[153] Section 14.9(3) of the **PSEA**, as interpreted by the Respondents, violates that principle. So would any provision with the same purpose, no matter how

clearly expressed. Section 14.9(3) is accordingly invalid and of no force and effect against the Petitioner in her function as a residential tenancy arbitrator, as infringing on the constitutional requirement of independence attaching to the function of that office.

## **VI**

### **REMEDY**

[154] The Respondents have quite properly conceded that Ministerial Order M 109 should be quashed, and that both the Minister's decision leading to that Order and the reconsideration decision ought to be set aside for lack of procedural fairness. I so order.

[155] The Respondents have also conceded that this will reinstate the Petitioner's appointment as an arbitrator by operation of law. On that basis, I make no specific order for reinstatement.

[156] The Petitioner is entitled to a declaration, and I so declare, that the Ministerial Order rescinding the Petitioner's appointment as a residential tenancy arbitrator is unlawful and of no force and effect on the grounds that section 14.9(3) of the **PSEA** does not, properly understood, allow for the mid-term termination of residential tenancy arbitrators.

[157] The Petitioner is further entitled to a declaration, and I so declare, that in any event, section 14.9(3) is of no force and effect in relation the Petitioner's office as a

residential tenancy arbitrator as violating the constitutionally protected principle of independence required in the circumstances.

[158] The Respondents have conceded that an order for costs up to December 7, 2005 at scale 4 would be appropriate, while opposing any order for costs of proceedings beyond that date. I think it appropriate, at this point, to grant liberty to the parties to address costs further, in light of the outcome, should they wish to do so.

[159] I further grant liberty to the parties to return to court should there be further issues arising from this judgment which need to be addressed or clarified.

“McEwan J.”

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The Honourable Mr. Justice McEwan