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**ADMINISTRATIVE TRIBUNALS – THE “JURY TRIALS”
OF CORPORATE LAW?**

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ADMINISTRATIVE TRIBUNALS – THE “JURY TRIALS” OF CORPORATE LAW?

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If a jury have not the right to judge between the government and those who disobey its laws, and resist its oppressions, the government is absolute, and the people, legally speaking, are slaves

Lysander Spooner, *an Essay on the Trial by Jury*, 1852.

I. Introduction

One of the goals of the Canadian legal system is to regulate the conduct of individuals, businesses and the government within our society.³ The image that often comes to mind is one of judges and juries in courtrooms. There can be no doubt that juries perform a fundamental role in the legal system. The fact that those accused of serious crimes have a constitutionally-entrenched right to be tried by a jury of their peers underscores the sanctity of the jury within our society.⁴ The jury exists to “protect individuals’ rights and to involve the community in the administration of justice,” a societal obligation integral to the functioning of our legal system.⁵

Administrative tribunals play an equally important (and increasing) role in the administration of justice, by providing “a quick and efficient means of resolving disputes.”⁶ Although tribunals

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³ *Practice Essentials for Administrative Tribunals*, Ombudsman Saskatchewan, at p. 11. Online: <https://www.ombudsman.sk.ca/uploads/document/files/omb-tribunal-guide_web-en-1.pdf>.

⁴ Section 11(f) of the *Charter of Rights and Freedoms* requires that any person charged with an offence where penalty is five years’ imprisonment or more has the right to a jury trial. See: Terry Skolnik, *The Jury System in Canada*, online: Juicio Por Jurados <<http://www.sistemasjudiciales.org/content/jud/archivos/notaarchivo/947.pdf>>.

⁵ *Canadian Jury Duty*, online: Canadian Law Site <<http://www.canadianlawsite.ca/jury-duty.htm>>.

⁶ *Practice Essentials for Administrative Tribunals*, supra note 3, at p. 13.

can take a variety of forms, they often perform judicial or quasi-judicial functions and have wide powers to also regulate the conduct of individuals; particularly in the capital markets.⁷ Hearings before regulatory agencies are often adversarial in nature, much like a courtroom proceeding. Tribunals adjudicate questions regarding commercial or industrial matters, often impacting large areas of the economy under both federal and provincial regulatory oversight.⁸ Adjudicative bodies like municipal boards, the Competition Tribunal, the National Energy Board, and the provincial securities commissions are just a few examples of agencies that have been given the statutory power to decide questions relating to, among other things, individuals' rights to practice a particular livelihood, Canadian public policy, and what it means to act "in the public interest."⁹

Courts and tribunals play an "equally essential [role in] maintaining the rule of law in our complex, rapidly changing world."¹⁰ What is less often discussed, however, and what this brief paper will examine, are the similarities between juries and administrative tribunals and how when we consider questions of cognitive bias, similar issues arise. We will focus on three areas: the hearing environment, the qualifications of the decision makers, and the principles that regulate their decision making. We conclude that administrative tribunals are the "juries" of corporate law and that lawyers and their clients would greatly benefit from applying many of the same forensic and advocacy skills to both.

⁷ Lisa Braverman, *Administrative Tribunals – a Legal Handbook*, (Aurora: Canada Law Book Inc., 2002), at p. 23.

⁸ *Ibid*; *Best Practices in Administrative Decision-Making: Viewing the Copyright Board of Canada in a Comparative Light*, online: Administrative Law Matters, at p. 19
<<http://www.administrativelawmatters.com/publications/best-practices-in-administrative-decision-making-viewing-the-copyright-board-of-canada-in-a-comparative-light>>.

⁹ *Ibid*.

¹⁰ Beverley McLachlin, *Administrative Tribunals and the Courts: an Evolutionary Relationship*, online: Supreme Court of Canada < <http://www.scc-csc.ca/court-cour/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>>.

II. The Hearing Environment

The decision-making process in administrative tribunals is similar to that of the regular courts. An administrative tribunal can be composed of a single decision maker or a panel of decision makers. While it is not uncommon for lawyers to sit on these panels, by their very nature, administrative tribunals are comprised of many, if not a majority, of lay people with no formal legal or judicial experience.

Like judges, lay members of administrative tribunals assess evidence, interpret the law and make decisions.¹¹ The chairperson is “typically responsible for leading the hearing process, making opening remarks, maintaining order in the hearing room and handling basic procedural matters,” resembling the role of a judge in a jury trial.¹² Following the hearing, the chairperson will arrange a meeting with all of the members of the hearing panel, to “discuss the [issues] among themselves prior to making a decision,” a task matching that of a jury deliberation.¹³

III. Decision Maker Qualifications

As described above, administrative tribunal panels are often comprised of individuals that are not “judges” in any real sense of the term. Decision makers may be individuals with “experience and expertise in areas other than law [with] an approach to the issues that is more sympathetic to the aims of the program than that often displayed by judges.”¹⁴ The decision makers are usually lay people with specialised expertise (unlike trial jury members) and they usually do not have an in-depth understanding of the law.

¹¹ *Practice Essentials for Administrative Tribunals*, supra note 3, at p. 13.

¹² *Ibid*, at p. 36.

¹³ Robert W. Macaulay and James L.H. Sprague, *Hearings Before Administrative Tribunals*, 4th ed. (Toronto: Carswell, 2011), at pages 22.2(c)-22.2(d).

¹⁴ Evan Fox-Decent, *Judicial Review of Administrative Action*, online: LSA McGill University, at p. 11 <http://lsa.mcgill.ca/pubdocs/files/judicialreviewofadministrativeaction/317-fox_decent_judicialreviewofadministrativeaction_Winter2006.doc>.

IV. The Principles of Natural Justice

In order to best ensure jury impartiality and overall fairness to the accused, Canada's jury system is "supported by juror eligibility requirements in provincial and territorial legislation" and by "numerous procedural mechanisms in the *Criminal Code*, notably by challenging and excusing jury members, sequestering jurors, and requiring unanimous jury verdicts."¹⁵ Administrative tribunals have similar requirements of fairness: hearings must be "fair, impartial and appropriate in the specific circumstances of the case."¹⁶ In fact, the principles of natural justice requiring a tribunal to be independent, disinterested and impartial are equally applicable to administrative and jury decision-making.¹⁷ What we do not have in administrative hearings is the ability to choose a jury, or to assess a panel members' fitness to sit on a particular case. That is a discussion for another day, and whether the test for judicial bias is a sufficient safeguard is an issue for another paper.

Impartiality

Impartiality is a concept that is "fundamental to both individual and public confidence in the administration of justice."¹⁸ In a jury setting, "even [the] potential [for] bias is contrary to our concept of trial fairness."¹⁹ As was held by Mr. Justice Peter Cory in *R v. Bain*,²⁰ apprehension of jury bias is to be avoided as the mere appearance of impartiality would be contrary to *Charter* principles.²¹ The same requirements for fairness and impartiality are found in administrative

¹⁵ *The Jury System in Canada*, supra note 5.

¹⁶ *Rules of Natural Justice*, online: Concordia University, at page 9
<https://www.concordia.ca/content/dam/common/docs/policies/official-policies/2011_Natural_Justice.pdf>.

¹⁷ *Judicial Review of Administrative Action*, supra note 15, at page 63.

¹⁸ *Criminal Jury System in Canada*, online: IPC < https://www.ipc.on.ca/site_documents/po-2826-chapter_3.0.pdf>.

¹⁹ Lisa Silver, *Don't Pre-Judge! Jury Vetting and the Supreme Court of Canada*, online: Ideablawg
<<http://www.ideablawg.ca/blog/2012/3/7/dont-pre-judge-jury-vetting-and-the-supreme-court-of-canada.html>>.

²⁰ [1992] 1 SCR 91 [*Bain*].

²¹ *Bain*, supra note 20.

tribunals. Reasonable apprehension of bias “is seen as relevant for administrative functions which are classified as adjudicative.”²²

At their core, both juries and administrative tribunals are composed of people who may make systematically erroneous decisions because of subjectivity and the way they think.²³ Biased decisions can “compromise the quality of justice that the court delivers.”²⁴ It is for this reason that jurors and tribunal members alike are screened and may be removed if a potential for bias is found to exist. The importance of an impartial jury is supported by the right to challenge and excuse jury members. In the case of administrative tribunals, once an inquiry is commenced, the reviewing court tries to objectively assess whether an “impermissible degree” of bias may exist.²⁵ Decision makers found to be biased may be disqualified, or, if a judgment has already been made, it may be overturned or remitted before a different panel. This objective approach taken in the case of both juries and tribunals reflects the well-known axiom that “justice should not only be done but should manifestly and undoubtedly be seen to be done.”²⁶

Independence

²² Diana Ginn, *Recent Developments in Impartiality and Independence*, 11 CJALP 25.

²³ David Neuberger, ‘Judge not, that ye be not judged’: *Judging Judicial Decision-Making*, F A Mann Lecture 2015, online: Supreme Court U.K. at para. 28 <<https://www.supremecourt.uk/docs/speech-150129.pdf>>.

²⁴ Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, *Judging by Heuristic: Cognitive Illusions in Judicial Decision Making*, 86 *Judicature* 44 2002-2003, online: Cornell Law Library, <<http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1733&context=facpub>>.

²⁵ *Judicial Review of Administrative Action*, supra note 15, at page 62.

²⁶ *Recent Developments in Impartiality and Independence*, supra note 22.

Independence is an equally-important principle that guides a jury or administrative tribunal’s decision making—it is of the utmost importance that each make a decision without the interference of third parties. Once a trial is completed, “the jury will arrive at its verdict in private.”²⁷ From that point forward, “the jury members are not allowed to talk to anyone until a decision has been reached,” the only exception being a judge and perhaps a court official.²⁸

Similarly, the principle that “he who hears must decide” found in administrative tribunals is “applied so as to insulate the decision makers from the after-hearing influence of any non-agency person and any agency member who had not heard all of the evidence and argument in a matter.”²⁹ As such, there should be no room for external influence or personal preference in decision making.³⁰ The decision maker’s “lonely task is to determine facts from evidence and apply rules to those facts to resolve a dispute, or to find and consider a panoply of facts and exercise discretion in the public interest that will affect another’s liberty or physical, emotional, or economic interest.”³¹

Fundamentally, the principles that guide the decision-making process found in both jury trials and administrative tribunals are nearly identical, highlighting the importance of impartial and independent adjudicators in our legal system.

V. Conclusion

²⁷ David M. Paciocco, *Understanding the Accusatorial System*, 14 CANCRIMLR 307.

²⁸ *The Role of the Jury*, online: Greg Monforton and Partners <<http://www.gregmonforton.com/role-of-jury.html>>.

²⁹ *Hearings Before Administrative Tribunals*, supra note 14, page 22.2(b).

³⁰ Carol Mahood Huddart, *Know Thyself: Some Thoughts about Impartiality of Administrative Decision-Makers from an Interested Observer*, 13 CJALP 147.

³¹ *Ibid.*

We do not contend that administrative tribunals and jury trials are clones of each other. Courtrooms and tribunals are each established to carry out different roles within the legal system, performing alternative functions depending on the nature of the case. However, we believe that there are considerable parallels that can be drawn between the two; the way they make decisions, the characteristics of lay decision-makers and the principles that guide each's decision making. Those similarities should help guide us when we approach advocacy opportunities before administrative tribunals. A longer and more disciplined study of how lay administrative adjudicators affect the rights and privileges of all Canadians is long overdue.

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