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The Politics of Transparency and Independence before Administrative Boards

*Lorne Sossin & Charles W. Smith*

I. INTRODUCTION
This study is about the need for transparency and independence in the conduct and functioning of administrative agencies, boards, and commissions. In liberal democracies, administrative bodies perform significant statutory functions in order to fulfil public policy goals, and have a mandate to act in the public interest. In order for administrative boards to fulfil this obligation, transparency and independence are essential. Although adjudicative independence recognizes the need for deliberative secrecy, a concern for confidentiality need not and should not characterize an administrative tribunal's conduct with government, stakeholders, or other parties. However, as we argue in this study, the principles of transparency and independence do not always mesh with the role that administrative tribunals, such as labour boards, maintain in the policy-making process. Given this reality, we question if administrative tribunals should play a role not just in implementing policy (through regulatory and adjudicatory activities) but also in serving to shape that policy. The problem is exacerbated by the tense and often contested relationship between a board's independence and a government's prerogative not just to shape the legislation and policy (which provides mandates to administrative agencies) but also to appoint decision-makers to administrative agencies. To that end, what is the appropriate relationship between an administrative tribunal's capacity to shape policy and a government's ability to appoint tribunal members it believes to be

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aligned with its priorities? This question leads to a broader one: Should tribunals be shaped through government appointments and policy mandates in an effort to conform to the government of the day's policy outlook?

We highlight two case studies in an effort to examine the tension between administrative transparency and independence and the role of tribunals in the larger policy process. The first case study is a dispute between the Alberta Labour Relations Board (ALRB) and a group of unions who challenged the role the ALRB played in the development of labour legislation. The second is a dispute in Saskatchewan between a newly elected government and its attempt to remake the Saskatchewan Labour Relations Board (SLRB) by removing and appointing new members in accordance with the new government's political and economic agenda. In a sense, these two cases present cautionary tales at the opposite ends of the spectrum in terms of relationships between administrative tribunals and government: in Alberta, the problem was a board alleged to be too close to the government of the day; while in Saskatchewan, the problem was a board alleged to be hostile to a newly elected government. In both cases, we believe the issue of the Board's proper role lay at the heart of the political and legal dispute, and better understanding that role sheds important light on our political and legal systems. In each case, we believe the justification for greater transparency and independence is well demonstrated.

The balance of this study is divided into two sections. In the first section, we explore the cautionary tales alluded to above. In the second section, we use those cautionary tales as a point of departure for a broader discussion regarding the role of boards and tribunals within government. We then offer our conclusions as to the proper balance between transparency and independence on the one hand, and the ability of these institutions to play a legitimate and constructive role in the policy process on the other hand.

II. TWO CAUTIONARY TALES
We begin our analysis, as indicated above, with two cautionary tales. The first case study examines a dispute between the Government of Alberta, the ALRB, and the Alberta Federation of Labour (AFL). The second example considers the Saskatchewan government's role in reshaping its Labour Relations Board in the wake of an election. In both cases, confusion surrounding the relationship between the Board and the government resulted in a bitter dispute; and in each, we believe greater transparency and independence could have resulted in resolving such disputes or avoiding them altogether.
A. THE ALBERTA DISPUTE

The first cautionary tale deals with a dispute in Alberta over the role of the ALRB in the development and implementation of the Labour Relations (Regional Health Authorities Restructuring) Amendment Act, 2003\(^1\) (Bill 27) between 2003 and 2006. Bill 27 was the culmination of efforts to restructure Alberta’s health services sector. Through Bill 27, Cabinet was given broad discretion to make regulations on a wide range of matters dealing with health care restructuring. These include regulations providing for the establishment and modification of bargaining units\(^2\) and the severance and termination pay to employees of the previous regional health authorities that had undergone restructuring or a change in governance.\(^3\) As a result of this statute the Lieutenant Governor created the Regional Health Authority Collective Bargaining Regulation.\(^4\)

The government presented Bill 27 as a means of streamlining and enhancing the efficiency of health care collective bargaining. The legislation had the effect of bringing public health workers into the realm of essential services. Similar to firefighters, police officers, and other health care workers, public health workers forfeited the right to strike while employers were denied the right to lockout workers in the event of not reaching a collective agreement.\(^5\) Bill 27 amended the Labour Code so that parties from regional health authorities were required to participate in interest arbitration, as is the case with other essential service employers and employees.\(^6\) The requirement for compulsory interest arbitration is set out generally in the Labour Code,\(^7\) and is elaborated in the regulation enacted pursuant to Bill 27 (the Regional Health Authority Collective Bargaining Regulation).\(^8\)

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\(^1\) SA 2003, c 6 [Bill 27]. This Bill received Royal Assent on March 27, 2003 and came into force on April 1, 2003. Associated with Bill 27 was the Regional Health Authority Collective Bargaining Regulation, AR 80/2003 [Collective Bargaining Regulation]. The description of dispute surrounding the Bill is based on a report written by the authors and commissioned by the Alberta Federation of Labour. The summary of facts of the Alberta dispute relies on the account set out by the Alberta Court of Queen’s Bench in CEP, Local 707 v Alberta (Labour Relations Board), 2004 ABQB 63, 351 AR 267, [CEP] and builds on the research conducted by Laverne Jacobs on the legislative debates surrounding Bill 27. See Laverne Jacobs, “Reconciling Independence and Expertise within the Expert, Multifunctional Tribunals” (Paper delivered at The Future of Administrative Justice symposium, University of Toronto, Faculty of Law, 18 January 2008), online: <http://www.law.utoronto.ca/documents/conferences/adminjustice08_Jacobs.pdf>.

\(^2\) Bill 27, supra note 1 (s 5 creating s 162.1 of the Alberta Labour Relations Code RSA 2000, c L-1 [Labour Code]).

\(^3\) Ibid (creating s 162.2 of the Labour Code).

\(^4\) Collective Bargaining Regulation, supra note 1.

\(^5\) Labour Code, supra note 2, s 96.

\(^6\) Ibid, ss 96-104.

\(^7\) Ibid.

\(^8\) Collective Bargaining Regulation, supra note 1. See in particular ss 15 and 16.
The government's policy initiative to eliminate the right to strike was subject to criticism for the closed process by which it was developed. Allegations emerged in the House that the legislation was being "cooked up by a secret cabinet committee" and was the result of "backroom deals." The concern was whether the government was making any effort to consult with the unions, employees, and other affected parties in the development of Bill 27 and its regulations.

The legislation and regulations not only contemplated the restructuring of the union environment in the health services sector but also envisioned a new role for the ALRB. Under the Labour Code the ALRB possessed the general power to determine the units appropriate for collective bargaining when, because of corporate restructuring, bargaining units required modification. In the particular instance of restructuring created by Bill 27 and its regulations, the ALRB was given the additional responsibility of determining the region-wide functional bargaining units, appropriate bargaining agents, collective agreements, and other related matters.

Prior to the introduction of Bill 27 the ALRB had undertaken a process of consultation on the restructuring of the health services sector. Indeed, the Board had started moving towards standardized bargaining units in its decision-making as early as the 1970s. Once the government began restructuring healthcare by dividing service delivery into regional health authorities in the 1990s, the ALRB, in response to industry pressure, organized conferences and policy hearings to re-examine the standard bargaining units it was using at the time.

The ALRB produced a discussion paper in 2002 in which it identified specific recommendations for change and sought responses in the nature of detailed support or objections from the public.

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9 Alberta, Legislative Assembly, Hansard 25th Leg, 3rd Sess, (5 March 2003) at 299 (Dr Raj Pannu).
10 Ibid at 294 (Dr Ken Nicol). See also, for example, the comment of Dr. Nicol to Premier Klein during Question Period on March 5, 2003, where he states in particular: "Changes to our public health care system are now proceeding via government committees, backroom deals, even shutting out government Members of the Legislative Assembly (MLAs). Revelations of a secret cabinet committee set to infringe upon workers' democratic rights is only the latest example of this government's bungled attempts to manage one of our most precious resources, our health care professionals." See also Jacobs, supra note 1 at 7.
11 See Labour Code, supra note 2, s 48.
12 See Collective Bargaining Regulation, supra note 1, particularly ss 3-17.
14 Ibid at 6.
15 CEP, supra note 1 at para 38. The Regional Health Authorities became primary providers of healthcare services in the province of Alberta effective 1 April 1995. The Regional Health Authorities Act, RSA 2000, c R-10, mandates this authority.
16 CEP, supra note 1 at paras 40-41.
17 Ibid at para 40.
Once responses to the recommendations had been reviewed, the ALRB decided that it would be useful to hold a policy hearing on two key issues in dispute. It circulated a letter in January 2003 indicating that it anticipated holding hearings in the fall of 2003 with case management sessions proceeding in the interim. The Board requested that stakeholders interested in participating file requests for party or intervener status by mid-April 2003. However, when the government introduced Bill 27 in the House on March 11, 2003, the ALRB put its policy review process on hold for "an indefinite period." The ALRB discontinued its policy review because of a complaint from several Alberta unions. The unions alleged that there had been improper contact between the Executive of the Alberta government and the ALRB in the drafting of Bill 27. It was alleged that the Chair and Vice Chair of the ALRB played a role in developing labour legislation that overtly favoured employers (including the government in its role as a public employer). The unions also argued that a public statement by the Minister of Human Resources and Employment (HRE) on April 15, 2003 influenced the Chair of the ALRB, through a speech in the House (with the Chair in the legislative gallery at the time), to pursue restructuring in the health field expeditiously. As a result of the political pressure placed on the ALRB, the unions believed that they were denied natural justice in the course of the proceedings dealing with Bill 27's imposed restructuring. The unions also argued that although some members of the tribunal were not directly involved in the alleged drafting process, all were "tainted" since they were affected implicitly.

Specifically, when the legislation was introduced, the unions raised allegations of bias against the Chair of the ALRB. The key complaints said to support the allegation of bias relate to memos sent by Chair Asbell to the Deputy Minister of HRE on February 14, 2003 and February 24, 2003. In addition, the complaints allege interference by Minister Dunford in comments made in the Legislature on April 15, 2003. Speaking to the government's view that the implementation

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18 Ibid at para 41.
20 Ibid at para 5.
21 Ibid at para 6.
22 Ibid at paras 6, 43.
23 The Alberta Court of Queen’s Bench concluded that many of the procedural errors that the unions alleged had been made by the ALRB really tied into the same thesis; namely, that the ALRB was acting unfairly toward them due to pressure by the government: see ibid at paras 14-17.
24 Ibid at para 2.
25 Ibid at para 42.
of Bill 27 should be handled expeditiously, as the Regulation itself said, Minister Dunford stated:

Moving from that area - and I'll wrap up so others can speak - I can't resist a comment about Bill 27 and what we're trying to do there... Bill 27 is simply a bridge to get from where we are now to where we're going to be, we believe, by September of 2004. Now, that date is important. The chairman of the Labour Relations Board is here in the gallery today, and he needs to hear what the time frame is that we're placing him under and that this will be one of the measurements, of course, that we'll be using in terms of our movement toward the goal.26

As a result of these disagreements, a motion for judicial review was brought before the Alberta Queen's Bench by several affected unions. The applicants sought judicial review on the grounds of breach of natural justice or, more specifically, reasonable apprehension of bias due to lack of independence and impartiality.27 At the heart of the debate was the fact that the HRE had consulted with the ALRB during its drafting of Bill 27. What is more, neither the Ministry nor the ALRB had made the consultation public. Knowledge of the consultation emerged only after the AFL made freedom of information requests to both the Ministry and the ALRB.28

The applicant unions and the AFL argued before the Court that there was improper and undisclosed contact between the Executive and the Chair of the ALRB with respect to the development of Bill 27.29 The unions requested, first, that all the Board's actions, policies, and decisions that in any way related to Bill 27 or its regulations be quashed.30 The unions further sought an order preventing the ALRB from taking any future decisions related to that statute.31

Through its freedom of information request, the AFL received three documents from the HRE prior to the judicial review hearing.32

26 Ibid at para 43.
27 Ibid at paras 3, 9, 35, 58.
28 Ibid at paras 25-31.
29 Ibid at paras 5-6.
30 Ibid at para 54.
31 Ibid at para 56.
32 Two of these documents—i) a memo from the Chair of the Board to the HRE Deputy Minister dated February 24, 2003 which apparently responds to the "Processes" document that seems to have been sent by HRE to the Board and ii) a memo by the Chair to the HRE Deputy Minister dated February 14, 2003 responding to a request for numbers of bargaining relationships that would be affected by the health care proposals—were disclosed by HRE: Ibid at paras 25-31. Although the ALRB possessed these documents and they were responsive to the request made by the AFL, they claimed exemptions from disclosing them (Ibid at paras 31-33).
Notwithstanding the information disclosed, the Alberta Court of Queen’s Bench rejected the applicant unions’ allegations of bias in relation to the communications at issue. After reviewing the facts regarding the allegation of bias, the Alberta Court of Queen’s Bench concluded:

In my view, a reasonable outsider would probably have concluded that the Government and ALRB shared a desire to move forward with reasonable promptness. I am not persuaded that this common interest of itself would suggest a bitter conspiracy to that reasonable person. Different entities can have common goals without formally agreeing to them.33

In the fall of 2005, documents surfaced relating to the development of Bill 27 which had not been before the Court of Queen’s Bench. As a result of various information exchanges, correspondence, and the response to further freedom of information requests by the AFL, additional communications between the Executive and the ALRB were inadvertently disclosed.34 These documents include email exchanges between staff of the Legislative Counsel and the Vice Chair of the ALRB that suggest the Vice Chair was involved in drafting regulations to Bill 27.

In an exchange of letters dated early December 2005, the Chair of the ALRB took the position that the Board had taken no steps to influence the policy decision.35 The Chair explained that the ALRB had only a “technical” role in advising the legislature.36 The AFL responded that even “technical” involvement is a breach of the LRB’s role and damaged the ALRB’s ability to act independently.37

The opposition parties called for a public inquiry over the inappropriate role of the Chair in drafting Bill 27. Although the government refused to grant this request, the AFL commissioned the authors to explore the relationship between a labour board and the government and to make recommendations in light of the situation.

33 Ibid at para 48.
34 The Alberta Court of Queen’s Bench held that the documents inadvertently released by the Commissioner were not privileged and that the AFL had disseminated them before being made aware of the Commissioner’s mistake. See Alberta (Information and Privacy Commissioner) v Alberta Federation of Labour, 2005 ABQB 927, 37 Admin LR (4th) 314.
36 Ibid.
37 Ibid.
that had developed with respect to Bill 27. Subsequent to the report, in April of 2007, the ALRB adopted new guidelines that govern its relationship with government and require disclosure of any advice or comments provided by the Board on legislative proposals.

The judicial decisions on the independence of the ALRB are discussed further below, but it is worth noting that the Alberta case demonstrates the perils of too little transparency and accountability in the relationship between the Board and the government. Given the problems highlighted in this dispute, is there a legitimate and appropriate role for a tribunal to provide non-partisan guidance on how to best modernize legislation? Is there any legitimate role for the Board in providing this guidance in a secret or confidential fashion? Some have suggested that it is better to be included in the process in a non-transparent fashion than to be excluded and have the resulting legislation be less effective as a result. However, in our view, the better approach is that guidance from the Board should be open for parties and stakeholders to see and to challenge that role if they feel it crosses the line from neutral to a more partisan or substantive role inappropriate to an independent body which will ultimately have to impartially adjudicate disputes involving the government of the day.

B. THE SASKATCHEWAN DISPUTE
The second cautionary tale involves Saskatchewan's labour board and explores the relationship between a new government who believes that its labour tribunal is at odds with the economic and political changes that it wishes to pursue.

In 2007, the Saskatchewan provincial election resulted in the defeat of the long-time New Democratic Party (NDP) government by the right-of-centre Saskatchewan Party (SP) led by Brad Wall. Although the party was born out of an alliance between the old Progressive Conservatives and disgruntled provincial Liberals, the SP underwent several changes between 2003 and 2007 designed to help the party appeal to a cross-section of Saskatchewan voters.

During the election campaign, the SP attempted to promote its new message of economic competence by promising to “work” with

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employers and trade unions in order to restore a “fair and balanced labour environment for workers and employers.”\textsuperscript{41} In its election platform, the SP promised to eradicate limits on collective bargaining agreements\textsuperscript{42} and to protect public services in the event of a strike.\textsuperscript{43} The SP also promised to make changes to the Workers’ Compensation Board (WCB) and, borrowing a proposal from the Saskatchewan Chamber of Commerce, pledged to advance the cause of “democratic work places” through mandatory certification elections and enhancing the ability of employers to speak out during certification drives.\textsuperscript{44}

Alongside its labour relations agenda, the SP mirrored the programme of numerous neo-liberal governments by promoting a vision for economic growth tied to lower taxes, more private sector investment in natural resource extraction, freer inter-provincial trade, and greater reliance on public-private partnerships. An important component of this vision was the creation of a new public-private economic partnership called Enterprise Saskatchewan.\textsuperscript{45} This quasi-corporatist agency was promoted as a way for government, business, labour, and First Nations (among others) to “measure and report on Saskatchewan’s tax and regulatory environment to ensure that Saskatchewan’s economy remains competitive within the New West.”\textsuperscript{46}

After his election victory, Wall wasted little time in introducing and expanding his economic and labour relations agenda. Recalling the legislature for a brief pre-Christmas sitting, the SP government promised new “democratic” labour laws designed to be “competitive with other Canadian jurisdictions.”\textsuperscript{47} In order to make Saskatchewan competitive in the “New West,” the SP modeled its tax and regulatory reforms on other neo-liberal governments in BC and Alberta. In so doing, the new government attempted to bridge its conception of “democratic” and “competitive” labour laws with absolute restrictions on the ability of workers to organize, collectively bargain, and strike.

\begin{thebibliography}{99}
\bibitem{42} \textit{Ibid} at 19.
\bibitem{43} \textit{Ibid} at 20.
\bibitem{44} Bruce Johnstone, “Chamber wants change; Business lobby pushes labour laws as election issue,” \textit{The [Saskatoon] Star-Phoenix} (23 October 2007) A8.
\bibitem{46} \textit{Securing the Future}, supra note 41 at 19.
\end{thebibliography}
The SP linked its version of economic competitiveness and democratic labour laws to the introduction of Bill 5, *The Public Service Essential Services Act* (PSESA) and Bill 6, *An Act to amend the Trade Union Act* (TUA) in late December of 2007. The only groups that appear to have been consulted on the new bills were government-aligned lawyers and members of the business sector.

The PSESA incorporated a sweeping definition of the term “essential services.” Under the new definition, all workers employed by the government of Saskatchewan; provincial crown corporations; regional health authorities; colleges and universities; municipalities; and any “person, agency or body, or class of persons, agencies or bodies, that provides an essential service to the public,” are deemed essential. Within ninety days of a collective agreement expiring, the public employer and the trade union involved must begin negotiations to conclude an “essential services agreement.” The agreement is required to contain a detailed list of what services, workers, and worker classifications must be maintained in the event of a work stoppage. If the employer and the trade union cannot agree on the essential service designation, section 9 of the Act gives the employer unilateral power to impose an essential service designation.

Bill 6, the amendment to the TUA, made several changes to the rules surrounding certification and unfair labour practices. The new bill changed the threshold for unions to achieve certification. Under the old rules, a union could ask the SLRB to order a certification vote if it demonstrated through signed cards (card-check certification) that it had twenty-five per cent support in a workplace. If a union demonstrated fifty per cent support, the SLRB could automatically certify the new bargaining unit. The new bill made votes mandatory.

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50 Bill 5, *supra* note 48, s 21. This gives cabinet the power to define, enlarge or restrict the services deemed essential. Currently, workers in corrections, energy, environment, government services, social services, information technology, highways, health and numerous other sectors fall under the purview of the Act. See *The Public Service Essential Services Regulations*, RRS 2009, c P-42.2.

51 Bill 5, *supra* note 48, s 6(1)(a).

52 *Ibid*, s 7(1)(b).


54 The legislation also made several changes to the SLRB, transferring some of its responsibility to cabinet and requiring new time limits for the Board to rule on unfair labour practice cases: Bill 6, *supra* note 48.
in all cases and changed the threshold to obtain a vote to forty-five per cent.55 The mandatory voting procedure and the watering down of the card-check certification process placed significant obstacles in front of any union seeking certification.56

The amendments also altered the provisions in the Act dealing with unfair labour practices. The changes extended the freedom of employers to "speak" during ongoing certification drives. Traditionally, limits on management speech recognize that employers retain extraordinary power in the workplace and are thus able to influence the outcome of a certification drive. Recognizing this, most legislation forbids employers from doing anything to "interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Act."57 The SP's amendments maintain this language but include new sections, stating that "nothing in this Act precludes an employer from communicating facts, and its opinions to its employees."58 The extension of employer speech provisions alters the ability of unions to freely communicate with workers during a certification drive and, ultimately, will make union organizing more prone to potential employer abuse.

Both pieces of legislation give the SLRB a great deal of discretion to mitigate the inevitable tension arising out of the new labour legislation. The only institution capable of administering these new rules while maintaining any semblance of neutrality in the collective bargaining process is an independent board. Given these circumstances, it would have seemed prudent for the government to maintain or even strengthen the neutrality of the Board to administer its new labour legislation; yet, the government took the opposite approach. On March 7, 2008, the SP Government passed an Order-in-Council

55 Ibid, s 3(1)-(2).
57 Bill 6, supra note 48, s 6.
58 Ibid.
terminating the appointments of SLRB Chair James Seibel and Vice-Chairs Angela Zborosky and Catherine Zuck. All three members were fired before the end of their scheduled terms (some in mid-hearing) and the government gave no reasons for the dismissals. The government also dismissed John Solomon as chair of the WCB. The SP government stated only that these types of changes were “routine,” denying that there was a political agenda behind the terminations.

Following the firings, the government announced the appointment of Kenneth Love as chair of the SLRB and David Eberle as chair of the WCB. Both men were acknowledged SP supporters and had held positions with the party in the past. Love was also a well-known management lawyer with little history presenting before the Board or representing labour unions. At the same time, the government announced that the SLRB chair’s salary would be raised from $120,000 to $180,000 per year, adding to the perception that the appointment was as much a political reward as a prudent administrative decision. Later, the Government announced that Steven Schiefner, a city lawyer from Moose Jaw, would take over as vice-chair of the Board.

The Government’s heavy-handed changes to the SLRB were met with vigorous opposition from the province’s trade unions. The Saskatchewan Federation of Labour (SFL), combined with several affiliates, vowed to oppose the changes to the SLRB through political and legal means. In late 2008, the SFL, the Saskatchewan Joint Board Retail Wholesale and Department Store Union, and the Canadian Union of Public Employees applied to the Court of Queen’s Bench for judicial review. The unions asked the court to interpret whether the cabinet had the authority to unilaterally dismiss quasi-independent members of administrative tribunals. The unions maintained that the terminations violated the principles of judicial independence and the overall purpose of the TUA. Upon review, the Court ruled that the government had the authority under The Interpretation Act to make the changes. The Court also ruled that cabinet could terminate

62 “Gov’t appoints LRB vice-chair,” The [Saskatoon] Star Phoenix (12 July 2008) A9. The SP defended the salary increases by only replacing one of the two vice-chairs (ibid).
64 The Interpretation Act, 1995, RSS c l-11.2.
65 Saskatchewan Federation of Labour, QB, supra note 63 at para 37.
appointments to the SLRB because appointments were always "at pleasure." 66

On appeal, the Saskatchewan Court of Appeal upheld the lower court's decision that the cabinet maintains the legal ability to replace members of administrative tribunals. 67 The Court of Appeal disagreed, however, that members of the SLRB simply sit "at pleasure." 68 As the SLRB is an arm's length institution that operates on the principles of natural justice, there is a reasonable degree of independence and therefore a measure of security of tenure. 69 Notwithstanding this small remonstration, the court maintained that the SP's actions were legal under s. 20 of The Interpretation Act. 70

Nevertheless, the SP's decision to remove members of the Board called into question, at least for members of the SFL, the independence and bias of the Board under the SP Government. According to numerous statements from union leadership, the perception is that the Board is now intimately tied to the SP's anti-union agenda. 71 As commentary from union members suggests, the SP's unilateral decision to fire the previous members of the labour board is central to this interpretation.

What lesson can be taken from the Saskatchewan experience? Once again, we believe that the lack of a clear and transparent process for selecting or removing board members in order to further a particular policy goal has fuelled the dispute. In light of this confusion, aggrieved parties in Saskatchewan have turned, as in the Alberta case, to the courts. Given the wide discretion afforded the executive on the appointment of decision-makers to administrative tribunals and agencies, on what basis will a court conclude that a government's intervention in the membership of the tribunal is a breach of independence? In the following section, we explore the legal context within which tribunals and government interact.

66 Ibid at paras 50-51.
68 Ibid at para 33.
69 Ibid at para 45.
70 Ibid at paras 51-60.
71 Wood, supra note 60 at A1. As SFL president Larry Hubich stated, "the Sask. Party has long had it in for the Labour Relations Board, which hears disputes between unions and employers around labour legislation, because it contended it was too friendly to labour. That is just false and it's based on sore losers within the business community who go to the Labour Relations Board and are found to be violating the law. Now the government has brought in a couple of pieces of legislation to make legal what was previously illegal and gut The Trade Union Act and that's not enough for them" (ibid).
III. WHAT IS THE ROLE OF ADJUDICATIVE BOARDS IN THE POLICY PROCESS?
Given the tension that can arise between a government’s legitimate political agenda and maintaining administrative independence, it is necessary to examine how boards operate within the policy process. This section will address the following questions: What is the role of an adjudicative board in relation to the political process, including the development of policy which the board will subsequently have to interpret; and what ought to be the requirements, if any, of transparency with respect to such a role for a board in other jurisdictions? To what extent can government use appointments and removals from adjudicative boards as a tool for furthering policy goals? In order to address these questions, it is first necessary to set out the framework for how independence is understood in the context of administrative law.

A. INDEPENDENCE AND IMPARTIALITY IN CANADIAN ADMINISTRATIVE LAW
It should be stated at the outset that the “right” of institutional independence is not a right enjoyed by a tribunal; rather, it is a right enjoyed by those whose disputes are adjudicated by that tribunal. Tribunals constitute a part of the executive branch of government. Much of the particularity and peculiarity of institutional independence in Canadian administrative law, however, arises because the institutional independence protection at common law has been modeled on the constitutional norm of judicial independence.

The standard of bias used in administrative law does not require those who allege it to show actual bias on the part of a decision-maker. Rather, the applicants in these cases must establish that the facts and circumstances give rise to a perception of bias. The perception test is referred to as a reasonable apprehension of bias. De Grandpré J. sets out the test with great clarity in his dissenting reasons in Committee for Justice and Liberty v. National Energy Board:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.... [The] test is “what would an informed

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72 Once again, in this sense, the analogy to judicial independence holds. See Mackin v New Brunswick (Minister of Finance), 2002 SCC 13, [2002] 1 SCR 405, Binnie J, dissenting.
73 [1978] 1 SCR 369, 68 DLR (3d) 716 [cited to SCR].
person, viewing the matter realistically and practically - and having thought the matter through - conclude."^{74}

In *Valente v. The Queen*,^{75} the Supreme Court of Canada noted that, broadly speaking, the test for independence in the judicial setting is "the one for reasonable apprehension of bias, adapted to the requirement of independence."^{76} 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.*^{77}

While administrative tribunals are viewed as part of the executive branch in a separation of powers context,^{78} the Court has adopted the framework of institutional independence for administrative bodies directly from this judicial framework.^{79} According to that framework, there are three essential conditions of judicial independence: security of tenure, financial security, and administrative independence.

The category of institutional independence is most relevant in this context. In *Canadian Pacific Ltd. v. Matsqui Indian Band*,^{80} the Supreme Court of Canada held that the test for institutional independence

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^{74} Ibid at 394.

^{75} [1985] 2 SCR 673, 24 DLR (4th) 161 [Valente cited to SCR].

^{76} Ibid at 684.

^{77} Ibid at 685 [emphasis added].


^{79} In earlier cases, such as *International Woodworkers of America, Local 2-69 v Consolidated-Bathurst Packaging*, [1990] 1 SCR 282, 68 DLR (4th) 524 [Consolidated-Bathurst Packaging], the term "judicial independence" was used by this Court to characterize the common law standards applicable to a labour tribunal.

enunciated in *Valente* applied, with added flexibility, to administrative tribunals. Lamer C.J. stated:

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...*, in which the independence of the Ontario Labour Relations Board was at issue. There, Gonthier J. stated at p. 332:

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

The Supreme Court of Canada has recognized that where a tribunal has more than one function (for example, making policy, prosecuting regulatory offences and adjudication), this commingling of functions

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81 While Sopinka J. appeared to write for the greatest number of judges on this point, it is Lamer C.J.'s decision that has become the predominant articulation of institutional independence in Canada.

82 *Matsqui, supra* note 80 at paras 75, 79, 80, citing *Valente, supra* note 75, and quoting *Consolidated-Bathurst Packaging Ltd v International Woodworkers of America* [1990] 1 SCR 282, 68 DLR (4th) 524.

83 *Ibid* at paras 83-85.
without internal safeguards can lead to a reasonable apprehension of bias. This issue was addressed in 2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool). In Régie, the Court clarified and refined the suggestion in Matsqui that administrative tribunals are subject to the Valente principles of institutional independence but the requisite level of institutional independence may be lower than for a court, and concluded that the directors (adjudicators) of the Régie had sufficient security of tenure because they could not be simply removed at pleasure (that is, without cause).

Thus, in Régie, the focus of the Court was on objective guarantees and the perceptions of an independent branch of government, not the realities of political interference with the activities of an adjudicative tribunal.

This focus shifted somewhat in Hewat v. Ontario, where the Ontario Court of Appeal considered the issue of institutional independence in the context of a labour board. The appellants were vice chairs of the Ontario Labour Relations Board who had been appointed by Order-in-Council for a fixed term of three years. For reasons which were widely understood to be political incompatibility, the Ontario government revoked their appointments mid-term by way of an Order-in-Council, and the vice chairs challenged the validity of these orders. The Ontario Divisional Court found the orders revoking the appointments were invalid but declined to order that the vice chairs be reinstated, awarding damages instead. The vice chairs appealed, arguing that, if they were not reinstated to their positions, "then the government is putting tribunal officers in the same position as employees generally—they can be dismissed at will so long as the employer is prepared to pay damages." The Ontario Court of Appeal noted the impracticality of ordering reinstatement as a remedy given the length of time that had passed since the revocations had occurred. However, the Court acknowledged the validity of the vice chairs’ arguments regarding the institutional independence of the Board if the government were able to revoke appointments at will, on payment of compensation:

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

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84 [1996] 3 SCR 919, 140 DLR (4th) 577 [Régie].
87 Hewat, supra note 85 at para 12.
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... 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.88

The link between appointments and independence was raised squarely in Canadian Union of Public Employees v. Ontario (the Retired Judges case).89 This case concerned the discretion of Ministers of Labour in Ontario to appoint chairs to interest arbitration panels in the hospital sector pursuant to the Hospital Labour Disputes Arbitration Act.90 Chairs of interest arbitrations were previously chosen from a group composed largely of experienced and mutually acceptable individuals. The Minister changed the process such that retired judges were appointed. The central issue in the appeal was whether this change breached the duty of fairness by interfering with the impartiality and independence of the arbitrators and raising a reasonable apprehension of bias, or by interfering with the legitimate expectations of the applicant union. The Divisional Court dismissed the application.

The Court of Appeal reversed this finding and found that the change in appointment schemes violated the institutional independence of the arbitration boards and also constituted a breach of the legitimate expectations of the applicant.91 With respect to the breach of independence finding Austin J.A., writing for the Court, held that retired judges who were appointed effectively at pleasure and on an

88 Ibid at para 21 [emphasis added; emphasis omitted].
90 RSO 1990, c H.14 [HLDAA]. Section 6(5) provides:
Where the two members appointed by or on behalf of the parties fail within ten days after the appointment of the second of them to agree upon the third member, notice of such failure shall be given forthwith to the Minister by the parties, the two members or either of them and the Minister shall appoint as a third member a person who is, in the opinion of the Minister, qualified to act.
91 Retired Judges, supra note 89 at paras 99-102.
ad hoc basis lacked financial security and security of tenure. He also found that the Minister (and the Government generally) had a financial stake in the outcome of the labour arbitrations and thus it created a perception of bias for the Minister alone to be responsible for appointments of chairs for the arbitration panels. The Court’s holding suggested that while the Minister had discretion to appoint anyone who in his opinion was qualified, this discretion was in fact limited to those qualified people who would be perceived as independent. This would represent a significant check on the Minister’s appointment power (and could effectively limit his options to the roster of mutually agreed upon arbitrators which had dominated appointments prior to the Minister’s change).

The limits of tribunal independence in the face of the clear policy direction of the Government were the subject of the Supreme Court’s landmark decision in Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch). In Ocean Port the Court confirmed that the guarantee of institutional independence in adjudicative tribunal settings is not a constitutional right, but rather a common law protection, and as such, is vulnerable to the government overriding it through ordinary statutory language at any time for any reason.

The dispute in Ocean Port involved a challenge to the independence of the Liquor Appeal Board on the basis that its members could be appointed at pleasure without security of tenure. 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.

92 Ibid at para 98.
93 Ibid at para 21.
94 Ibid at para 99.
97 Ocean Port, supra note 95 at para 20.
The Court went on to assert 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.... 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 administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question.98

The Court clarified the scope and implication of Ocean Port in Bell v. Canadian Telephone Employees Association,99 particularly in the context of purely adjudicative administrative settings. (Bell concerned a challenge to the independence and impartiality of the Canadian Human Rights Tribunal on the basis of the influence over the Tribunal exercised by the Canadian Human Rights Commission, a party to proceedings before the Tribunal).100

The Supreme Court used its decision in Bell to reiterate two principles of administrative independence. First, the Court affirmed its position in Ocean Port that adjudicative tribunals do not enjoy any constitutionally rooted protection of judicial independence or

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98 Ibid at para 21-22 [emphasis added].
100 Ibid and see Bell Canada v Canadian Telephone Employees Assn, [1998] 3 FC 244 (TD), 143 FTR 241.
Transparency and Independence

impartiality. Writing jointly for the Court, McLachlin C.J. and Bastarache J. also rejected the attempt by Bell to delineate a category of tribunals known as “quasi-judicial” or “purely adjudicative,” which would be subject to higher requirements of independence and impartiality. They make clear that the determination of the particular standard of independence and impartiality required in a particular setting must involve a contextual rather than a categorical analysis:

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... 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.101

In Ocean Port, McLachlin C.J. characterized tribunals as spanning “the constitutional divide between the judiciary and the executive.”102 This metaphor suggests a set of institutions which, functionally at least, operate within both the judicial and executive spheres. While conceding that courts and tribunals may share similar functions, McLachlin C.J. stressed that it is the constitutional status of each that was at issue in this case. Of tribunals, she stated, “While they may possess adjudicative functions, they ultimately operate as part of the executive branch of government, under the mandate of the legislature.”103 While lower court judges have explored other grounds on which the independence of tribunals may be protected, notably in the context of the rule of law arguments underpinning the B.C. Supreme Court in McKenzie v. Minister of Public Safety and Solicitor

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101 Bell, supra note 99 at para 22 [emphasis in original].
102 Ocean Port, supra note 95 at para 32.
103 Ibid.
General,104 these have yet to find broad acceptance in appellate settings.

A higher-profile instance of the Court declining to interfere with government action occurred with respect to Linda Keen, who was removed as President of the Canadian Nuclear Safety Commission (CNSC).105 Natural Resources Minister Gary Lunn, who removed Keen in January of 2008, justified Keen’s removal on the basis that she had lost the government’s confidence over the way she handled the shutdown of the medical isotope-producing nuclear reactor in Chalk River, Ontario, owned and operated by Atomic Energy of Canada Limited, a Crown corporation, in December 2007.106

Keen was removed as President of the CNSC on January 15, 2008, the day before she was scheduled to appear before the House of Commons’ Natural Resources Committee to offer her version of the events leading up to the shutdown of the reactor. Critics were quick to condemn the Minister’s decision as a political maneuver aimed at silencing a federal employee’s criticism of a controversial Government decision. For example, “Liberal [Member of Parliament] David McGuinty accused the Conservatives of U.S. Republican-style tactics by dismissing Keen in the ‘dark of night,’ just hours before she was due to testify.”107

In a December 27 letter from Lunn to Keen (leaked to the Ottawa Citizen), the Minister indicated that he questioned Keen’s judgment in the Chalk River/medical isotopes incident and was considering having her removed.108 Keen responded by accusing the Minister of improper interference and threatened litigation if she were removed.109

While Keen remained a CNSC commissioner following her termination as President of the CNSC (she subsequently resigned in

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107 Ibid.


109 CBC News, supra note 106.
September of 2008), she challenged the Government’s action in Federal Court. In April 2009, the Federal Court dismissed her claim, based largely on the *Ocean Port* argument that the position of President of the CNSC is an “at pleasure” appointment.\(^{110}\)

It is worth emphasizing that the leading case law from the Supreme Court of Canada, discussed above, explores the requirement of independence for tribunals either in terms of statutory language (for example, was the appointment “at pleasure”?) or in terms of the objective and structural features of a tribunal (for example, security of tenure) which determine whether it is sufficiently independent at common law. There is far less guidance when it comes to improper communications between tribunals and government and the concept of institutional or corporate “taint” (the idea that if certain members of the Board are exposed to a particular view, it may be inferred that the entire tribunal has been so exposed).\(^{111}\)

While the Supreme Court’s jurisprudence has attempted to constrain the development of tribunal independence as a constitutional principle, it has at the same time recognized the importance of such independence as an organizing principle of administrative justice. The Court’s approach to the issue of independence may be described as ambivalent.\(^{112}\) Indeed, the Supreme Court has used the constitutional doctrine of judicial independence as the point of departure for developing the common law doctrine of administrative independence.\(^{113}\) While the Court makes clear that a legislature may authorize “at pleasure” appointments, the broader constitutional foundation of the principle of impartiality, in which the independence doctrine is situated, remains to be fully explored by the Court. Having affirmed for the past fifty years, since *Roncarelli v. Duplessis*,\(^{114}\) that no legislature can be interpreted as authorizing arbitrary exercises of executive discretion, it would be difficult to imagine a court upholding


\(^{111}\) This idea of “corporate taint” was discussed in *EA Manning Ltd v Ontario (Securities Commission)* (1995), 125 DLR (4th) 305, 23 OR (3d) 257, leave to appeal to SCC refused, 125 DLR (4th) vii, in which the Ontario Court of Appeal concluded, “Although there may be circumstances where the conduct of a tribunal, or its members, could constitute institutional bias and preclude a tribunal from proceeding further, this is not such a case. This is not a case where the Commission has already passed judgment upon the very matters which are to be considered in the pending hearings” (at 317).

\(^{112}\) For discussion of this apparent ambivalence toward the doctrine of administrative independence, see Lorne Sossin, “The Ambivalence of Administrative Justice in Canada: Does Canada Need a Fourth Branch?” in *Lamer: The Sacred Fire*, eds Daniel Jutras and Adam Dodek (2009) 46 Sup Ct L R 51.

\(^{113}\) See, for example, *Matsqui*, supra note 80; *Consolidated-Bathurst Packaging*, supra note 79.

\(^{114}\) [1959] SCR 121, 16 DLR (2d) 689.
a legislative provision which purported to authorize biased decision-making by an executive body. If a lack of impartiality cannot be legitimately authorized by a legislature, how is it possible to legislate a scheme which expressly lacks independence?

This relationship between the common law doctrine of independence and its constitutional origins is particularly important in the context of appointments to and removals from administrative tribunals where the legitimacy of administrative justice in the eyes of the public is at stake. It is a widely shared view that public confidence in the administrative justice system would be enhanced by a merit-based system of appointments, but it not always clear how this commitment could be most effectively enshrined in law, particularly in light of the fact that the judges who would issue such a ruling are themselves appointed without such constraints on executive discretion.

While the Supreme Court has recognized that administrative appointments must be a “reasonable” exercise of discretion in Retired Judges, the Court has not recognized expressly that the appointment process can undermine the independence of the tribunal, or that political patronage is inconsistent per se with the independence of an adjudicative tribunal. When the Canadian Bar Association Task Force on administrative appointments asked the federal government for a description of the appointment process, it was told that no such description existed and that each order-in-council appointment was a separate matter to be considered on its own merits. The Task Force concluded, “This appears to be an arbitrary way to conduct public business.”

116 Supra note 89.
Thus, the legal backdrop provides a framework for approaching questions of administrative independence, but little specific guidance as to the appropriate relationship between adjudicative tribunals and the government of the day. It is against this backdrop that the Alberta and Saskatchewan cases should be understood. Watson J. of the Alberta Court of Queen’s Bench heard the legal challenge by the unions to the ALRB’s involvement in the drafting of Bill 27 in January of 2004, discussed above. The unions argued that not only were the independence and impartiality of the Chair and Vice Chair compromised by their involvement in the legislative process, but that this “taint” spread to all members of the Board.

The ALRB itself declined to rule on the allegations that it had breached the requirements of independence and impartiality. The panel presiding over the matter in which this challenge was raised offered the following explanation for declining to rule:

There is an inevitable tension in this and any other statutory labour relations board between its role as a government-created entity charged with ongoing responsibility for administration of collective labour relations laws and policy—in effect, a participant in both government and the labour relations system that government regulates—and its role as a neutral adjudicator of parties’ rights within that system. In possessing these dual roles, the Board is not a court, for all the court-like qualities and obligations it possesses. The Applicants’ demand for a hearing has every prospect of bringing those roles into direct conflict with each other, to the detriment of one or the other. In dealing with all these and other, unforeseen, issues that a hearing might generate, the Board would be asked by the parties to prefer one role over the other. Every decision along the way to the ultimate resolution of the applications would be attended by the risk that parties so minded would fear of two things: either that the Board was protecting its interest as a branch of government; or that the Board, cowed by arguments that called its commitment to the principles of natural justice into question, was giving insufficient weight to contrary considerations.

This is, in our opinion, a result to be avoided. We consider that the long-term health of the labour relations system and the long-term reputation of the Board could only suffer by the spectacle of the Board so patently sitting in judgment of its own independence when the attack is based on factual considerations rather than exclusively
considerations of practice, procedure or institutional structure. We simply decline to be the forum within which these particular allegations are dealt with.\textsuperscript{120}

In \textit{CEP}, Watson J. held that the Board had not erred by deferring decision on this question to the Court and that, in light of the facts and circumstances, the ALRB Chair’s involvement in the drafting of Bill 27 did not give rise to a reasonable apprehension of bias at law.\textsuperscript{121}

In this regard, Watson J. held:

\begin{quote}
[I]t seems to me that part of the very purpose of such tribunals is that the personnel sitting as adjudicators would necessarily bring to the table not merely their human life experience, but particular knowledge and experience about issues and subjects, as well as the attitudes which necessarily escort such knowledge and experience.
\end{quote}

As for the apparent exchanges between Chair Asbell and the Government during the period between the launch of the policy review as to restructuring in January 2003, and the tabling and passage of Bill 27 in March 2003, I am satisfied that there was no litigation in play at that time such as would prevent Chair Asbell from being consulted by the Government as to the practicalities of what the Government was proposing to do. Accordingly, I do not consider this a situation such as criticized in various cases cited by HSAA and the Applicants: Szilard cited in \textit{Newfoundland Telephone} and \textit{Consolidated Bathurst}; Ellis-Don.\textsuperscript{122}

Watson J. concluded:

\begin{quote}
In sum, the level of contact between Chair Asbell and the Government, on the face of it, is not lower than a level of generality that a reasonable person would assume might possibly occur from time to time as between Government and the head of a tribunal when legislation affecting that tribunal is about to be tabled....
\end{quote}

I stop well short of saying that anything goes in this respect. In my view, specific Government contact with a member of a tribunal about an issue then under specific

\textsuperscript{120} \textit{CEP}, \textit{supra} note 1 at para 214.

\textsuperscript{121} \textit{Supra} note 1.

\textsuperscript{122} \textit{Ibid} at paras 227, 231 [footnotes omitted].
adjudication and affecting a specific party would be of concern and could raise considerations such as argued here: Tobiass; Ellis-Don. However, the matters raised here do not persuade me that a reasonable person would find such a disqualifying taint on the particular facts here.123

Watson J.’s focus on the presence of actual or impending litigation as a requirement of a finding of a breach of independence or impartiality adopts a particularly narrow approach. Taken to its logical conclusion, this view would suggest that any contact between the Board and the Government on matters outside the context of “specific adjudication...affecting a specific party” is acceptable as a matter of law.

The real issue in these kinds of court cases, arguably, is the public perception of a conflict of interest in the government’s interest as a party on the one hand, and its policy-making role on the other. The government in this context has been recognized to have a “significant interest” in the outcomes as well as the process of interest arbitration in the health services field.124

Whether or not the involvement of the Chair and Vice Chair in the development of Bill 27 in Alberta was unlawful, in our view, it seems clear in view of the risk to public confidence that the involvement of the Board in the legislative process was not appropriate. The fact that the involvement of the Chair was not disclosed at the time and the fact that the Government sought to block disclosure subsequently could be a basis to infer that even the Government and the Chair of the Board realized this was not proper. This is not to suggest that there was no mechanism possible for the Government if it wanted the view of the Board or its Chair on aspects of the proposed legislation. The Government could have sought input in a more open fashion, and at the same time explained why it believed that it was important to have such a perspective. The Government could have also used the opportunity of a more open dialogue to reiterate that seeking such input from the Board or its Chair was not intended to influence the Board’s subsequent consideration of the legislation in an adjudicative context.

123 ibid at paras 235-236 [footnote omitted].
124 See the Supreme Court’s observations in this regard in Retired Judges, supra note 89 at para 116 per Binnie J. At para 120 of his majority judgment in this case, Binnie J. cited with approval the observations of Owen Shime, the labour arbitrator in Re McMaster University and McMaster University Faculty Association (1990), 13 LAC (4th) 199, [1990] OLAA No 84 (Ontario Labour Arbitration) at 204: “Arbitrator/selectors have always maintained an independence from government policies in public sector wage determinations and have never adopted positions which would in effect make them agents of the government for the purpose of imposing government policy.”
The propriety of the ALRB's role in Bill 27 raises questions of accepted practices over time and across other Canadian jurisdictions. As discussed below, this standard has been a shifting one but the trend toward clearer and brighter lines between labour boards and provincial governments is apparent.

Similarly, in Saskatchewan, the real damage caused by the Government's use of its appointment power is to the credibility and legitimacy of the Board. How can this loss of confidence be assessed against a standard of the reasonable apprehension of bias? At what point does the Board lose its ability to fairly adjudicate disputes? Public confidence is not an absolute; it shifts over time and in response to particular disputes or crises. Given the ambiguity surrounding the appropriate, or at least accepted, relationship between boards, courts and the Executive today, as illustrated in the examples discussed above, we believe it is important to examine how these relations have evolved over time. Within that context, we turn to the manner in which labour board chairs have historically managed their professional responsibilities over labour policy with duties of fairness, impartiality and natural justice. We believe that this history will help shed light on the ambiguous relationship between labour board chairs, labour relations and government policy. It is to these experiences that we now turn.

B. THE CONTEXT OF LABOUR BOARDS

When asked about the appropriateness of Labour Board members having a role in the policy-making and/or legislative process, many people familiar with the history of labour in Canada respond simply, "It is not a matter of whether it is appropriate. It has always been this way." Below we explore the experience most observers point to as the first and most influential case of a labour board chair taking a leadership role in the development of government labour policy.

1. Ontario: The Finkelman Experience

There is nothing controversial in the observation that labour boards are inextricably linked to labour legislation and labour policy. Indeed, the birth of labour boards in Canada was itself a product of a particular policy and legislative initiative. In Ontario, the administration of George Drew followed the lead of the federal wartime labour boards and implemented a collective bargaining regime between 1943 and 1945. The first chair of the OLRB was University of Toronto law professor Jacob Finkelman.

As chair of the OLRB from 1945-49 and again from 1953-67, Finkelman took painstaking steps to insulate the Board from hostile Conservative back benchers or company lawyers eager to limit the power of the OLRB from promoting (or even expanding) collective bargaining rights for trade unions. For instance, in the early 1950s Finkelman's Board was challenged by an Ontario High Court decision that quashed an OLRB certification ruling based on the principles of natural justice.\textsuperscript{126} The Court's decision was controversial because the \textit{Ontario Labour Relations Act} (OLRA) contained a strongly worded privative clause that was supposed to prevent judicial review of board decisions. While the decision was, according to Finkelman, the "closest" that the Government and the courts came to interfering in the direct affairs of the Board, the steps taken by the Chairman after the decision were meant to insulate, to all degrees possible, the Board from direct interference by external actors.\textsuperscript{127} Finkelman's reforms sought to make all Board procedures compatible with three principles of natural justice: i) the opportunity to be heard; ii) disclosure to the parties of the facts and considerations upon which the Board bases its decision; and iii) impartiality.\textsuperscript{128} The incorporation of natural justice into administrative tribunals (especially quasi-judicial boards such as the OLRB) is generally considered the foundation of administrative independence across the country.

The independence principle of the Board grew into a guiding principle of the early labour relations community. By the late 1950s, public questioning of the Chair of the OLRB on government policy was deemed inappropriate. In 1957, for instance, when Ontario Cooperative Commonwealth Federation (CCF) leader Donald MacDonald asked Finkelman to comment on whether the OLRA was "violating its own spirit" in allowing municipalities to opt out of the Act, Finkelman responded:

...as Chairman of the Board I am prepared to answer any questions on the policies of the Board and the reasons for those policies. Those policies are not matters of government policy. They are made by the Board and the Board will accept responsibility for them and I will accept responsibility for them. They are not the Minister's responsibility. On the other hand, in the Department it has been my fortune or

\textsuperscript{128} Jacob Finkelman, \textit{The Ontario Labour Relations Board and Natural Justice} (Kingston, ON: Industrial Relations Centre Queen's University, 1965) at 2.
misfortune to be associated for many years with the
drafting of this legislation, and as a civil servant my feeling
was that I should not be called upon as an individual to
express an opinion on government policy. I think that is a
matter which lies entirely within the province of the
Minister and I cannot express any opinion thereon. If Mr.
MacDonald wishes to ask any questions with relation to
the number of cases that have come before the Board and
in which municipalities have been involved and files have
been passed, and the number of cases for which files have
been opened, I will be glad to get him that information,
but, I cannot, I feel I should not, express opinions which
are political opinions of the Department and to which I
may be privy as a member of the Civil Service.129

Of course, this did not leave the public service or the Labour Board free
from criticism. Speaking in the Ontario House of Commons in 1963,
Elmer Sopha, a Liberal from Sudbury, criticized the overly legalistic
approach to labour relations moulded by Finkelman, stating that he
knew that “the chairman of the labour relations board wrote the first
statute, the first Labour Relations Act that was offered within this
province,”130 and because of the chairman’s close relationship with
the government, “he takes a much more active part in defending
the labour legislation than most deputy ministers in defending
legislation that is put forward by any other department.”131

Finkelman’s relationship with the government, while not overly
contentious, did vary over time. He was often called upon to comment
on future policy directions of the government, and was often present
in policy discussions regarding amendments to the OLRA.132 Most of
these amendments were largely housekeeping in nature and, as such,
Finkelman’s advice was largely sought on procedural grounds. This
distinction between involving the Board in “technical” or “housekeeping”
legislation but not on matters of substantive policy was common in

129 Testimony of Jacob Finkelman, Ontario, Legislative Assembly, Special Committee
on Labour Relations Act, Select Committee on Labor Relations (June 1957) at 190
(Chair: James Maloney). For the politics surrounding this committee, see Charles
W Smith, “Fairness and Balance”: The Politics of Ontario’s Labour Relations Regime,

130 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 26th Leg, 4th
Sess, No 62 (21 March 1963) at 2054.

131 Ibid.

132 On the advice of Finkelman, an amendment was passed to provide for the succession
of bargaining rights in case of merger or amalgamation of certified unions following
the unification of the Trades and Labour Congress and the Canadian Congress of
Labour in 1956.
In no way, however, did the Chair of the OLRB feel that this interaction compromised his independence. In 1959, for instance, Walter Gordon, Chair of the Committee on the Organization of Government in Ontario (the Gordon Commission), expressed disappointment when Finkelman refused to answer substantive questions on government policy. In particular, Finkelman refused to comment on whether it was advisable for the OLRB to be able to make decisions against which there was no provision for appeal. Said Finkelman, “[i]t's a matter of policy over which the OLRB has no jurisdiction,” and then asked to be excused from answering it. Gordon responded by stating he was very disappointed “that you didn’t feel it proper to express a view on it.”

These early examples set the precedent for how modern labour boards operate. There is room, of course, for board personnel to advise or seek advice from government. But Finkelman made it clear that such advice never crossed the jurisdictional boundaries in which labour boards operate. Finkelman’s behaviour seemed to correspond to the view of George Adams, a future OLRB chair, that the comprehensive jurisdiction “permits a labour relations board to be seen in the labour relations community as a protector of the respective interests of both unions and management and, thereby, contributes to the moral authority of the tribunal and the acceptability of its legal policies.”

These guiding principles have entrenched a doctrine of independence between the legitimate policy role of labour board chairs and their role in aiding the government in shaping labour legislation. While Finkelman’s advice was seen as crucial in the early years of labour relations law, by the late 1950s a clear dividing line had emerged. In Ontario, this hands-off approach continued with Finkelman’s successors G.W.T Reed, Ted Armstrong and George Adams. While the appointment of Rosalie Abella in 1985 may have ended the neutral ground between labour boards and the courts (Abella, was after all, a sitting judge at the time), it only entrenched the doctrine of independence from government interference.

2. British Columbia: The Weiler Experience
In British Columbia, to take another notable example, the British Columbia Labour Relations Board (BCLR B) under the chairmanship of Paul Weiler between 1973-78 was given jurisdiction over collective bargaining (the traditional role of boards) but also the adjudicative
functions of arbitration and the regulation of strike and picketing behaviour that was usually under the purview of the courts.\textsuperscript{137} The amalgamation of these functions, Weiler has argued, gave the Board administrative autonomy from overt government intervention and judicial tinkering.\textsuperscript{138} Under this model, if "the Labour Board is to be effective in the fray, it must be seen by the labour-management community as the body with the final authority on labour law."\textsuperscript{139}

Under B.C.'s first NDP government, the Weiler Board was widely seen by experts as fiercely independent, as Labour Minister Bill King had insisted on a non-partisan attempt to mediate the conflicting sides of B.C.'s tense labour-management community. Weiler stated that it was the Labour Minister's view that "polarization of labour law reform had to stop if there was to be a real chance of moderating the level of conflict on the ground."\textsuperscript{140} The most important way to address the systemic conflict, King insisted during second reading of the new labour bill, was for a new structure, function and philosophy at the Board. Under King's legislation, the Board "is completely independent, not only in fact but in appearance. Under [the new code], the chairman is granted legislative tenure for five years and he can only be removed by address of the Legislative Assembly. So this secures the position of the chairman of the new board as independent and not susceptible to any political pressures that might otherwise be the case."\textsuperscript{141} King further went on to address the importance of impartiality, flexibility and expertise in adjudicating industrial conflict in the province.

Yet, while the B.C. NDP's labour code was widely heralded by labour experts as being the most far reaching of its time, initially business and labour were critical of the new legislation and the newfound powers of the Board.\textsuperscript{142} For business groups, the NDP legislation simply represented a violation of the free market principles long endorsed by the opposition Social Credit Party. The labour movement was wary of some of the new remedial powers given to the Board, especially its ability to impose first contracts in the event that an agreement could not be reached between an employer and a newly certified union. According to Harry Arthurs, this section

\textsuperscript{137} Paul C Weiler, "The Administrative Tribunal: A View from the Inside" (1976) 26 UTLJ 193 at 197-98 [Weiler, "A View from the Inside"].
\textsuperscript{138} Paul C Weiler, Reconcilable Differences: New Directions in Canadian Labour Law (Toronto: Carswell, 1980) at 299 [Weiler, Reconcilable Differences].
\textsuperscript{139} Ibid [emphasis in original].
\textsuperscript{140} Ibid at 6.
\textsuperscript{141} British Columbia, Legislative Assembly, Debates of the Legislative Assembly, 30th Parl, 3rd Sess, Vol 1 No 15 (3 October 1973) at 396 (Hon WS King).
represented a “sharp departure from the traditional NDP philosophy that the outcome of collective bargaining should be determined by an economic contest, rather than by legal intervention.”\textsuperscript{143}

The “departure from NDP philosophy” also led the labour movement to criticize Weiler’s selection as Chair. As a visiting scholar at the University of British Columbia, Weiler was instrumental in drafting the new legislation, including the functions of the new BCLRB.\textsuperscript{144} Unions also believed that the appointment of a law professor (and not a labour member) would inevitably lead to a board that favoured employers. Building on this critique, the B.C. Federation of Labour was also critical of the new labour code’s underlying theme of balance and compromise, which gave the Board power to settle disputes “through the promotion of effective industrial relations.”\textsuperscript{145} For some of the unions, this was code for limiting the collective rights of workers in favour of employers.

Over the next three years, however, the B.C. NDP’s strategy of separating the administrative sides of collective bargaining and labour relations from the government and the courts implanted the Board with an institutional legitimacy. According to Weiler, the BCLRB’s expanded jurisdiction, the broad expertise of its members and its new procedural powers “minimize[d] the use of the formal legal approach in labour relations in which lawyers throw ‘rights’ and ‘duties’ at each other.”\textsuperscript{146} These structural changes allowed the Board to address disputes quickly, experiment with new problem solving techniques, and, if need be, pass judgment on economic disputes between unions and employers. Since the Board was given purview over all aspects of industrial relations, it developed an expertise and institutional legitimacy amongst its participants. Perhaps just as importantly, the reforms fashioned a more transparent relationship with the legislature in which governments could quickly respond to situations through legislative amendment if they disagreed with a Board decision or policy. In this context, Weiler believed that “there has been an ongoing dialogue between the board and the legislature in the refinement of labour law policy, a dialogue which it would be difficult if not impossible to duplicate with the judiciary.”\textsuperscript{147}

According to Weiler, the newfound transparency and independence at the Board gained support from both heavily unionized employers and, just as importantly, the provincial labour movement. This

\begin{itemize}
  \item \textsuperscript{143} Ibid at 291.
  \item \textsuperscript{144} Weiler, Reconcilable Differences, supra note 138 at 4.
  \item \textsuperscript{145} Wilfred List, “BC labor code is most innovative in Canada,” Globe and Mail (8 December 1975) 8.
  \item \textsuperscript{146} Weiler, “A View from the Inside,” supra note 137 at 203.
  \item \textsuperscript{147} Ibid at 210.
\end{itemize}
assisted in saving the Labour Code from being radically dismantled by the Social Credit Party when it returned to office in 1975.\textsuperscript{148} What seemed to be consistent about the NDP reforms implemented by the Weiler BCLRB was a commitment to the idea that if the basic principles of collective bargaining and the right to strike could be agreed to, then an independent board could act to mediate the intense struggle between labour and management.

3. The Evolving Importance of Independence in the Labour Board Context

By the 1980s, direct involvement by government in the operation or decision-making of labour boards was widely seen as compromising the independence of board decision-making. The importance of this principle became clear in Saskatchewan in the 1980s when the SLRB seemed to be taking an overt "government line" in deciding cases.

In one instance, Conservative appointment Dennis Ball ruled that Canada Safeway Ltd. management could change wages and working conditions in an expired contract without the union's consent despite a section in the province's TUA that would make it illegal for an employer to take such action without the consent of the union.\textsuperscript{149} In 1986, similar cries were heard from Alberta when the AFL cited a "conservative climate" of labour board decision-making for de-legitimizing the entire system of post-war labour relations.\textsuperscript{150}

By the mid-1980s, many provinces were willing to openly eliminate collective bargaining procedures (and end legal strikes) in order to combat budgetary and economic crises.\textsuperscript{151} Throughout this period, many governments claimed that the move away from free collective bargaining would be temporary measures, although as Leo Panitch and Donald Swartz have demonstrated, many of these measures were soon entrenched as permanent policy.\textsuperscript{152} Similar trends continued throughout the 1990s and 2000s. In Ontario, the

\begin{itemize}
\item \textsuperscript{148} \textit{Ibid} at 7-9.
\item \textsuperscript{150} Lorne Slotnick, "Alberta unions take aim at labor laws, but roots of trouble run much deeper," \textit{The Globe and Mail} (19 June 1986) 3.
\item \textsuperscript{151} See generally Mark Thompson, Joseph B Rose & Anthony E Smith, eds, \textit{Beyond the National Divide: Regional Dimensions of Industrial Relation} (Montréal: McGill-Queen's University Press, 2003).
\item \textsuperscript{152} Leo Panitch & Donald Swartz, \textit{From Consent to Coercion: The Assault on Trade Union Freedoms}, 3rd ed. (Toronto: Garamond, 2003).
\end{itemize}
Progressive Conservative government of Mike Harris unilaterally dismissed OLRB personnel whom it deemed too close to the previous NDP administration.\textsuperscript{153} That dismissal, which led to the case in \textit{Hewat} (discussed above), tainted the Board's ability to act as an independent body, especially given the hostility of the government towards organized labour.\textsuperscript{154} These tensions escalated when the Tories stripped the OLRB of its remedial certification powers in 1998 after the Board made a certification decision at a Windsor Walmart.\textsuperscript{155} Although the Liberals removed many of the restrictions imposed by the Tories after 2003, the Board has never regained the full remedial powers that it had before 1995.\textsuperscript{156}

Notwithstanding the changes in Ontario, we maintain that the few exceptions to the open embrace of neo-liberal industrial relations policies in Canada has been the continued reliance on tripartite boards to regulate certification procedures while being the ultimate arbitrator of collective bargaining disputes. To be sure, it is problematic that governments continue to take coercive action to end strikes or even eliminate collective bargaining rights for (mainly public sector) workers. Yet, the boards themselves have remained a permanent fixture in the industrial relations setting because they continue to maintain the non-partisan legitimacy built by reformers like Finkelman and Weiler. For both unions and employers, labour boards are a neutral body to mediate certification, collective bargaining and strike disputes. Or, to be more candid, while the labour boards and their members are empowered to interpret government legislation, they do so as:

> professional adjudicators who [are] prepared to (and indeed bound to) implement any duly-enacted legislation, regardless of their personal views. This [is] not just a matter of integrity; it [is] also a statutory duty, as the \textit{Interpretation Act} makes clear

> ...this professional fidelity to the legislation passed by any government is a central tenet of the theory of tribunal independence.\textsuperscript{157}
In practice, Canadian labour boards have been able to maintain this independence because governments, with a few notable exceptions, have not been willing to openly dismantle the administrative side of labour relations. Governments have not taken these steps because boards maintain such a high degree of respect amongst both employers and unions. This brief review of the history of the role of labour boards in the development of labour policy and legislation reveals significant changes over time. There are several reasons for these changes.

First, since the end of WWII the role of government in labour relations was changing. Governments across the country became interested in labour policy goals beyond merely the creation of a credible and effective mode of dispute resolution and peace between employers and workers. In this period, government policy protected the principles of "exclusivity" and "majoritarianism," giving unions the absolute right to bargain collectively, strike, and organize in individual job sites once certain conditions have been met.\(^1\) Second, governments used their appointment power to fill labour boards with individuals trusted to adopt similar views on labour policy to the government of the day. One of the reasons few raised concerns about the roles of people like Jacob Finkelman and Paul Weiler in the development of labour policy was the confidence of stakeholders in the independent judgment of non-partisan experts (Harry Arthurs might be put in a similar category). Confidence in the merit basis of appointments to a labour board and perceptions of independence are intertwined. Where governments appoint individuals to labour boards known or believed to share a government's own perspective on labour policy, the credibility of the board may be eroded. Third, administrative law standards evolved (particularly in the period of 1979-95), the rules of natural justice expanding to embrace institutional impartiality and independence as norms of fairness (see the discussion above).

These factors have resulted in a significant shift in how relations between government and labour boards are viewed in Canada. Levels of contact between board chairs and government that were commonplace in the 1950s had become unacceptable by the 1980s and 1990s. This raises the question of what legitimate role, if any, labour boards may today play in the policy-making process. It is to this question that we now turn.

\(^1\) Fraser v Ontario (Attorney General), 2008 ONCA 760, [2009] 92 OR (3d) 481.
C. WHAT IS THE EXTENT OF A LABOUR BOARD’S LEGITIMATE ROLE, IF ANY, IN THE POLICY-MAKING PROCESS GENERALLY?

In light of the above analysis of the legal and historical backdrop, we now turn to address the key question of what the relationship between an adjudicative board and the government ought to be. Labour boards perform adjudicative functions but do so in the service of policy goals. The primary policy goal, however, remains impartial and informal dispute resolution based on expertise in labour relations, rooted in mutual acceptability of employer and union groups.

While visible guideposts may be elusive, it is clear that the nature of adjudicative functions constrains the extent to which board members legitimately may be involved in the shaping of policy goals. Because a labour board is not a court, but rather a part of the executive branch, it is impossible to conclude that it should never be part of the policy-making process. In our view, it is preferable to see the involvement of the board in the policy or legislative process in terms of a burden of justification rather than in terms of bright lines. In other words, the involvement of board members in a policy-making process that is perceived as partisan creates a prima facie perception that the board will not be able to adjudicate disputes under the resulting policies or legislation in a disinterested and impartial fashion. This prima facie perception creates a burden of justification both on government and the labour board to account for how this relationship does not undermine the impartiality and independence of the board. Below, we discuss specific factors that might legitimize such a role for board members.

First, transparency might legitimize the involvement of the board in policy-making. One of the central differences between tribunals and courts is the fact that tribunals often have the power to engage in policy-making while courts do not.\(^{159}\) Labour boards themselves develop public policy and, as noted above, the ALRB was in the process of a policy initiative in the area of restructuring the health services sector at the time Bill 27 was announced. Where the government wishes to legislate in areas in which a board is already active in developing policy, it may be justified to involve the board in some fashion in developing the legislation.

The board’s process of policy development typically is a transparent one, based on inviting submissions from various stakeholders and interested parties. If the involvement of the board in the legislative process is transparent as well, and would survive scrutiny by unions and employer representatives, this is one indication that the board’s involvement might be legitimate.

\(^{159}\) See Francis Houle & Lorne Sossin, “Tribunals and guidelines: Exploring the relationship between fairness and legitimacy in administrative decision-making” (2006) 42 Canadian Public Administration 282 at 304.
Second, several jurisdictions have labour statutes which give the Minister of Labour (or the government) the express power to refer questions to labour boards which relate to ministerial powers and how they are exercised. Alberta has now adopted such guidelines in the wake of the Bill 27 controversy. The existence of such provisions suggests that where such reference jurisdiction is available, it may be an appropriate mechanism by which to involve the board in a policy initiative. If the Legislature wishes for the government to be able to avail itself of the expertise of the board, there is no reason why it should not provide clear statutory legitimacy for so doing, in which case the transparency of that consultation is assured and the independence of the board is preserved.

Third, whether the independence and impartiality of a labour board is undermined by involvement in a legislative initiative may depend on the content of the initiative. For example, if the legislation is “technical” or of a “housekeeping” (or procedural) nature, consulting with the board may pose less of a problem than when the legislation is substantive and perceived by unions or employers to affect its interests in material ways. However, this is a line that is inexorably difficult to draw and often in the eye of the beholder. Consider the example of a proposal for the board to charge user fees for adjudicative services. On the one hand, this could be seen as a procedural change with little consequence for substantive labour rights. However, others may view it as fundamentally altering the access to the board and privatizing dispute resolution, with adverse consequences for labour.

Fourth, there is an important distinction relating to the depth of involvement in the legislative initiative. If the chair or vice chair of a labour board is asked to review draft legislation with a view to identifying unintended consequences or problematic language, this is unlikely to raise the same concerns as where the chair or vice chair is asked to draft the legislation or to shape the policy preferences that the legislation seeks to advance. For this reason, the determination of the appropriateness of a board member’s involvement in a policy process will be contextual and should be considered on a case-by-case basis.

Fifth, as part of that contextual analysis, it is necessary to distinguish between a government that seeks an independent view on legislation from the chair of a labour board and a government that seeks to involve the chair so as to influence the interpretations the board is likely to give legislation. The motivation of the Ontario government’s consultations with Finkelman in the 1950s was to enhance the credibility of its early foray into labour relations; this motivation contributes to why so few observers then or now look back on that involvement as problematic. The motivation for the consultation with the board member, in other words, is significant.
Similarly, signposts are needed to clarify the legitimate mechanisms by which a government may remove or appoint board members to align with their own policy perspectives or goals. These signposts may come in the form of government regulations or guidelines, or by the government delegating the appointment power to an independent committee or commission. The events in Saskatchewan (and Ontario under Premier Harris) demonstrate that the arbitrary dismissal of labour board members risks undermining the independence, and ultimately the legitimacy, of the labour relations process.

IV. CONCLUSION
Labour boards are creatures of the executive branch of government. They are appointed and funded by the executive and may be subject to executive-led procedures, practices and policies. Labour boards are also adjudicative bodies that enjoy, at common law, institutional independence and impartiality. This independence and impartiality requirement, however, is not a protection of the board. It is, rather, a protection of those who come before the board. This legal standard should serve not as a minimum standard, but as a catalyst for a culture of adjudicative integrity, propriety and transparency. As these are common law and not constitutional guarantees, it remains open to the legislature, if it wishes, to restrict or modify the independence and impartiality of the board. But until and unless it does, those constraints limit the activities and consultations in which board members can appropriately engage.

There is no clear rule of practice in Canadian jurisdictions on board involvement in the policy or legislative process, but there is, we would suggest, an evolving consensus on this issue. The relationship between labour boards and provincial governments has been evolving, from a period of time in the 1950s, 1960s, and 1970s when close contacts appeared not to have been uncommon and rarely to have generated controversy, to the 1980s and 1990s when one finds fewer instances of this kind of involvement and more controversy associated with it. Together, these factors suggest increased risks of board involvement in government legislative and policy initiatives. Even where legal standards have not been breached expressly, such commingling of the board in adjudicative and policy-related activities appears more difficult to justify than it might have been in the past.

In commenting on the renewed interest in appointments and independence, David Mullan offered the following observation:

Especially critical in recent litigation have been issues of the impact on independence of government proposals to change the composition of tribunals either by non-renewal of expiring appointments or even dismissal. The
early case law in this domain rejected such challenges on the basis that those seeking renewal would realize that the government of the day would be looking at their performance in terms of their overall discharge of their duties in terms of the general philosophy and dictates of the empowering statute. It was simply inappropriate to presume that members of a tribunal might act in such a way as to favour government interests in particular cases in order to enhance their chances of reappointment. More recently, confronted by the specter of governments blatantly and unapologetically using their powers of appointment, reappointment...and dismissal to achieve political ends and political rebalancing, such arguments are now making some headway.\textsuperscript{160}

A focus on independence must, in our view, concentrate on the broader context of appointments decision making. It is not simply a matter of security of tenure, financial independence or control over administration—though these are clearly important guarantees—but also a question of transparency. Those affected by tribunal decision making have a right to expect an independent hearing before an independent adjudicator. Prior to the Supreme Court’s decision in Ocean Port, Mullan speculated that the independence principle from the Provincial Judges Remuneration Reference\textsuperscript{161} could apply to tribunals as well: “If the Preamble can be deployed to challenge compromises of independence in the case of non-section 96 judges, it is not much of a stretch to extend that to adjudication by tribunals.”\textsuperscript{162}

While the Supreme Court adopted a different approach in Ocean Port, this does not preclude the notion that administrative law imposes constraints on the government's appointment power. One type of constraint is the limit on ministerial discretion developed and applied in the context of appointments in the Retired Judges case, discussed above. Another type of constraint, in our view, must remain tied to the notion of independence. This must be an approach to independence tailored to the diverse and distinctive sphere of administrative justice, not one grafted from the judicial context.

All adjudication must be premised on protections ensuring that the outcome of decision-making is determined on the merits. Only decision-makers appointed on a merit-based system of appointment

\textsuperscript{160} David J Mullan, Administrative Law (Toronto: Irwin Law, 2001) at 346.


\textsuperscript{162} Mullan, supra note 160 at 347.
can truly ensure this outcome. As Supreme Court Justice Rosalie Abella has observed, “[t]he public will only have confidence in tribunals if they have confidence that they are not seen as the dumping grounds for post-electoral rewards.” Integrating appointments within a culture of adjudicative independence for tribunals, like clarifying the involvement boards appropriately may have in government policy making, would together represent a significant step toward ensuring public confidence in administrative justice in Canada.

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