



# The Independent Board & the Legislative Process

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## Introduction

This report<sup>1</sup> considers the independence and impartiality of the Alberta Labour Relations Board (“ALRB”) in relation to allegations that the Chair and Vice Chair of the Board participated in the legislative process, specifically, the development of the *Labour Relations (Regional Health Authorities Restructuring) Amendment Act, 2003* (“Bill 27”).

The purpose of this report is not to reach factual findings on what actually occurred in relation to *Bill 27* and the ALRB but rather to reach conclusions on the appropriate scope, if any, for the Chair and Vice Chair of the ALRB (or for Board members more generally) to participate in the legislative process. Specifically, I have been asked in this Report to address three questions:

- 1) Was the role of the ALRB (and its Chair and Vice Chair) in the development and drafting of *Bill 27* improper or likely to lead to a reasonable apprehension of bias or a lack of independence on the part of the Board in its adjudicative role in interpreting and applying the new legislation?
- 2) What is the role of a Labour Board in relation to the development and drafting of labour legislation in other Canadian jurisdictions? What are the requirements, if any, of transparency with respect to such a role for a Board in other jurisdictions?
- 3) What is the extent of a Labour Board’s legitimate role, if any, in the policy-making process generally?

## Summary of Facts

The purpose of this Report is not to address any disputes with respect to the factual underpinnings of the Board’s involvement in the development of *Bill 27*. It is necessary, however, to have an understanding of the incidents giving rise to the apprehension of partiality.<sup>2</sup>

The unions alleged that there had been improper contacts between the Executive of the Alberta government and the Labour Board. It was alleged that the Chair and Vice Chair of the Board had played a role in developing labour legislation that favoured employers. They also argued that the Minister of Human Resources and Employment had influenced the Chair of the Board to pursue restructuring matters expeditiously through a speech in the House (with the Chair in the legislative gallery at the time). As a result of this

pressure, the unions believed that they were denied natural justice in the course of proceedings dealing with the restructuring.<sup>3</sup> The unions also argued that although some members of the tribunal were not directly involved in the alleged drafting process, all were affected implicitly and “tainted.”

The piece of legislation in question is a regulation under the *Labour Relations (Regional Health Authorities Restructuring) Amendment Act, 2003*, an Act introduced as “Bill 27”. *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, including regulations providing for the establishment and modification of bargaining units and the severance and termination pay to employees of the previous regional health authorities that had undergone restructuring or change in governance.<sup>5</sup> As a result of this statute, the Lieutenant Governor created the *Regional Health Authority Collective Bargaining Regulation*.<sup>6</sup>

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, policemen and other health care workers, public health workers would forfeit the right to strike and employers would forfeit the right to lockout workers in the event of not reaching a collective agreement. *Bill 27* amended the *Alberta Labour Relations 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.<sup>7</sup> The requirement for compulsory interest arbitration is set out generally in the Code<sup>8</sup>, and is elaborated in the regulation enacted pursuant to *Bill 27* (*the Regional Health Authority Collective Bargaining Regulation*).<sup>9</sup>

The Government’s policy initiative was also subjected 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”<sup>10</sup> and resulted from a “backroom deal.”<sup>11</sup> 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

<sup>1</sup> This report was commissioned by the Alberta Federation of Labour in March of 2006. In the preparation of this report, I spoke with several current and former Labour Board Chairs and members as well as individuals involved with analogous administrative tribunals, labour lawyers and academics. They bear no responsibility for the views expressed herein. Chuck Smith has provided superb research assistance and has collaborated on several key aspects of this report.

<sup>2</sup> This description is based on the summary of facts in *C.E.P., Local 707 v. Alberta (Labour Relations Board)* 2004 ABQB 63 (“*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” (unpublished paper).

<sup>3</sup> 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 due pressure by the government. See *CEP* paras. 14-17.

<sup>4</sup> S.A. 2003, c. 6 [hereinafter “*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.

<sup>5</sup> See *Bill 27*, s. 5 creating ss. 162.1 and 162.2 of the *Alberta Labour Relations Code* R.S.A. 2000 c. L-1 [*Alberta Labour Relations Code*].

<sup>6</sup> AR 80/2003.

<sup>7</sup> See *Alberta Labour Relations Code*, ss. 96-104.

<sup>8</sup> *Alberta Labour Relations Code*, *ibid*.

<sup>9</sup> AR 80/2003. See in particular ss. 15 and 16.

<sup>10</sup> Alberta Hansard March 5, 2003 at 299 (Dr. Raj Pannu (ND, Edmonton Strathcona))

<sup>11</sup> *Ibid*. See also for example, the comment of Dr. Ken Nicol (Liberal, Lethbridge East) 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 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 Jacobs, supra note 2, at fn. 27.

envisioned a significant role for the Alberta Labour Relations Board. Under the Labour Code the Board possessed the power generally to determine the units appropriate for collective bargaining when, because of corporate restructuring, bargaining units were required to be modified.<sup>12</sup> In the particular instance of restructuring created by Bill 27 and its regulations, the Board was given the further specific responsibilities of determining the region-wide functional bargaining units, the appropriate bargaining agents, collective agreements and other related matters.<sup>13</sup>

Prior to the introduction of Bill 27, the Board had undertaken a process of consultation on the restructuring of the health services sector.<sup>14</sup> The Board started its process of its own initiative and in response to requests by the community. It had already started to move toward standardized health care bargaining units in its decision-making in the 1970s. Once the government began restructuring into regions in the 1990s, the Board, in response to the industry, organized conferences and policy hearings to re-examine the standard bargaining units it was currently using.

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.<sup>15</sup> Once responses to the recommendations had been reviewed, the Board decided that it would be useful to hold a policy hearing into two key issues in dispute. It circulated a letter in January, 2003 indicating that it anticipated holding these 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 intervenor status by mid-April 2003. However, when the government introduced Bill 27 in the House on March 11, 2003, the Alberta Labour Relations Board put its policy review process on hold for “an indefinite period”.<sup>16</sup>

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, plus a “Processes” document mentioned by Chair Asbell in the latter memo, plus a government official’s name mentioned in the former memo.

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 of Bill 27 should be handled expeditiously - as the Regulation itself said. Minister Dunford said:

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.<sup>17</sup>

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. At the heart of the debate was the fact that the Ministry of Human Resources and Employment had consulted with the Labour Board during its drafting of Bill 27. The fact of the consultation had not been made public by either the Ministry or the Board. However, knowledge of it emerged when the Alberta Federation of Labour made freedom of information requests to both the Board and the Ministry.

The applicant unions and the Alberta Federation of Labour (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. 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. The Unions further sought an order preventing the Board from taking any future decisions related to the statute.

Through their freedom of information request, the AFL received three documents from the Ministry of Human Resources and Employment (HRE) prior to the judicial review hearing.<sup>18</sup> 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 in this allegation of bias, the Alberta Court of Queen’s Bench concluded:

<sup>12</sup> See *Alberta Labour Relations Code*, s. 48.

<sup>13</sup> See *Regional Health Authority Collective Bargaining Regulation*, particularly ss. 3-17.

<sup>14</sup> See Alberta Labour Relations Board, “Discussion Paper—Standard Health Care Bargaining Units” [2001] Alta.L.R.B.R. DP-005 (January 24, 2002), available online: <http://alrb.gov.ab.ca/healthcare/dp-005.pdf>.

<sup>15</sup> *Ibid.*

<sup>16</sup> See “Letter to Stakeholders re: Labour Relations Board Healthcare Bargaining Unit Policy Review” letter written by Mark Asbell, Chair, Alberta Labour Relations Board, dated March 11, 2003; available online: [http://www.alrb.gov.ab.ca/healthcare/Letter\\_Mar\\_12\\_03.doc](http://www.alrb.gov.ab.ca/healthcare/Letter_Mar_12_03.doc). See also *CEP* at paras. 39-41.

<sup>17</sup> *CEP*, at para. 43.

<sup>18</sup> 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 Feb. 14, 2003 responding to a request for numbers of bargaining relationships that would be affected by the health care proposals – were disclosed by HRE. Although the ALRB possessed these documents and they were responsive to the request made by the AFL, they claimed exemptions from disclosing them.

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.<sup>19</sup>

The reasoning of the Court of Queen's Bench is discussed in more detail below.

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. In response to further freedom of information requests by the AFL, additional communications between the Executive and the Labour Board were inadvertently disclosed.<sup>20</sup> These documents include email exchanges between staff of the Legislative Counsel and the Vice Chair of the ALRB suggesting the Vice Chair was involved in drafting regulations to Bill 27.

In an exchange of letters in early December, 2005, the Chair of the ALRB took the position that the Labour Board "had no role in influencing the policy decision." He added, "Nor should it have such role. Such policy determinations are completely the responsibility of the legislature and are not the role or the mandate of the Labour Relations Board."<sup>21</sup>

The Chair elaborated on the role of the ALRB as providing "technical advice on how to implement these policy decisions."<sup>22</sup> The Alberta Federation of Labour responded that what is characterized by the Chair as technical advice "crossed a line." A separate dispute regarding the fate of the disclosed documents has continued to embroil the parties. Whether the new facts cast doubt on the initial judgment of the Alberta Court of Queen's Bench regarding the allegations of bias remains uncertain. Both the AFL and the opposition Liberals have called for a public inquiry into this matter. The purpose of this Report is not to further investigate the factual underpinnings of the current controversy but rather to explore the broader implications of the facts as set out for the proper role of adjudicative tribunals in relation to Government policy-making. It is to these implications that I now turn.

<sup>19</sup> *Ibid.* at para. 48.

<sup>20</sup> The documents can be found at <http://www.afl.org/campaigns-issues/lrb/default.cfm>. The Alberta Court of Queen's Bench held that the documents inadvertently released by the Commissioner were not privileged and that they had disseminated them before being made aware of the mistake of the Commissioner, *Alberta (Information and Privacy Commissioner) v. Alberta Federation of Labour*, [2005] A.J. No. 1776 (December 6, 2005).

<sup>21</sup> Letter from Chair Mark Asbell to Gil McGowan, President of the AFL, December 1, 2005 at <http://www.afl.org/upload/lrb-dec1-05-ltr.pdf>.

<sup>22</sup> *Ibid.*

<sup>23</sup> Once again, in this sense, the analogy to judicial independence holds. See Binnie J. (in dissent) in *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405.

## Questions to be Addressed

This Report will address three questions:

- 1) Was the role of the ALRB (and its Chair and Vice Chair) in the development and drafting of Bill 27 improper or likely to lead to a reasonable apprehension of bias or a lack of independence on the part of the Board in its adjudicative role in interpreting and applying the new legislation?
- 2) What is the role of a Labour Board in relation to the development and drafting of labour legislation in other Canadian jurisdictions? What are the requirements, if any, of transparency with respect to such a role for a Board in other jurisdictions?
- 3) What is the extent of a Labour Board's legitimate role, if any, in the policy-making process generally?

## Analysis

In this analysis, each of these three questions will be addressed in turn.

### 1) Was the role of the ALRB (and its Chair) in the development and drafting of Bill 27 improper or likely to lead to a reasonable apprehension of bias or a lack of independence on the part of the Board in its adjudicative role in interpreting and applying the new legislation?

Prior to expressing a view on whether the allegations of the unions in relation to the Chair of ALRB and the drafting of Bill 27 would constitute a reasonable apprehension of bias, it is necessary to set out the prevailing legal standard.

#### 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 but rather a right enjoyed by those whose claims and disputes are adjudicated by that tribunal.<sup>23</sup> Tribunals constitute a part of the executive branch of government. Much of the particularity and the peculiarity of institutional independence in Canadian administrative law, however, arise 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. This perception test is referred to as a “reasonable apprehension of bias”. The test was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*,

the 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 person, viewing the matter realistically and practically - and having thought the matter through - conclude.”<sup>24</sup>

In *Valente v. The Queen*,<sup>25</sup> 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”.<sup>26</sup> 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.<sup>27</sup>

While administrative tribunals are viewed as part of the executive branch in a separation of powers context,<sup>28</sup> the Court has adopted the framework of institutional independence for administrative bodies directly from this judicial framework.<sup>29</sup> 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*,<sup>30</sup> the Supreme Court

of Canada held that the test for institutional independence enunciated in *Valente* applied, with added flexibility, to administrative tribunals.<sup>31</sup> 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* (1990), 68 D.L.R. (4th) 524, [1990] 1 S.C.R. 282, 42 Admin. L.R. 1, in which the independence of the Ontario Labour Relations Board was at issue. There, Gonthier J. stated at p. 561:

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

I agree and conclude that it is a principle of natural justice that a party should receive a hearing before a tribunal which is not only independent, but also appears independent. Where a party has a reasonable apprehension of bias, it should not be required to submit to the tribunal giving rise to this apprehension. Moreover, the principles for judicial independence outlined in *Valente* are applicable in the case of an administrative tribunal, where the tribunal is functioning as an adjudicative body settling disputes and determining the rights of parties. However, I recognize that a strict application of these principles is not always warranted.<sup>32</sup>

Lamer C.J. concluded that the *Valente* principles apply to administrative tribunals on the basis of natural justice principles, but that the test for institutional independence may be less strict than for courts.<sup>33</sup>

The Court has recognized that where a tribunal has more than one function (for example, making policy, prosecuting regulatory offences and adjudication), this commingling of functions without internal safeguards can lead to a reasonable apprehension of bias. This issue was addressed in *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*.<sup>34</sup> In *Régie*, the Court clarified and refined

<sup>24</sup> [1978] 1 S.C.R. 369 at p. 394

<sup>25</sup> (1985), 24 D.L.R. (4th) 161 (S.C.C.) [hereinafter *Valente*].

<sup>26</sup> *Ibid.*, at 168.

<sup>27</sup> *Ibid.*, at 169-70

<sup>28</sup> As Katrina Wyman put it, “The doctrine of tribunal independence is not concerned with establishing administrative tribunals as a fourth branch of government”: K. Wyman, “The Independence of Tribunals in an Era of Ever Expanding Judicial Independence” (2001) 14 C.J.A.L.P. 61 at 100. See also J.M. Brown & J.M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 1998, Looseleaf) at 11:4120, who note that where an executive body appears before an executive tribunal, a conflict does not inherently arise.

<sup>29</sup> In earlier cases, such as *I.W.A. v. Consolidated Bathurst* (1990), 68 D.L.R. (4th) 524 at 561 (S.C.C.), the term “judicial independence” was used by this Court to characterize the common law standards applicable to a labour tribunal.

<sup>30</sup> (1995), 122 D.L.R. (4th) 129 (S.C.C.) [hereinafter *Matsqui*].

<sup>31</sup> While Sopinka J. appeared to write for the greatest number of judges on this point, it is Lamer C.J.’s decision which has become the predominant articulation of institutional independence in Canada.

<sup>32</sup> *Ibid.*, at paras. 75, 79 & 80.

<sup>33</sup> *Ibid.*, at paras. 83-85.

<sup>34</sup> (1996), 140 D.L.R. (4th) 577 (S.C.C.) [hereinafter *Régie*].

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 (i.e., without cause).

Thus, in *Regie*, 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*,<sup>35</sup> where the Ontario Court of Appeal considered the issue of institutional independence in the context of a labour relations tribunal.<sup>36</sup> 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.”<sup>37</sup> 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 naïve not to recognize that elected governments must have room to make political decisions and to conduct themselves in a manner to assure that their political policies are implemented. We were told by counsel that, until recently, the practice over the past 25 years has been to make appointments to tribunals that have *quasi-judicial* functions for a fixed period

of three years with the expectation gleaned from experience that in normal circumstances there would be repeated renewals of that term. There are many tribunals, agencies and boards in this province, each with different responsibilities, and it would be difficult to lay down any single rule or practice that would be suitable for all. That having been said, the Ontario Labour Relations Board in its quasi-judicial functions must of necessity maintain a public perception of independence from government if the public is to have any respect for its decisions. *Indeed, it is difficult to imagine how any tribunal with quasi-judicial functions could maintain the appearance of integrity to those who appear before it, without some degree of independence.*

The limits of tribunal independence in the face of the clear policy direction of the Government was the subject of the Supreme Court’s landmark decision in *Ocean Port*. 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.<sup>38</sup>

*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.<sup>39</sup>

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:

<sup>35</sup> (1998), 7 Admin. L.R. (3d) 257 (S.C.C.) [hereinafter *Hewat*].

<sup>36</sup> For discussion of the significance of this case, see Katrina Wyman, *Appointments to Adjudicative Tribunals: Politics and Courts* (1999) 52 U. of T. Fac. L. Rev. 101. See also C. Flood, “*Hewat v. Ontario*” (1998) C.L.E.L.J. 263.

<sup>37</sup> *Ibid.*, at para. 12.

<sup>38</sup> For a more detailed appraisal of *Ocean Port*, see P. Bryden, “Structural Independence of Administrative Tribunals in the Wake of *Ocean Port*” (2003) 16 C.J.A.L.P. 125; and L. Sossin, “Developments in Administrative Law: the 2001-2002 Term” (2002) 18 Supreme Court Law Review (2nd) 41-74.

<sup>39</sup> *Ibid.*, at para. 20.

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

However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. ... Ultimately, it is Parliament or the legislature that determines the nature of a tribunal’s relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislature’s intention in assessing the degree of independence required of the tribunal in question.<sup>40</sup>

The Court clarified the scope and implication of *Ocean Port* in *Bell v. CTEA* – 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).<sup>41</sup>

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 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. It is not adequate to characterize a tribunal as “quasi-judicial” on the basis of one of its functions, while treating another aspect of the legislative scheme creating this tribunal – such as the requirement that the tribunal follow interpretive guidelines that are laid down by a specialized body with expertise in that area of law – as though this second aspect of the legislative scheme were external to the true purpose of the tribunal. All aspects of the tribunal’s structure, as laid out in its enabling statute, must be examined, and an attempt must be made to determine precisely what combination of functions the legislature intended that tribunal to serve, and what procedural protections are appropriate for a body that has these particular functions.<sup>42</sup>

In *Ocean Port*, McLachlin C.J. characterized tribunals as spanning “the constitutional divide between the judiciary and the executive”.<sup>43</sup> This very metaphor suggests a set of institutions which, functionally at least, operates 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.”<sup>44</sup>

It is worth emphasizing that the leading case law from the Supreme Court of Canada, discussed above, explores the requirement of independence for tribunals in terms of objective and structural features (e.g. security of tenure, etc). There is far less guidance when it comes to improper communications between tribunals and

<sup>40</sup> *Ibid.*, at para. 20-22.

<sup>41</sup> See, for example, *Bell Canada v. Canadian Telephone Employees Assn.*, [1998] 3 F.C. 244 (T.D.).

<sup>42</sup> *Bell*, at para. 22.

<sup>43</sup> *Ibid.* at para. 22.

<sup>44</sup> *Ibid.* at para. 12.

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).<sup>45</sup>

b) The Application of this Legal Standard in the ALRB/Bill 27 Context

The legal challenge by the unions to the involvement of the ALRB in the drafting of Bill 27 was heard by Watson J. of the Alberta Court of Queen’s Bench in January of 2004. The unions argued not only was 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.

In dismissing this application, it is important to our considerations that the Board is not declining original jurisdiction for which there is no alternative forum. The Applicants here have access to the courts. The Courts have the unquestioned authority and independence to address the issues raised, without the problems we have noted above. In our opinion, it is in every way more appropriate that we insist the Applicants pursue their case in that other forum, if they decide.<sup>46</sup>

The case was heard by the Alberta Court of Queen’s Bench. In *C.E.P., Local 707 v. Alberta (Labour Relations Board)*,<sup>47</sup> 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. In this regard, Watson J.’s held:

[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.

As demonstrated by the numerous cases on standard of review, such as *Pushpanathan*, it is expected that the tribunal be “expert” - and that is one of the reasons the tribunal gets deference, not one of the reasons it should be overturned.

Asking myself, therefore, whether a well-informed person, looking at the matter realistically and practically under 2747-3174 *Québec Inc. [Regie]*, would question the impartiality and independence of ALRB or

<sup>45</sup> This idea of “corporate taint” was discussed in *E.A. Manning Ltd. v. Ontario Securities Commission* (1995) 125 D.L.R. (4th) 305 (Ont. C.A.) leave to appeal to the S.C.C. refused 125 D.L.R. (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 332)

<sup>46</sup> ALRB decision, paras. 58-60.

<sup>47</sup> 2004 ABQB 63.

its members on the basis that they might have carried with them, or possess, even a fixed view that it is necessary to move expeditiously with their Legislative assignment, I conclude that no reasonable person would think so.

Moreover, I am not persuaded that a reasonable person's view of such a conclusion would be affected by the fact in this case that Minister Dunford in the Legislature saw fit to repeat what the Code already said to that effect. The fact that Minister Dunford made obscure references to some sort of efficiency plan or objective should not be taken out of context and, in my view, does not elevate the concern as to impartiality or independence to a troubling level.

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 *Newfoundland Telephone* and *Consolidated Bathurst, Ellis-Don*.<sup>48</sup>

Watson J. concluded:

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....

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 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. (footnotes omitted)<sup>49</sup>

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 appears to me to be an unduly 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. I do not believe this to be an accurate statement of the applicable legal standard. That said, the purpose of this report is not to present a specific critique on the correctness of the decision of the Alberta Court of Queen's Bench.

Since the decision of the Court was released in January of 2004, other revelations of the Chair and Vice Chair's involvement in the legislative process have surfaced (as mentioned above). The substance of the new documents does not significantly alter the allegations as they existed at the time of the judicial review but does provide more detailed evidence of the nature and scope of the contacts between the Government and the Board.

Whether or not the contact between the ALRB Chair and the Government rendered future adjudication by the Board on matters relating to Bill 27 invalid, it clearly has adversely affected the confidence of key stakeholders in the impartiality and independence of the Board. The Government has been recognized to have a "significant interest" in the outcomes as well as the process of interest arbitration in the health services field.<sup>50</sup>

Independence and impartiality engage the spirit of administrative law as well as its letter.

An analogy might be found in a recent report on the independence and impartiality of the adjudicative function undertaken by the Ontario Securities Commission (OSC). In 2003, former Court of Appeal justice Coulter Osborne was commissioned to head a committee (referred to as the "fairness committee") to report on the independence and impartiality of the Ontario Securities Commission.<sup>51</sup> The Osborne Report accepted that the involvement of the OSC both in policy-making and adjudication was not unlawful by the prevailing standards of the Supreme Court,<sup>52</sup> but nonetheless was problematic in that those who come before the adjudicative panel of the OSC could not be confident that those same members would not also have had a role in shaping the policies to be enforced. Based on the perception that these "structural problems"

<sup>48</sup> Ibid. at paras. 208-212.

<sup>49</sup> Ibid. at 235-236.

<sup>50</sup> See the Supreme Court's observations in this regard in *CUPE v. Ontario (Ministry of Labour)* 2003 SCC 29 at para. 116 per Binnie J. In his majority judgment in this case, Binnie J. cited with approval the observations of Owen Shime, a labour arbitrator quoted in *McMaster University and McMaster University Faculty Assn.* (1990), 13 L.A.C. (4th) 199, at p. 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."

<sup>51</sup> See the Committee's report at [http://www.osc.gov.on.ca/Regulation/FiveYearReview/fyr\\_20040818\\_fairness-committee.pdf](http://www.osc.gov.on.ca/Regulation/FiveYearReview/fyr_20040818_fairness-committee.pdf).

<sup>52</sup> Ibid. at pp.73-74.

compromised confidence in the impartiality of the Commission, the Osborne Report recommended bifurcating the policy-making and regulatory roles of the OSC from its adjudicative functions – this recommendation was accepted by the Government (although it has yet to be acted upon).

A similar approach may be warranted in the context of the ALRB. While the involvement of the Chair and Vice Chair in the development of Bill 27 may not have been unlawful (though this remains, in my view, an open question in light of the recent disclosures), that is not to say the involvement of the Board in the legislative process was appropriate or legally sanctioned. 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. The propriety of 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.

## 2) What is the role of a Labour Board in relation to the development and drafting of labour legislation in other Canadian jurisdictions? What are the requirements, if any, of transparency with respect to such a role for a Board in other jurisdictions?

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 I 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.

### 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, for instance, the administration of George Drew and his labour minister Charles ‘Tod’ Daley were forced to concede certain elements of collective bargaining legislation in 1943 when the Co-operative Commonwealth Federation

formed the official opposition in a minority parliament. The Tories answer was the creation of a labour court, which was staffed with judicial administrators. Organized labour, however, fared poorly before this judicial board and the Tories were pressured to replace the judicial form of collective bargaining regulation with an expert administrative board, which became the Ontario Labour Relations Board, headed by University of Toronto law professor Jacob Finkelman.<sup>53</sup>

In 1944, the federal government endorsed a formal collective bargaining policy with the passage of the Industrial Relations and Disputes Investigation Act, 1948. For the most part, the provinces followed the federal government's lead and passed similar legislation of its own.<sup>54</sup> For most observers, the passage of these acts represented a far more formal and structured form of industrial relations than what had come before.<sup>55</sup> Under this model, the industrial relations process would be administered by third party—neither a political nor legal actor—who could expertly weave through the contentious environment of industrial relations. In order to accomplish this goal, the administrative tribunals became a neutral ground in which employers, employees and legal experts could meet.

In the early years, these boards took significant steps to solidify their positions under their parent legislation, creating an atmosphere of distinctive spheres as between the board, the courts and the government. Jacob Finkelman, for instance, chair of the Ontario Labour Relations Board from 1945-1949 and again from 1953-1967 took painstaking steps to insulate the OLRB from partisan attacks from hostile Conservative back benchers or company lawyers, eager to limit the power of the board to promote (or even expand) collective bargaining. For instance, in the early 1950s Finkelman's board was challenged from a significant court decision which quashed a board decision on the principles of natural justice, despite a strongly worded privative clause which was suppose to prevent judicial review of board decisions.<sup>56</sup> 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 immediately after the decision by the chairman were meant to insulate, to all degrees possible, the board from direct interference between the board and external actors.<sup>57</sup> Finkelman's response later in the decade was to enshrine the rules of the board within three principles of natural justice: i) the opportunity to

<sup>53</sup> See Judy Fudge and Eric Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948* (Toronto: Oxford University Press, 2001), 272.

<sup>54</sup> There was significant pressure from the Labour movement for a national labour code after the war. Corporation lobbying, however, combined with earlier decisions by the Judicial Committee of the Privy Council soon ended any discussion of a national labour code. See *Toronto Electric Commissioners v. Snider* [1925] A.C. 396. The result was a labour relations policy which was highly fragmented between the federal government and ten provincial jurisdictions. In many cases, this fragmentation led to a highly uneven and fragmented post-war labour policy. For an analysis of these results, see H.C. Pentland's critique for the Woods Commission, “A Study of the Changing Social, Economic, and Political Background of the Canadian System of Industrial Relations,” *Report on the Task Force on Labour Relations (The Woods Commission)* No. 1 (Ottawa: Privy Council Office, 1968).

<sup>55</sup> Canadian Industrial Relations, *The Report of the Task Force on Labour Relations* (Ottawa: Privy Council Office, 1968), 19.

<sup>56</sup> *Re Toronto Newspaper Guild, Local 87, American Newspaper Guild and Globe Printing Company* [1951] O.R. 435, [1951] 3 D.L.R. 162; [1952] O.R. 345 (C.A.), [1952] 2 D.L.R. 302; [1953] 2 S.C.R. 18, [1953] 3 D.L.R. 561. (this would become known as the *Gale* decision)

<sup>57</sup> See Finkelman interview in, F. David Millar, *Shapes of Power: The Ontario Labour Relations Board, 1944 to 1950* (Unpublished Ph.D. Thesis, York University 1980), 383-386.

be heard; ii) disclosure to the parties of the facts and considerations upon which the Board bases its decision; and iii) impartiality.<sup>58</sup>

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 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 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 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.<sup>59</sup>

Of course, this did not leave the public service or the labour board free from criticism. Speaking in the Ontario House of Commons in 1962, Elmer Sopha, a Liberal from Sudbury criticized the overly legalistic approach to labour relations molded by Charles Daley's labour department and argued that the “chairman of the Board writes all amendments to the Act—layman unable to understand them without legal assistance.” which itself crafted a form of labour policy making it difficult, if not impossible for regular trade unionists to see the board as accessible.<sup>60</sup>

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.<sup>61</sup> 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 to take root across provincial labour boards. In no way, however, did the Chair of the OLRB feel that this 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, “it's a matter of policy over which the OLRB has no jurisdiction,” said asking to be excused from answering it. Gordon responded by stating he was very disappointed “that you didn't feel it proper to express view on it.”<sup>62</sup>

In many ways, these early examples set the precedent for which modern labour boards operate. There is room, of course, for board personnel to advise or seek advice from government. But Finkelman seemed to make it clear that such advice never crossed the jurisdictional boundaries in which labour boards operate. In many ways, Finkelman's behaviour seemed to correspond to George Adam's view (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.”<sup>63</sup>

These guiding principles seemed to have permanently 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

<sup>58</sup> Jacob Finkelman, *The Ontario Labour Relations Board and Natural Justice* (Kingston: Industrial Relations Centre Queen's University, 1965), 2.

<sup>59</sup> Testimony of Jacob Finkelman, *Proceedings of the Select Committee on Labor Relations*, (Archives of Ontario RG 49-138 Box C 89 Proceedings of Select Committee on Labor Relations), 190

<sup>60</sup> Ontario Hansard, P.2954ff, 1962.

<sup>61</sup> For instance, on the advice of Finkelman an amendment was passed to provide for succession of bargaining rights in case of merger or amalgamation of certified trade unions following the merger of the TLC and the CCL. In 1957, Finkelman recommended that after the verdict in *Canadian General Electric Co. Ltd. versus the OLRB*, the act had to be amended to provide the Board power to deal with questions relating to certification and those workers deemed to exercise managerial functions.

<sup>62</sup> “Gordon Disappointed” *Globe and Mail*, 23 January 1959, 4.

<sup>63</sup> George W. Adams, *Canadian Labour Law* (Canada Law Textbook, 1985).

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 independence doctrine from government interference.

In British Columbia, to take another notable example, the Labour Board under the chairmanship of Paul Weiler 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 which was usually under the purview of the courts. The amalgamation of these functions, Weiler contended, gave the board administrative autonomy from both overt government intervention or judicial tinkering. Under such a 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*.”<sup>64</sup> Under BC’s NDP government, the labour board was widely seen by experts as being fiercely independent, as the Labour Minister Bill King had insisted on a non-partisan attempt to mediate the conflicting sides of BC’s political economy. Weiler maintained that it was the Labour Minister’s view that “polarization of labour law reform had to stop if there was a real chance of moderating the level of conflict on the ground.”<sup>65</sup> Yet, while the NDP’s labour code was widely heralded by labour experts as being the most far reaching for its time, both management and labour were wary of Weiler’s role on the board. Labour was especially suspicious as they saw the NDP’s attempts to reach out to the business community as a betrayal of their core principles. Yet, as Weiler himself recognized, it was the attempt by both the government and the board to separate the administrative sides of collective bargaining and labour relations from the partisan politics of the political parties which saved the Labour Code from being dismantled by the Social Credit party returned to office in 1975. What seemed to be consistent in the Weiler-led reforms was a commitment by both labour and management (and through their respective political parties) 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.

### b) The Evolving Importance of Independence

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. Such an example was paramount in Saskatchewan in the 1980s when the Saskatchewan labour board seemed to be taking an overly “government line” in deciding cases. In one instance, Conservative appointment Dennis Ball ruled that management in Safeway Ltd. store could change wages and working conditions in an expired contract without the union’s consent despite a section in the province’s Trade Union Act that would make it illegal for an employer to take such action without the consent of the union.<sup>66</sup> In 1986, similar cries were heard from the Alberta Federation of Labour who cited a “conservative climate” of labour board decision making for de-legitimizing the entire system of post-war labour relations.<sup>67</sup>

By the mid-1980s, the Provinces were willing to openly eliminate collective bargaining procedures (and end legal strikes) if it sought their legislative means.<sup>68</sup> Throughout this time period, the many state actors claimed that the move away from “free” collective bargaining would be temporary, although as Leo Panitch and Donald Swartz have demonstrated, many of these temporary measures were soon entrenched as permanent policy.

Perhaps the few exceptions to the open embrace of neo-liberalism through a coercive industrial relations policy by the federal and provincial governments has been the continued reliance on tripartite boards and tribunals to regulate certification procedures while being the ultimate arbitrator of collective bargaining procedures. While governments may take drastic action to end strikes or even eliminate collective bargaining rights for some (mainly public sector) workers, the boards themselves have maintained a permanent fixture in the industrial relations setting primarily because they continue to maintain the non-partisan legitimacy built up during the 1950s and 1960s. For both unions and employers, the labour boards continue to be a neutral site to mediate certification, mediation and strike activity. Or, to be more candid, while the Labour Boards and their members were empowered to interpret government legislation, they did so as,

...professional adjudicators who were prepared and (indeed bound to) implement any duly-enacted legislation, regardless of their personal views. The was not just a matter of integrity; it was also a statutory duty, as the *Interpretation Act* makes clear...this

<sup>64</sup> Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980), 299.

<sup>65</sup> *Ibid.*, 6.

<sup>66</sup> Lorne Slotnick, “Labor Board rangles Saskatchewan unions,” *The Globe and Mail*, 19 April 1986, 8.

<sup>67</sup> Lorne Slotnick, “Alberta unions take aim at labor laws, but roots of trouble run much deeper,” *The Globe and Mail*, 19 June 1986, 3.

<sup>68</sup> For an overview of the uneven nature of these policies throughout the provinces see the essays in, Mark Thompson, Joseph B. Rose and Anthony E. Smith eds., *Beyond the National Divide: Regional Dimensions of Industrial Relation* (Montréal: McGill-Queen’s University Press, 2003).

professional fidelity to the legislation passed by government is a central tenet of the theory of tribunal independence.<sup>69</sup>

In practice, Canadian labour boards were able to maintain this independence because government's were not willing to openly dismantle the administrative side of labour relations because they maintained such a high degree of respect amongst both employer's and unions.

In many jurisdictions, however, reform to labour legislation deliberately tampered with the administrative side of industrial relations policy. In Ontario, the New Democratic Party introduced their long awaited reforms to the Ontario Labour Relations Act (OLRA) in 1993. Contained within the package of reforms were various commitments to organized labour (Bill 40), including an easing of certification requirements, the extension of organization rights to workers previously left outside the Act,<sup>70</sup> a loosening of restrictions on secondary picketing and boycotts, and a ban on replacement workers ("anti-scab" legislation).<sup>71</sup> In management and business circles, the NDP amendments to the OLRA were criticized as being an overtly political document which was seen to reward their supporters while doing little to advance the cause of industrial relations in the Province.<sup>72</sup> Similarly, after the defeat of the NDP by the rejuvenated Conservative party in 1995 the government aggressively introduced labour law reforms (Bill 7) that was universally criticized by labour groups as being overly heavy-handed and too pro-business. The Conservative reforms erased all the NDP amendments and tightened restrictions on certification, eliminated union successor rights, removed the remedial certification powers of the OLRB, and made it easier for companies to contract out work and eliminate union jobs.<sup>73</sup>

Surrounding much of the debate regarding the NDP's Bill 40 and the Conservative's response in Bill 7 there was an intense criticism from experts in labour policy denouncing both the Conservatives and the NDP for overly "politicizing" the labour relations framework. Writing in 1998, for instance, former OLRB chair Kevin Burkett argued that in the late 1990s "labour law" was held hostage by overt political actors who were using the law for partisan gain. In light of the economic environment fostered by the free trade agreement in 1988, he writes,

One could have expected that Ontario Labour Law reform would seek to meet

this challenge by means of an open and deliberative process that would draw upon the best that labour, management, and academia had to offer. Instead we received something quite different; one-sided labour law reform produced without meaningful consultation that has since spawned a second round of one-sided labour law reform, also produced without meaningful consultation, which has left a legacy of division, one-upmanship and uncertainty. Ontario deserved better.<sup>74</sup>

Such an analysis seemed to be consistent with many industrial relations experts, who suggested that the overly political nature of the NDP's labour law reforms, "shifted the legal balance in labour-management disputes in labour's favour."<sup>75</sup> The assumption here is that since the Second World War, labour policy has evolved to become a natural mediator between three equally competing groups: management, unions, and state officials. Between the years 1943 and 1985, as mentioned earlier, Ontario was dominated by the Conservative party. The policies that emerged from that government, while not as openly hostile as the Ontario Conservative government in 1995, reflected the product of a business aligned government who supported collective bargaining inasmuch as it was an institution that could not be avoided. In 1945, for instance, organized labour had virtually ground the province to a standstill through a concentrated strike effort in the mines and in the auto plants. The 1945 strike in Windsor's Ford plant gave rise to Ivan Rand's famous "formula" for union security, and paved the way for the eventual formation of the *Ontario Labour Relations Act* and the creation of the OLRB.<sup>76</sup>

Thus, a brief review of the history of the role of the Board in the development of labour policy and legislation reveals significant changes over time. There are several reasons for these changes.

First, the role of the 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.

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 role of someone like Jacob Finkelman in the development of labour

<sup>69</sup> Judith McCormack, "Comment on the 'Politicization of the Ontario Labour Relations Framework in the 1990s,'" *Canadian Labour and Employment Law Journal* 6 (1999): 343.

<sup>70</sup> This provision extended unionization rights to domestic workers, agricultural and professional groups.

<sup>71</sup> For an overview of these changes see Christopher Schnek, "Fifty Years After PC 1003: The Need for New Directions," in Cy Gonick, Paul Phillips and Jesse Vorst eds., *Labour Gains, Labour Pains: 50 Years of PC 1003* (Halifax: Fernwood, 1995), 197-8.

<sup>72</sup> Virginia Galt, "Business finds solidarity in war of ideologies," *The Globe and Mail*, 4 February 1992, A5. The amount of business opposition to the Labour Law reforms was, according to business leaders themselves unprecedented in the history of Ontario. According to these same groups, the three coalitions that were created in 1991 and 1992 (*Project Economic Growth, The All Business Coalition and The More Jobs Coalition*) represented the collective effort of 85% of all private sector employers.

<sup>73</sup> See the review of these reforms in Leo Panitch and Donald Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms*, 3d ed. (Toronto: Garamond, 2003), 189-90.

<sup>74</sup> Kevin M. Burkett, "The Politicization of the Ontario Labour Relations Framework in the 1990s," *Canadian Labour and Employment Law Journal* 5 (1998): 168.

<sup>75</sup> John Crispo quoted in the *Globe and Mail*. See James Rusk, "Instability predicated for firms in Ontario," *The Globe and Mail*, 6 October 1995, A7.

<sup>76</sup> Millar, *Shapes of Power*, supra .

policy was the confidence of stakeholders in the independent judgment of non-partisan experts (Paul Weiler and 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 1979-1995) as the rules of natural justice expanded to embrace institutional impartiality and independence as norms of fairness (see the discussion above).

Together, 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 I now turn.

### 3) What is the extent of a Labour Board's legitimate role, if any, in the policy-making process generally?

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). As Laverne Jacobs observed in the context of the ALRB/Bill 27 controversy, "It is difficult to form an opinion as to whether the Board and the government have acted inappropriately. What makes this decision difficult is not a lack of facts. Although we do not have the fullest set of information, what stumps the reader of this case or one who hears about it is the lack of guideposts we have about the nature and purpose of administrative tribunals."<sup>77</sup>

While visible guideposts may be elusive, it is clear that the nature of the adjudicative functions of the ALRB 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 and is part of the executive branch, however, it is impossible to conclude that it may **never** be part of the policy-making process. In my view, it is preferable to see the involvement of

the Board in the policy and/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, I discuss specific factors that might justify such a role for Board members.

### **Policy-Making by Labour Boards**

First, a justification for the involvement of the Board in policy-making may be transparency. 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.<sup>78</sup> 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 that 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 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 of legitimacy for the Board's involvement. In the Bill 27 context, if the Board had completed its hearing on the restructuring prior to the legislation being announced, that legislative process might well have built on the input of the Board and the submissions of the parties who participated in its process.

### **Statutory Direction**

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. For example, section 115 of the *Ontario Labour Relations Act* provides:

### Reference of questions

115. (1) The Minister may refer to the Board any question which in his or her opinion relates to the

<sup>77</sup> Laverne Jacobs, "Reconciling Independence and Expertise within the Expert, Multifunctional Tribunals" (unpublished paper).

<sup>78</sup> See F. Houle & L. Sossin, "Tribunal Policy-Making" (2006) 42 *Canadian Public Administration* (forthcoming).

exercise of his or her powers under this Act and the Board shall report its decision on the question.

### Same

(2) If the Minister refers to the Board a question involving the applicability of section 68 (declaration of successor union) or 69 (sale of a business), the Board has the powers it would have if an interested party had applied to the Board for such a determination and may give such directions as to the conduct of its proceedings as it considers advisable. 1995, c. 1, Sched. A, s. 115.

The existence of such provisions suggests that where such reference jurisdiction is available, it may be the 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.

### The Technical/Substantive Distinction

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 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 (as illustrated by the exchange of correspondence between the ALRB and AFL in relation to the Bill 27 controversy). 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, but others may view it as fundamentally altering the access to the Board and privatizing dispute resolution.

Given the importance of mutual acceptability to the credibility and effectiveness of a labour board, only those matters which employer and union groups agree to characterize as “technical” should be the subject of routine consultation between the Board and the Government (this is also, of course, predicated on disclosure of such consultations). Where a Board Chair or Vice Chair agrees to be consulted on a matter because it relates to a “technical” matter, the onus rests squarely on

the Board Chair or Vice Chair to disclose that consultation and to justify, if challenged, the judgment that the matter in question was merely technical or procedural.

### Degree of Involvement

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 which 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.

### Motivation for Involvement

Fifth, as part of that contextual analysis, it is necessary to distinguish between a Government which seeks an independent view on legislation (and turns in that search to the Chair of a Labour Board) and a Government which 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 of Finkelman in the 1950s were 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.

### **Conclusions and Recommendations**

Labour Boards are creatures of the executive branch of government. They are funded by the executive and may be subject to executive-led procedures, practices and policies. Labour Boards are also adjudicative bodies which 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, in turn, should serve not as a minimum standard but as a catalyst for a culture of adjudicative integrity, propriety and transparency.

Of course, because these are common law and not Constitutional guarantees, it may remain 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.

Having presented an analysis of the state of the law, the evolving practice across Canada and the circumstances which may justify limited Board involvement in policy-making, I offer the following conclusions and recommendations

## Conclusions

### Conclusion - Question 1

The issue of the legality of the ALRB Chair's participation in the drafting of Bill 27 has been addressed by the Alberta Court of Queen's Bench (while allegations relating to the role of the Vice Chair surfaced for the most part subsequent to that hearing). The issue is not simply whether the Court was correct in finding no reasonable apprehension of bias in relation to the Board's involvement in the policy-making and legislative process, but rather a broader assessment of public confidence and stakeholder credibility in the ALRB. There is little doubt that the undisclosed involvement of a Board Chair in a legislative process perceived by organized labour to be adverse to the interest of workers in Alberta is problematic and damaging. Legal standards set out minimum requirements for validity. They do not set the parameters for what is acceptable in preserving and promoting the independence of a labour board.

### Conclusion – Question 2

There is no clear rule of practice in Canadian jurisdictions on Board involvement in the policy and/or legislative process, but there is an evolving consensus on this issue. The relationship between labour boards and provincial governments has been evolving in the past decades, 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, 1990s when one finds fewer instances of this kind of involvement and more controversy associated with those occurrences.

It is not simply a matter of the evolution of practice. The appointment practices to labour boards and the Government's role in labour policy have also evolved considerably over this period, as has the applicable administrative law standards. The expectation of fairness and independence has been heightened and the scrutiny of labour board appointments has been intensified. 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.

### Conclusion – Question 3

Determining whether the participation of a Board Chair or Vice Chair in a policy or legislative process is appropriate requires a contextual analysis. It is not possible to say that such participation is never appropriate, but there is a basis to conclude that such participation always requires justification. The following criteria might be used in assessing whether such participation may be justified in the context:

- a) the extent to which the Government lacks capacity and expertise and requires the capacity and expertise of the Board Chair and Vice Chair
- b) the extent to which the participation of the Board Chair and Vice Chair is disclosed to all of the Board's key stakeholders and not opposed (or, if there is opposition, the extent to which a forum is provided for that opposition to be expressed and considered)
- c) the extent to which the legislation or policy directly affected the operation and practice of the Board (as opposed to labour policy more generally)

## Recommendations

- Where Government wishes to have the option of involving a Labour Board in the development of labour legislation, a specific reference power should be added to the empowering legislation of the Board. This power should set out the transparency both of the questions put to the Board by Government and the answers provided.
- Where the legislation is silent on the mechanisms by which the Government may communicate with the Labour Board on questions of legislative initiative, the Board itself should develop and issue guidelines. These guidelines should indicate the kinds of Government activities in which a Board Chair or member may be involved (for example, statutory provisions dealing with Board practice, access to Boards and the jurisdiction of the Board), how this information is to

be disclosed and how the impartiality and independence of the Board is to be assured (for example, providing for the recusal of Board members in appropriate circumstances). These guidelines should be available to the public.

- Unless expressly authorized by statute or contemplated by guidelines, no member of a Labour Board should have a direct role in drafting labour legislation which is undisclosed to unions and employers. Where allegations are made of improper contact between Board members and Government, the Board should at first instance undertake an investigation and issue a formal response.





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