Ocean Port or the Rule of Law?
The Saskatchewan Labour Relations Board

S. Ronald Ellis and Mary E. McKenzie[*]

The Saskatchewan government's March 2008 mid-term termination, without cause, of the appointments of the SLRB's neutral members – the Chair and Vice-Chairs – in reliance on a statutory, at-pleasure appointments provision, presents the constitutional issue addressed in McKenzie*: whether* Ocean Port *rules out the applicability of the unwritten constitutional principle of judicial independence to adjudicative tribunals. Without reference to relevant authorities, the Court of Queen's Bench for Saskatchewan, relying on* Ocean Port*, dismissed a union challenge, holding that the SLRB's statutory "at-pleasure appointments regime" overrides the common law prohibition of at-pleasure adjudicative appointments and, moreover, is not incompatible with Board independence or impartiality. Union concerns about independence and impartiality are dismissed as both "theoretical" and, in light of other "safeguards", such as the oath of impartiality and the tradition of respected Board appointments, unwarranted. The authors, both committed to constitutional protection of adjudicative tribunal independence and impartiality, respond.*

La révocation à mi-mandat, en mars 2008, des membres neutres du SLRB - son président et ses vice-présidents - par le gouvernement de la Saskatchewan s'appuyant sur une disposition statutaire prévoyant la possibilité de faire des nominations à titre amovible soulève la question constitutionnelle, traitée dans l'affaire McKenzie*, de savoir si, en vertu de la décision rendue dans l'affaire Ocean Port*, le

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principe constitutionnel de l'indépendance judiciaire s'applique aux tribunaux d'arbitrage. Sans faire référence aux autorités applicables, la Cour du Banc de la Reine de la Saskatchewan, en s'appuyant sur l'affaire *Ocean Port, a rejeté une contestation judiciaire déposée par un syndicat au motif que le régime statutaire de la SLRB permettant des nominations à titre amovible l'emporte sur l'interdiction issue du droit commun à cet effet et, de plus, que ce régime n'est pas incompatible avec l'indépendance ou l'impartialité de l'organisme. Les inquiétudes soulevées par le syndicat au sujet de l'indépendance et l'impartialité n'ont pas été retenues au motif qu'elles étaient « théoriques », compte tenu de l'existence de pratiques comme le serment d'impartialité et la tradition voulant que les nominations des membres soient respectées. Prônant tous deux la protection constitutionnelle de l'indépendance et l'impartialité des tribunaux d'arbitrage, les auteurs répondent.*

PREFACE

Ocean Port[1] is the 2001 Supreme Court of Canada decision widely interpreted as putting to rest the possibility that the unwritten constitutional principle of judicial independence identified in the Court's 1997 decision in *PEI Reference*[2] might apply to adjudicative tribunals.

Some academics, practitioners and public policy-makers applauded that view, seeing that interpretation of *Ocean Port* as a salutary affirmation of the Sovereignty of Parliament and of the wisdom of taking the role of shaping and structuring these tribunals out of the hands of the courts and leaving them firmly in the hands of the legislatures that create them.[3]

There was then and continues to be a different point of view. An argument emerged – in the literature and in the jurisprudence – that that interpretation of *Ocean Port* would not be the final word on this subject.[4] Speaking to the annual training conference of Toronto clinics in April 2003, Ellis offered the following:

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1 *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 CarswellBC 1877, 2001 CarswellBC 1878, [2001] 2 S.C.R. 781 (S.C.C.) [hereinafter "*Ocean Port*"].

2 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CarswellNat 3038, 1997 CarswellNat 3039, [1997] 3 S.C.R. 3 (S.C.C.) [hereinafter "*PEI Reference*"].

3 See, especially, Kevin Whitaker, "What Must be Done to Modernize Tribunals: Challenges and Strategies" (presented to the Nova Scotia Adjudicative Board's Conference in December 2007). See also Katrina Miriam Wyman, "The Independence of Administrative Tribunals in an Era of Ever Expansive Judicial Independence" (2000-2001) 14 C.J.A.L.P. 61.

4 For a classic analysis of *Ocean Port's* administrative law context, see Philip Bryden, "Structural Independence of Administrative Tribunals in the Wake of *Ocean Port*" (2002-2003) 16 C.J.A.L.P. 125.

> . . . ten or fifteen years from now *Ocean Port's* place in the administrative justice system will be seen to have been principally important for the impetus it gave to a fundamental rethinking of our theory of administrative justice and to a more careful consideration of the nature of our administrative justice tribunals. In some future case, the Court will be faced with an administrative tribunal that is a rights tribunal but whose decision-makers, by reason of statutory provisions . . . clearly do not qualify as impartial or independent. In that future case, the Court will . . . be inevitably moved to reassert the role of the courts as the ultimate guardians of the rule of law in our administrative justice systems.[5]

The predicted future case did not take long to appear. In January 2006, the Supreme Court of B.C. heard argument in a five-day judicial review proceeding in *McKenzie*, a case involving a mid-term, without-cause termination of a B.C. residential tenancy arbitrator. For its authority to terminate the arbitrator from a then recently renewed and merit-based five-year term, the B.C. government had relied on a statutory provision that it interpreted as effectively converting the appointments of virtually all B.C. tribunal members to "at-pleasure" appointments.

The termination was challenged on a number of grounds, but the issue of national interest was the constitutional validity of the alleged at-pleasure provision. The government relied on *Ocean Port* as negating any constitutional protection for the residential tenancy arbitrators' independence. The Petitioner argued that, notwithstanding *Ocean* Port, the unwritten constitutional principle of judicial independence applied to the arbitrators, rendering the "at-pleasure" statutory provision constitutionally invalid and the termination null and void.

In September 2006, in a judgment written by Mr. Justice McEwan, the Supreme Court of B.C. distinguished *Ocean Port* and held that the unwritten constitutional principle of judicial independence *did* apply to B.C. residential tenancy arbitrators. The adjudicative function of those arbitrators could not, in the Court's view, be distinguished from the adjudicative function of courts. The at-pleasure statutory provision relied on by the government as authority for the termination of the arbitrator's appointment was declared constitutionally invalid.[6]

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[5] Ron Ellis, "Fair Hearings in an Ocean Port World" (2003) 18 J.L. & Soc. Pol'y 46.

[6] *McKenzie v. British Columbia (Minister of Public Safety)* (2006), 2006 CarswellBC 2262, 2006 BCSC 1372, 272 D.L.R. (4th) 455 (B.C. S.C.) [hereinafter "*McKenzie*"]. For an evaluation of the significance of this decision, see Philip Bryden, *McKenzie v. British Columbia (Minister of Public Safety and Solicitor General)*: A Constitutional Guarantee of Tribunal Independence? (2007) 40:2 U.B.C. L. Rev. 677.

In 2007, the B.C. Court of Appeal dismissed the government's appeal in *McKenzie*, solely on the grounds of mootness. The Court chose not to deal with the constitutional issue on its merits. Although it dismissed the government's appeal, the Court went on to cast doubt on the precedential value of the lower court's constitutional decision – again on the grounds of mootness.[7]

As a public interest litigant, the Petitioner (Respondent in the appeal) sought to have the constitutional precedent confirmed, and applied for leave to appeal to the Supreme Court of Canada. In April 2008, that application was dismissed. This left the McEwan judgment on the constitutional issue in *McKenzie* intact on its merits, but with its precedential value in question.

The issue of constitutional protection for the judicial independence of Canada's adjudicative tribunals and their members remains, therefore, a live issue in Canadian law, with numerous administrative law conferences since 2005 giving it a central place in their programs. Academics and practitioners alike followed the progress of the *McKenzie* case and continue to debate the applicability of *Ocean Port* to tribunals operating at the "adjudicative end" of the tribunal spectrum – most recently in a formal plenary session debate at the June 2009 CCAT Conference held in Halifax.

The resolution that was debated in the latter forum was:

> BE IT RESOLVED THAT:
> *Ocean Port . . . represents the appropriate view of administrative tribunals in Canada, i.e., that court-like principles of independence should not be guaranteed for tribunals, and that there should be no restrictions on how governments may wish to design tribunals and their membership and processes.*

With that constitutional issue left unresolved in law, it was inevitable that another case would come to the fore. This time the case arose in Saskatchewan.

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[7] *McKenzie v. British Columbia (Minister of Public Safety)* (2007), 2007 CarswellBC 2501, 287 D.L.R. (4th) 313 (B.C. C.A.), paras. 34-37 and 44.

SFL V. SASKATCHEWAN[8]

(a) Introduction

In March 2008, a group of Saskatchewan union organizations[9] collaborated in an application for judicial review of the newly elected Saskatchewan Party's decision to terminate the appointments of the "neutral" members of the Saskatchewan Labour Relations Board (SLRB) – the Chair and the two Vice-Chairs – and replace them with what the unions alleged were pro-business, Saskatchewan Party loyalists.[10] The terminations were acknowledged by the government to be without cause and occurred before the incumbent Chair's and Vice-Chairs' current terms of appointment had expired. As in *McKenzie*, the government relied for its authority to terminate on a statutory provision that purported to convert the appointments of the incumbent Chair and Vice-Chairs to at-pleasure appointments. The unions saw the terminations and new appointments as furthering the government's plan to "promote business interests" at the tribunal.[11]

In the January 14, 2009 decision of Mr. Justice Zarzeczny (referred to in this article as *SFL v. Saskatchewan*),[12] the Court of Queen's Bench for Saskatchewan dismissed the unions' application.

For its authority to terminate the appointments mid-term without cause, the government relied on the following section of the Saskatchewan *Interpretation Act, 1995*:

> 20(1) . . . notwithstanding any other enactment, or any agreement, if a person is a member of a board, commission, or other appointed body of the Government of Saskatchewan or any of its agencies or Crown corporations *on the day on which the Executive Council is first installed following a general election* as defined in the *Election Act*, *the term of office for which that person was appointed is deemed to end on the earlier of*:
> (a) the last day of the term for which the person was appointed, or

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8 *Saskatchewan Federation of Labour v. Saskatchewan (Attorney General)*, 2009 CarswellSask 35, 323 Sask. R. 115, 2009 SKQB 20 (Sask. Q.B.) [hereinafter "*SFL v. Saskatchewan*"].

9 The Saskatchewan Federation of Labour, the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, and the Canadian Union of Public Employees.

10 Saskatchewan Federation of Labour, Press Release (May 14, 2008).

11 *Ibid.*

12 *Supra* note 8.

> (b) *a day designated by the Lieutenant Governor in Council or by the person who made the appointment*.[13]

This provision effectively converts all Saskatchewan tribunal appointments made before an election, to at-pleasure appointments after the election.[14] We will refer to it as the "post-election at-pleasure provision".

It is also important to note that the Order-in-Council (OIC) appointing the new Chair and Vice-Chairs specifically provides that these appointments are at-pleasure appointments. They were appointed (by "O.C. 98/2008") "to serve at pleasure for a term not exceeding five years from the date of this Order in Council". The same Order in Council also re-appointed the remaining 18 incumbent union and employer members of the Board on the same at-pleasure basis for, in their cases, a further three years.[15]

These "at-pleasure" OIC appointments seem to be at odds with section 4 of the *Trade Union Act*, which specifies the appointment of the Chair and Vice-Chairs of the Board to "*terms* not exceeding five years" and other members to "*terms* not exceeding three years".[16] The Court noted this potential statutory interpretation issue, but appears to have concluded that the at-pleasure language in the appointment itself settled that issue.[17]

The unions' judicial review application challenged the validity of the new appointments and sought the reinstatement of the terminated Chair and Vice-Chairs.[18] It appears from the judgment that the challenge was principally based on the allegation that the government had exercised its discretion to terminate and appoint the Chairs and Vice-Chairs for an "unlawful or improper purpose or motive".[19] The constitutional validity of the post-election at-pleasure provision itself, or of the orders in council

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13 S.S. 1995, c. I-11.2 [emphasis added]. That the government relied on this provision for its authority to terminate the appointments of the Chair and Vice-Chairs is confirmed by the Court. See *SFL v. Saskatchewan*, *supra* note 8 at para. 34.

14 The Court agrees with that interpretation. See *SFL v. Saskatchewan*, *supra* note 8 at para. 36.

15 *Ibid.* at para. 2.

16 Section 4, *Trade Union Act*, c. T-17 of The Revised Statutes of Saskatchewan, 1978 (effective February 26, 1979), as amended [hereinafter "*Trade Union Act or TUA*"].

17 *SFL v. Saskatchewan*, *supra* note 8 at para. 33.

18 It is to be noted that the terminated Chair and Vice-chairs were not parties to the application.

19 *SFL v. Saskatchewan*, *supra* note 8 at paras. 8, 15, 18, 23 and 26.

appointing members at pleasure, were not, as far as the judgment shows, issues the unions appear to have argued.

However, amongst its reasons for rejecting the applicants' various arguments, the Court itself addressed the issue of the constitutional validity of the government's "statutory regime" of "at-pleasure" appointments to the SLRB. Mr. Justice Zarzeczny held that that the statutory, at-pleasure regime must prevail over the security-of-tenure requirements of judicial independence.[20] For this conclusion, the Court relied, without more, on *Ocean Port's* approval of statutory at-pleasure appointments at the B.C. Liquor Appeal Board, and relied particularly on the concluding sentence of paragraph 24 of the *Ocean Port* decision, *viz*:

> . . . The degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.

The central focus of this article is the constitutional question presented by this portion of the Court's judgment: whether in effectively dismissing the application of *PEI Reference*'s unwritten constitutional principle of judicial independence to the SLRB, the Court has correctly understood and applied *Ocean Port*. However, the Court also concluded that the at-pleasure appointments regime that it found to be constitutionally valid was not in any event incompatible with the Labour Board's independence and impartiality. This is an unexpected perspective on the law of judicial independence that, if correct, would render the constitutional issue largely irrelevant. It is important, therefore, that we address the merits of that perspective first.

(b) At-pleasure Appointments and Independence

There is a general perception that, absent constitutional constraints, public officials appointed or deemed to be appointed "at pleasure" may be removed from their positions at any time for any reason – partisan politics, a capricious whim, unhappiness of a government or its influential friends with a particular decision, the need to create vacancies for patronage appointments – in short, anything.[21]

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[20] *Ibid.* at paras. 48 and 49

[21] See most recently *Pelletier v. Canada (Attorney General)*, 2007 CarswellNat 1, 2007 CarswellNat 2, [2007] 4 F.C.R. 81 (F.C.A.), para. 34: "As a preliminary matter, it is important to remember that the issue in this case is not whether the government was entitled to put an end to Mr. Pelletier's appointment. Mr. Pelletier held his office at pleasure; the government was entitled to remove him at any

Notwithstanding these generally accepted implications of at-pleasure appointments, Mr. Justice Zarzeczny concludes that the government's at-pleasure appointments regime is not inconsistent with the SLRB's impartiality and independence, stating:[22]

> With all these institutional safeguards in place the *theoretical* concerns and apprehensions raised expressly and implicitly by the applicants respecting the independence and impartiality of the LRB and its functions *are answered*. In the result, this Court concludes that there is not any merit to this aspect of the application and it is dismissed.[23]

In rejecting the unions' concerns regarding the independence and impartiality of the SLRB as "theoretical" and "answered", the Court relied on four "institutional safeguards".

First, the Court relied on the fact that the Board is tripartite. All decisions are made with employer and union nominees present and participating in the decision-making process with the Chair or Vice-Chairs.[24] Second, the Court referred to the fact that that the Chair, Vice-Chairs and all members have sworn to: "faithfully and impartially to the best of [their] judgement, skill and ability, execute and perform [their] office . . . so help me God."[25] Third, the Court emphasized the 35-year tradition of respected appointments to the Board. Mr. Justice Zarzeczny states:

> Noteworthy is the fact that in the some 35 year modern history of the LRB (characterized by the fact that the chairperson is employed full time in that capacity) many different Government administrations (NDP, Conservative Party and now Saskatchewan Party) have appointed chairpersons and more recently vice-chairs, who proved themselves to be impartial, independent and highly respected decision makers. The court can take judicial notice of the fact that some of these past chairs have gone on to become highly respected members of the Superior Courts of this province including the Saskatchewan Court of Appeal and this Court. Another became a member and vice-chair of the Canada Labour Relations Board and is now a respected labour arbitrator and practitioner. Yet another became a distinguished pro-

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time for any reason." (Whether this is correct for adjudicators is a somewhat open question, since it is arguable, in reliance on *Roncarelli* and *CUPE*, that a government could not dismiss even an at-pleasure adjudicator for an improper purpose. This was the unions' argument in this case and was also argued, in the alternative, in *McKenzie*.)

22 *SFL v. Saskatchewan*, *supra* note 8 at paras. 55-61.

23 *Ibid.* at para. 61. (Emphasis added.)

24 *Ibid.* at paras. 56 and 57.

25 *Ibid.* at paras. 57 and 58.

> fessor and Dean of the College of Law, University of Saskatchewan, to give only a few examples.[26]

And, finally, the Court relied on the fact that the Board's decisions are subject to judicial review.[27]

Mr. Justice Zarzeczny expresses confidence that oaths of office, the presence of union and employer nominees, a history of respected appointments, and the availability of judicial review are sufficient guarantors of independence to reduce the unions' concerns about the Board's independence to the merely theoretical. Some might think that confidence misplaced. The more important point, however, is that it reflects a view of the law that has been obsolete in Canada since 1985.

It is true, of course, that for more than a hundred years, Canadian governments did routinely appoint adjudicators – including provincial court judges – on an at-pleasure basis, and the law saw those appointments to be quite compatible with judicial independence. This was so because, in that era, the law effectively *presumed* that anyone appointed to an adjudicative position was independent simply by virtue of his or her appointment.

That presumption of independence was predicated on the courts' trusting in two things: (1) governments continuing to honour the tradition of responsibly refraining from arbitrarily exercising their power to remove adjudicators, even though adjudicators were appointed at pleasure; and (2) adjudicators ensuring that their decision-making was not influenced by contemplation of the possibility that, in their case, that tradition might not be respected.

But this trust-based doctrine of judicial independence was explicitly overruled by the Supreme Court of Canada in its 1985 decision in *Valente*.[28] In that decision, and in all subsequent jurisprudence concerning judicial independence, it has been well settled that at-pleasure appointments of adjudicators, whether they be provincial court judges or adjudicative members of adjudicative tribunals, are not, in law, compatible with their individual independence, or with the institutional inde-

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[26] *Ibid.* at para. 59. Mr. Justice Zarzeczny does not say, but seems to suggest that, throughout these years, all of the appointments were also at-pleasure appointments. He also does not indicate whether, over the course of those 35 years, there were any previous instances of a SLRB Chair or Vice-Chair being dismissed from office, mid-term without cause.

[27] *Ibid.* at para. 60.

[28] *Valente v. R.*, 1985 CarswellOnt 129, [1985] S.C.J. No. 77, 1985 CarswellOnt 948, [1985] 2 S.C.R. 673 (S.C.C.).

pendence of the court or tribunal to which they have been appointed.[29] And this remains true, notwithstanding adjudicator oaths or a tradition of at-pleasure appointments of respected persons.[30]

Thus, in finding that the government's regime of at-pleasure appointments did not affect the independence or impartiality of the Board, the Court of Queen's Bench for Saskatchewan overlooked 25 years of binding authority to the contrary.

Whether the Saskatchewan Legislature was constitutionally able to override that law remains, as we have said, a live question, but, as we move into our discussion of that question, it is essential to understand that the Court cannot have it both ways – both a valid statutory regime of at-pleasure appointments and independence. If the Saskatchewan Legislature's statutory regime of at-pleasure appointments, including the post-election at-pleasure provision, is held to be constitutionally valid, then we must face the fact that the Legislature will have succeeded, in law, in destroying the independence of the Saskatchewan Labour Relations Board.

THE CONSTITUTIONAL ARGUMENT

(a) Introduction

The issue in *Ocean Port* was whether the unwritten, constitutional principle of judicial independence first enunciated in *PEI Reference*[31] (and referred to in this article as the "*PEI principle*") applied to the B.C. Liquor Appeal Board, thus rendering statute-authorized at-pleasure appointments to that Board constitutionally invalid.

Ocean Port held that the *PEI principle* did not apply to the B.C. Liquor Appeal Board, and that at-pleasure appointments to that Board

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[29] *Ibid.* at para. 31: "The essence of security of tenure for purposes of s. 11(d) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner." See also in particular *2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool)*, 1996 CarswellQue 965, 1996 CarswellQue 966, [1996] 3 S.C.R. 919 (S.C.C.) at para. 67 [hereinafter "*Régie*"].

[30] For a full analysis of the pre-*Valente* tradition-and-duty-based history of presumed independence of adjudicators and judges appointed at pleasure and the effect of *Valente* and subsequent jurisprudence on that presumption, see Ron Ellis, "The Justicizing of Quasi-Judicial Tribunals, Part I" (2006) 19 C.J.A.L.P. 303 at 320-328.

[31] *Supra* note 2 at, *inter alia*, para. 107.

authorized by the Legislature were, therefore, constitutionally valid. It is acknowledged that the judgment contains language that could be read to also indicate that the *PEI principle* does not apply to administrative tribunals of any kind. See especially the paragraph in which the sentence relied upon in *SFL v. Saskatchewan* appears. That paragraph reads in full as follows:

> 24. Administrative tribunals, by contrast, lack this constitutional distinction from the executive. *They are, in fact, created precisely for the purpose of implementing government policy.* Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given *their primary policy-making function*, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract Charter requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.

However, within the *Ocean Port* judgment itself – notably in paragraph 33 – the range of tribunals to which the decision was intended to apply is clarified. We argue that this fact, together with more recent constitutional authorities, including, but by no means confined to, the judgment of Mr. Justice McEwan in *McKenzie*, makes it now abundantly clear that *Ocean Port's* rejection of the applicability of the *PEI principle* to tribunals ought to be interpreted as applying only to tribunals *whose* "*primary function*" *is* "*policy making*". These authorities clarify both the meaning of the *Ocean Port* decision and the constitutional purpose underlying the *PEI principle*.

However, before dealing with these authorities, it is important to be cognizant of the literature and jurisprudence that preceded *Ocean Port*.

(b) Pre-*Ocean Port* Context

Prior to *Ocean Port*, there had long been important moments of recognition, both in the academic literature and in the jurisprudence, that within the ranks of what were traditionally referred to generically as "regulatory agencies" there has always been a category of agencies that were in fact barely, if at all, distinguishable from courts – a category that required special treatment.

In a 1978 Ontario Economic Council report written by Professor Michael Trebilcock, *et al.*, the authors identified a category of agencies

they found it necessary to distinguish from the "regulatory agencies" that were the principal focus of their work. The relevant passage reads as follows:

> The foregoing analysis is not intended to suggest that all regulatory agencies can be viewed in [a] political dimension. Obviously, agencies such as Workmen's Compensation Boards and Land Compensation Boards, *where the necessary political brokering of public policy is already reflected in their detailed statutory mandates*, and the application of those mandates involves relatively technical adjudications on relatively confined inter-party disputes, are most usefully modeled along judicial analogues, given that generally *the only realistic substitute policy instrument for the administration of such statutes is the courts*. Concepts of judicial due process are obviously, therefore, highly appropriate institutional reference points.[32]

The McRuer Report[33] made the same point. McRuer included in his categorization of tribunals the category of "judicial tribunal". Examining the constitutional limitations on the powers of a legislature to confer statutory powers of decision on a body other than a court, he proposed a distinction between "judicial" and "administrative" powers based on an "examination of the function of the power". He then posed two, what seem even now to be fairly straightforward, propositions:

> . . . (1) If it is appropriate that a particular power should be exercised by impartial persons independent of political control, who, in making their decisions, strive to do justice in the same sense as the courts, the power should be treated as a judicial power. (2) If it is appropriate that the exercise of a particular power should be subject to political control, the power should be treated as an administrative power and its exercise should be subject to the control and direction of, or be accountable through appropriate channels to, a responsible Minister, and through him to the Legislature.[34]

McRuer asserted a constitutional requirement, based on the Rule of Law, that "judicial tribunals" must be "independent of political control and . . . so constituted and operate in such a manner as to render them impartial".[35]

In McRuer's view, the "basic concept of the separation of judicial powers from political control, developed over the centuries in relation to

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[32] Michael J. Trebilcock, Leonard Waverman, and J. Robert S. Prichard, "Markets for Regulation: Implications for Performance Standards and Institutional Design" in *Government Regulation: Issues and Alternatives 1978* (Canada: Ontario Economic Council) [emphasis added].

[33] *Royal Commission Inquiry into Civil Rights*, Report No. 1, Vol. 1 (1968) (Chair: James Chalmers McRuer) at 28 [hereinafter "McRuer Report"].

[34] *Ibid.* at 121.

[35] *Ibid.* at 122.

the courts, applies equally to all judicial tribunals."[36] From this, he saw a number of implications flowing, including the requirement that members of such tribunals not be appointed by the Minister of a Department that would be affected by the tribunal's decisions, and that their terms of appointment be sufficient to ensure their independence. *Removal from office should be only for cause*. He concluded that "these are minimum requirements to ensure independence and impartiality of judicial tribunals".[37]

The Supreme Court of Canada itself first recognized this distinct category of "judicial tribunals", or "judicial bodies", in its decision in *Blaikie*, 30 years ago.[38] On the question of whether, in view of the provisions of section 133 of the BNA Act, the provincial legislature had the constitutional authority to limit the guarantees for the use of English and French in proceedings in the "tribunals" of Quebec, a unanimous Court said:

> . . . the reference in s. 133 to "any of the Courts of Quebec" ought to be considered broadly as including not only so-called s. 96 Courts but also Courts established by the Province and administered by provincially-appointed Judges. It is not a long distance from this latter class of tribunal to those which exercise judicial power, although they are not courts in the traditional sense. If they are statutory agencies which are adjudicative, applying legal principles to the assertion of claims under their constituent legislation, rather than settling issues on grounds of expediency or administrative policy, they are judicial bodies . . .[39]

A contrary view concerning the independence of tribunals of any kind was expressed by Robert Macaulay in his 1989 Ontario report, "Directions".[40] Macaulay, who saw all tribunals as regulatory agencies, baldly asserts that they are *not* independent. They are *accountable*. Nevertheless, he conceded, tribunals must be independent "in their decision-making"[41].

An Ellis critique of the Macaulay Report at the time reads as follows:

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36 *Ibid.* at 123.

37 *Ibid.* [emphasis added].

38 *Blaikie c. Québec (Procureur général)*, 1979 CarswellQue 156, 1979 CarswellQue 156F, [1979] 2 S.C.R. 1016 (S.C.C.).

39 *Ibid.*

40 Robert Macaulay, *Directions, Report on a Review of Ontario's Regulatory Agencies prepared for the Ontario Management Board of Cabinet* (1989).

41 *Ibid.*

> . . . a major deficiency in the Macaulay Report is its failure to make explicit the undoubted reality that institutional arrangements devoted to control of agencies, and to the assurance of their accountability, must be balanced by institutional structures devoted to providing agencies and their members with the capacity - both real and apparent - for independent decision-making. *Saying* that agencies are, and must be, independent or arms-length in their decision-making does not make them so. And an administrative-law system design that provides no protective structures but relies for the system's capacity for truly independent decision-making solely on the expectation that, within the secret corridors of agency members' minds, integrity may be counted on to routinely triumph over obvious and compelling self-interest, is a system design that is . . . so ingenuous as to not be creditable. It is a design that may be expected to achieve whatever truly independent decision-making it proves to be capable of on the backs of sacrificed heroes. It is, in short, a design for *quasi-independent* decision-making - if Rosie Abella will allow me to borrow and adapt one of her felicitous phrases.[42]

A year after the Macaulay Report, the Canadian Bar Association released its *Report on The Independence of Federal Administrative Tribunals and Agencies* written by Professor Ed Ratushny of the University of Ottawa, and widely known as the Ratushny Report.[43] Ratushny emphasized that the independence of the wide range of tribunals that dispense justice to Canadians must be "jealously guarded".[44] One basic theme of the Report was that "Canadians should be told by Parliament whether or not a tribunal or agency is independent of government, and they should be entitled to rely on what they have been told".[45] "Such independence should be real and not a sham".[46] The Report also asserted that a tribunal that exercises court-like functions – for which it proposed to reserve the label "adjudicative tribunal" – "should be guaranteed a high degree of independence".[47]

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42 Paul Aterman, "What's Not New in Administrative Justice: Macaulay and Ouellette – Remember Them?" (2005) 18 C.J.A.L.P. 251 at 288 (quoting S.R. Ellis, Speaking Notes for an address to the 1989 Conference of Ontario Boards and Agencies).

43 Canadian Bar Association, *Report on The Independence of Federal Administrative Tribunals and Agencies* (presented to President John R. Jennings at the Annual General Meeting Commemorating the Seventy-Fifth Anniversary of the Canadian Bar Association, London England, 1990; Principal Author: Ed Ratushny, Q.C., Professor of Law University of Ottawa).

44 *Ibid.* at 7

45 *Ibid.*

46 *Ibid.* at 24.

47 *Ibid.* at 28-29.

In a series of *ex cathedra* speeches to administrative law conferences over recent years, senior members of the judiciary have also signalled their own concerns about the challenges posed by the questions about independence and impartiality for tribunals that are, in fact, doing the work of courts.

In a 1991 speech to the CCAT Conference in Ottawa,[48] Chief Justice Antonio Lamer drew what he saw to be an important distinction between regulatory agencies and what he described as:

> tribunals . . . created to operate essentially as adjudicators in areas where so many individual cases are involved that it would be unfeasible to expect the superior courts to handle the caseload, or where the nature of the subject matter requires a specialized knowledge that is not generally possessed by superior court judges.
>
> Such tribunals carry on the function of adjudicating disputes between individuals and the state in a manner that is similar to the function of the judiciary.
>
> These bodies are not regulatory agencies but are created to operate essentially as adjudicators . . . in a manner that is similar to the function of the judiciary . . . [and] *expected to dispense justice in the same sense as the courts of law*.

In that speech, Lamer also discussed the independence of such tribunals in the context of their "perceived fairness". Tying the integrity of administrative justice to the independence and impartiality of the decision-maker, he noted that, as of that time, the same wide support for independence of the judiciary did not exist for adjudicative tribunals. He then added a comment that is much to the point: "[T]he fairness of the administrative process in cases where a tribunal carries out adjudicative functions in individual cases is no less tied to the independence of the tribunal from the government than it is for the judiciary".

Six years later, in 1997, the Honourable Roy McMurtry, the then Chief Justice of Ontario, told an annual Conference of Ontario Boards and Agencies (COBA) in Toronto that it was time to recognize the role of administrative tribunals as part of our justice system – the administrative part of the justice system.[49]

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[48] The speech was subsequently published. See The Honourable Chief Justice Lamer, "Administrative Tribunals - Future Prospects and Possibilities" (1991) 5 C.J.A.L.P. 107.

[49] See quotation in Ron Ellis, "Appointments Policies in the Administrative Justice System: Lessons from Ontario: Four Speeches" (1998) 11 C.J.A.L.P. 205 at 250-252. (The reference is to an unpublished speech. A copy of the speech manuscript as distributed at the conference is available from Ellis.)

The latter view has now been confirmed by the unanimous judgment of the Supreme Court of Canada in *Paul*:

> While there are distinctions between administrative tribunals and courts, both are part of the system of justice. Viewed properly, then, the system of justice encompasses the ordinary courts, federal courts, statutory provincial courts and administrative tribunals.[50]

In a speech to the 1998 annual BCCAT Conference in Vancouver,[51] Supreme Court of Canada Justice Beverley McLachlin (as she then was) distinguished between two categories of decision-making bodies: 1) "regulatory or licensing bodies"; and 2) "dispute resolving bodies". The latter, the Justice said, are "doing what the courts have traditionally done," adding that ". . . a theory of the Rule of Law that cannot account for these [dispute resolving] bodies will have a very short life. The Rule itself will become illegitimate."[52]

The next year, at BCCAT's 1999 Conference, the Honourable Madam Justice Carol Mahood Huddart of the B.C. Court of Appeal put the question somewhat differently.[53] She said:

> . . . we know that an impartial decision-making process is fundamental to a democracy and to the rule of law that permits people with different ideas of morality to live together in a peaceful community. It is from the perspectives of a decision-maker and of a client that I address you today about *the ethic of impartiality* that lies at the root of our legal system and the Rule of Law.[54]

She added:

> . . . Even [as early as *Roncarelli* in 1959] . . . every Canadian would have agreed that fair decision-making procedures require an impartial decision-maker, one free of bias in favour of or against a party to the dispute or a person affected by the decision being made. And they would have understood free of bias to mean manifestly so.[55]

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50 *Paul v. British Columbia (Forest Appeals Commission)*, 2003 CarswellBC 2432, 2003 CarswellBC 2433, [2003] 2 S.C.R. 585 (S.C.C.) at para. 22.

51 Subsequently published. See The Honourable Madam Justice Beverley McLachlin, Supreme Court of Canada, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998) 12 C.J.A.L.P. 171. [hereinafter "*McLachlin BCCAT speech*"].

52 *Ibid.* at 176.

53 Subsequently published. See The Honourable Madam Justice Carol Mahood Huddart, "Know Thyself: Some Thoughts About Impartiality and Administrative Decision-Makers From an Interested Observer" (1999-2000) 13 C.J.A.L.P. 147.

54 *Ibid.* at 148.

55 *Ibid.* at 150.

In her remarks, Huddart, J. also examined the guarantors of impartiality. She referred to the *Valente* requirements of independence (security of tenure, financial security and freedom from administrative control by the executive on matters bearing on their adjudicative function) and advanced the view that the independence of any particular body must be examined "structurally"; "that is, independently from the actual operation of the agency in a particular case"[56] – a point that was, of course, central to the *Valente* decision.

Over time then – before *Ocean Port* – a policy question of extraordinary import for our justice system and the rule of law had been consistently identified: How to ensure the necessary independence and impartiality of our non-regulatory, non-policy making, adjudicative tribunals – the independence and impartiality of Trebilcock's agencies "where the necessary political brokering of public policy is already reflected in their detailed statutory mandates" and "concepts of judicial due process are obviously . . . highly appropriate institutional reference points", of McRruer's "judicial tribunals", of the Supreme Court of Canada's "judicial bodies" (*Blaikie*), of Ratushny and the CBA's "adjudicative tribunals", of Lamer's "bodies expected to dispense justice in the same sense as the courts of law", of McLachlin's "dispute-resolving bodies", and of Huddart's "impartial decision-makers", all the while not intruding on the executive branch's control and direction of its regulatory agencies.

This is the context in which the applicability of the *PEI principle* to adjudicative tribunals such as the Saskatchewan Labour Relations Board falls to be considered – the context in which *Ocean Port*'s possible relegation of all administrative tribunals to a single category of "regulatory agency" falls to be interpreted.

Given that context, the remarkable and, with respect, confusing thing about the Supreme Court of Canada's judgment in *Ocean Port* is the broad language it uses in describing the "primary function" of administrative tribunals as "*policy-making*". Taken at face value, that language appears to simply overlook the prior authoritative recognition of the distinction between regulatory agencies or licensing bodies, on the one hand, and judicial or adjudicative tribunals, or judicial or dispute resolving bodies, on the other.

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[56] *Ibid.* at 153.

(c) The Post-*Ocean Port* Authorities

The constitutional argument concerning the independence of adjudicative tribunals begins with accepting the fact that it is now beyond dispute that the *unwritten* constitutional principle of judicial independence first recognized in *PEI Reference* is fully established in its own right, whether or not it is ultimately found to apply to adjudicative tribunals.[57]

Re Bagri is one of the Supreme Court's post-*PEI Reference* decisions that make the settled nature of the principle and its constitutional context particularly clear. In that 2004 decision, in a majority judgment written by Iacobucci and Arbour JJ., and concurred in by McLachlin C.J. and Major J., the Supreme Court had occasion to consider the constitutional status of the principle of judicial independence in Canada generally. The pertinent passage reads as follows:

> This principle [of judicial independence] exists in Canadian law in a number of forms. In the Constitution, it is explicitly referenced in ss. 96 to 100 of the Constitution Act, 1867 and in s. 11(d) of the Charter. The application of these provisions, however, is limited. The former applies to judges of superior courts, and the latter to courts and tribunals charged with trying the guilt of persons charged with criminal offences: Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island . . . at para. 84; Ell . . . at para. 18. Judicial independence has also been implicitly recognized as a residual right protected under s. 7, as it, along with the remaining protections in ss. 8 to 14, are specific examples of broader principles of fundamental justice: Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, at p. 503. Moreover, the commitment to the "foundational principle" of judicial independence has also been referenced by way of the Preamble to the Constitution Act, 1867: Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, at para. 109; see also Ell, at para. 19. *Judicial independence further represents the cornerstone of the common law duty of procedural fairness, which attaches to all judicial, quasi-judicial and administrative proceedings, and is an unwritten principle of the Constitution*.[58]

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[57] See, for example *Ell v. Alberta*, 2003 CarswellAlta 915, 2003 CarswellAlta 916, [2003] 1 S.C.R. 857 (S.C.C.), para. 19 [hereinafter "*Ell*"]; *Application Under s. 83.28 of the Criminal Code, Re*, 2004 CarswellBC 1378, 2004 CarswellBC 1379, [2004] 2 S.C.R. 248 (S.C.C.), para. 81 [hereinafter "*Re Bagri*"]; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 CarswellBC 2207, 2005 CarswellBC 2208, [2005] 2 S.C.R. 473 (S.C.C.), paras. 44-51; and *Charkaoui v. Canada (Minister of Citizenship & Immigration)*, [2007] S.C.J. No. 9, 2007 CarswellNat 325, 2007 CarswellNat 326, [2007] 1 S.C.R. 350 (S.C.C.), para. 32.

[58] *Ibid.*, *Re Bagri*, at para. 81. [Emphasis added - citations for *PEI Reference* and *Ell* have been omitted.]

In ruling out the application of the *PEI principle* to the SLRB, the Court of Queen's Bench for Saskatchewan, without analysis, equated the SLRB to the B.C. Liquor Appeal Board, relying solely, as we have seen, on the last sentence in *Ocean Port*'s paragraph 24.[59] It may be helpful to quote that sentence again here:

> . . . The degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.

We would note in passing that the explicit caveat in that sentence that the intention of the legislature prevails only if "constitutional constraints" are "absent" is not of assistance on the issue of whether *Ocean Port* must be taken to have ruled out altogether the application of the *PEI principle* to tribunals. It is apparent from its context that this reference to constitutional constraints was intended by the Court to be only a reference to *written* constitutional constraints, such as those set out specifically in section 11(d) of the *Charter*, and, perhaps also to the constitutional restraints the Court had previously found to apply implicitly to tribunals making decisions under section 7 of the *Charter*.

We do not argue here that the SLRB falls within the protection of these *written Charter* constraints. Rather, we argue that it falls within the protection of the *unwritten PEI principle* of judicial independence. In our respectful submission, the Court of Queen's Bench for Saskatchewan, apparently without the benefit of the context provided by the pre-*Ocean Port* literature and jurisprudences or of consideration of the post-*Ocean Port* constitutional-law authorities, has misconstrued and misapplied *Ocean Port*.

The "particular" tribunals referred to in paragraph 24 of *Ocean Port* – the only category of tribunals with which, we argue, *Ocean Port* is concerned – were, as we have said, tribunals whose "primary function" is "policy making". See in that paragraph, for example, the sentence beginning: ". . . given their primary policy-making function . . .".

On the same point, consider the post-*Ocean Port* decision of the Supreme Court of Canada in *C.U.P.E. v. Ontario (Minister of Labour)*.[60] In that case, the Court itself recognized limitations on the reach of its judgment in *Ocean Port*. Binnie J., writing for a majority, characterized the *Ocean Port* decision in the following terms:

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[59] *SFL v. Saskatchewan*, *supra* note 8 at para. 48.

[60] *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 CarswellOnt 1803, 2003 CarswellOnt 1770, [2003] 1 S.C.R. 539 (S.C.C.) [hereinafter "*CUPE*"].

> Ocean Port Hotel, supra, involved adjudication of licensing violations in the context of government liquor policy. As was stated at para. 33 [of Ocean Port], "*[The B.C. Liquor Appeal Board] is first and foremost a licensing body*. The suspension complained of was an incident of the Board's licensing function. . . . The exercise of power here at issue falls squarely within the executive power of the provincial government." . . . *Here the context is quite different*.[61]

The phrase "licensing body", as used in paragraph 33 of Chief Justice McLachlin's *Ocean Port* judgment and quoted by Binnie J., resonates with the distinction that the then Justice McLachlin drew in her 1998 address to the BCCAT Conference between "regulatory or *licensing bodies*" and "dispute resolving bodies".[62]

Two years after its decision in *Ocean Port*, and a month after its decision in *CUPE*, the Supreme Court issued its decision in *Bell*[63] – also, like *Ocean Port*, a unanimous judgment, and also written by Chief Justice McLachlin. In *Bell*, the Court identified categories of tribunals positioned along a "spectrum" stretching from the "executive" branch at one end, to the "judicial" branch at the other. "Some tribunals", the Chief Justice said, "are closer to the executive end of the spectrum" *and have* "*the primary purpose of developing government policy or supervising its implementation*", whereas "[o]ther tribunals [are] closer to the judicial end of the spectrum" *and have as* "*their primary purpose*", *not policy making, but the* "*adjudication of disputes through some form of hearing*". The latter are tribunals, the Chief Justice said, that "function in much the same way as a court" and that are "not involved in crafting policy".[64]

In *McKenzie*, in distinguishing *Ocean Port*, Mr. Justice McEwan relied *inter alia* on his observation that "[the decision in *Bell*] appears to acknowledge a form of tribunal to which the characterization of administrative tribunals in *Ocean Port* [as tribunals whose primary function is policy making] simply does not apply".[65] With respect, that observation is self-evidently correct. The description in *Bell* of tribunals at the judicial end of the spectrum as tribunals whose "primary purpose" is the adjudication of disputes, and who are *not* "involved in crafting policy" cannot be rationally reconciled with the same Court's description in *Ocean Port*

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61 *Ibid.* at paras. 119 and 120 [emphasis added].

62 *Supra* note 51.

63 *Bell Canada v. Canadian Telephone Employees Assn.*, 2003 CarswellNat 2427, 2003 CarswellNat 2428, [2003] 1 S.C.R. 884 (S.C.C.).

64 *Ibid.* at paras. 21-24 [emphasis added].

65 *McKenzie*, *supra* note 6 at para. 134.

of apparently all tribunals as tribunals whose "primary function" is "policy making".

Moreover, in *Bell*, the Supreme Court was given a clear opportunity to confirm that the *PEI principle* did not apply to administrative tribunals of any kind – if that had been its view – and declined to do so. The Appellant, Bell Canada, had advanced two alternative constitutional arguments. It first argued that the *PEI principle* applied to the Canadian Human Rights Tribunal (CHRT) – the tribunal whose independence was at issue in *Bell* – and conferred on that tribunal "the *same* degree of independence" [emphasis added] as "a s. 96 superior court". The Supreme Court explicitly rejected that argument, and, based on *Bell*, one can now consider it settled law that the *PEI principle* does not confer on the SLRB, or on any other tribunal, the *same* degree of independence enjoyed by section 96 superior courts.[66]

But Bell Canada's second, and alternative, constitutional argument was that the *PEI principle* did at least constitutionally guarantee the judicial independence of that tribunal at the level of independence required by the common law of procedural fairness. In response to that alternative argument, the Court did not say that the principle simply did not apply to the CHRT. Instead, the Court merely said that it did not think it necessary to consider that argument since, on the facts, the legislation that Bell Canada claimed undermined the CHRT's independence was not, in any event, incompatible with the common law requirements of judicial independence. Paragraph 30 in the *Bell* judgment makes the Court's position in this respect clear:

> Bell [the Appellant] suggests, in the alternative, that the constitutional principle applies and holds the Tribunal to the standard of common law procedural fairness. Since, as discussed below (at para. 53), the common law standard is met, this submission does not advance Bell's argument.

In short, although *Ocean Port* decided that the *PEI principle* is not applicable to tribunals whose primary function is policy-making, subsequent authorities show that it did not address the issue of the application of the *PEI principle* to adjudicative tribunals.

At the centre of the continuing argument that *Ocean Port* must be seen as barring the application of the *PEI principle* to administrative tribunals of any kind is the proposition that the *PEI principle* applies only to "courts". That argument typically takes as its doctrinal starting point

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[66] *Bell*, *supra* note 63 at para. 29.

the statement in the majority judgment in *PEI Reference* that the principle is applicable to "all *courts*".[67]

It is important, therefore, to emphasize that the eight-judge majority in *PEI Reference* knew in advance of issuing its judgment that there would be a question as to whether its use of the phrase "all courts" would subsequently be seen to encompass tribunals – or some tribunals – and yet elected to leave that question unaddressed. The majority had notice of the question since the dissenting reasons of Justice La Forest specifically brought it to their attention. Thus:

> . . . If one is to give constitutional protection to courts generally, one must be able to determine with some precision what the term "court" encompasses. It is clear both under the *Constitution Act, 1867* as well as under s. 11(d) of the *Charter* what courts are covered, those under the *Constitution Act, 1867* arising under historic events in British constitutional history, those in s. 11(d) for the compelling reasons already given, namely protection for persons accused of an offence. But what are we to make of a general protection for courts such as that proposed by the Chief Justice? *The word "court" is a broad term and can encompass a wide variety of tribunals. In the province of Quebec, for example, the term is legislatively used in respect of any number of administrative tribunals. Are we to include only those inferior courts applying ordinary jurisdiction in civil matters, or should we include all sorts of administrative tribunals, some of which are of far greater importance than ordinary civil courts? And if we do, is a distinction to be drawn between different tribunals and on the basis of what principles is this to be done?*[68]

It is also important to note in this respect that by 1997, when *PEI Reference* was decided, the Supreme Court had previously established – in, for instance, its decisions in *Blaikie*[69] and again in *Weber*[70] – that it was comfortable, even in constitutional law contexts, with the word "courts" being understood as encompassing "tribunals". This understanding is also seen in the line of cases in which tribunal jurisdiction over *Charter* issues was confirmed. This line of cases culminated after 1997 in the Court's decisions in *Paul* and *Martin*.[71]

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67 *PEI Reference*, *supra* note 2 at para. 106.

68 *Ibid.* at para. 323 [emphasis added].

69 *Supra* note 38.

70 *Weber v. Ontario Hydro*, 1995 CarswellOnt 240, 1995 CarswellOnt 529, [1995] 2 S.C.R. 929 (S.C.C.). In *Weber*, the Supreme Court held that tribunals were "*courts* of competent jurisdiction" if they have jurisdiction over the person, the subject matter and the remedy sought, which the court found they often do.

71 *Paul*, *supra* note 50; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 CarswellNS 360, 2003 CarswellNS 361, [2003] 2 S.C.R. 504 (S.C.C.).

While, in *Bell*, the Supreme Court found it unnecessary to address the question of whether the *PEI principle* applied to the Canadian Human Rights Tribunal and its members, it is apparent that the Court understood the importance and the open nature of that question. That it did so is evident in another unanimous judgment that it issued on the same day as *Bell – i.e.*, *Ell*,[72] the decision concerning the independence of Alberta's justices of the peace.

In *Ell*, the Court went to considerable lengths to specify the prescriptive formula that was to be used to identify "office holders" to which the *PEI principle* would apply. "The *scope* of the unwritten principle of independence must be interpreted", it said, "in accordance with its underlying purposes", and its application to any particular office holders "depends on whether [the office holders] *exercise judicial functions that relate to the bases upon which the principle is founded*". Those "bases" are, the Court held, threefold: "[1] *impartiality in adjudication*, [2] *preservation of our constitutional order*, and [3] *public confidence in the administration of justice*".[73]

It is clear that the "office-holders" the Court had in mind included "tribunals". In considering the nature of the "bases" upon which the unwritten principle of judicial independence is "founded", the Court observed, *inter alia*, that "[c]ourts also ensure that the power of the state is exercised in accordance with the rule of law and the provisions of our Constitution" and "act as a shield against unwarranted deprivations by the state of the rights and freedoms of individuals". It then concluded: "[T]his constitutional mandate gives rise to the principle's institutional dimension: the need to maintain the independence of a court *or tribunal* as a whole from the executive and legislative branches of government".[74] See also the paragraph in which the Court observed that "[t]he manner in which the essential conditions of independence may be satisfied varies in accordance with the nature of the court *or tribunal* and the interests at stake". In support of that proposition, the Court cited *Matsqui*,[75] clearly a prototypical "tribunal" decision.[76]

The Court did not say in *Ell* that the extension of the *PEI principle* to office holders was conditional upon their functions engaging all three

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[72] *Ell*, *supra* note 57.

[73] *Ibid.* at paras. 20 and 24 [emphasis added].

[74] *Ibid.* at para. 22 [emphasis added].

[75] *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CarswellNat 264, 1995 CarswellNat 700, [1995] 1 S.C.R. 3 (S.C.C.) [hereinafter "*Matsqui*"].

[76] *Ibid.* at para. 30 [emphasis added].

of the "bases" of judicial independence. Obviously, either one of the first two of those bases would be of sufficient importance to attract the principle. Absent *either* "impartiality in adjudication" or the "preservation of the constitutional order", how could the third basis – "public confidence in the administration of justice"– be sustained?

Since its first appearance in *PEI Reference* in 1997, when it was applied to provincial civil law courts, the *PEI principle's* subsequent history includes the following: In 2003, its applicability to Ontario labour arbitrators was arguably inferred in *CUPE*;[77] the question of its application to the Canadian Human Rights Tribunal was, as we have seen, left open in *Bell*; and the principle was found to be applicable to Alberta's non-sitting justices of the peace in *Ell.* In 2005, its applicability to Quebec's municipal court judges was acknowledged by the Supreme Court of Canada in *Provincial Court Judges' Assn. (New Brunswick) v. New Brunswick (Minister of Justice)*.[78] And, in 2006 it was held to apply to B.C.'s Residential Tenancy Arbitrators in *McKenzie*, and, by the Ontario Court of Appeal in the *Deputy Judges case*[79] to Ontario's "Deputy Judges" – Ontario small claims court judges appointed to three-year, renewable fixed terms.

It is critically important to recognize that the law does not regard judicial independence as an "end in itself". Judicial independence is valued, as was said in *PEI Reference*, because it is an indispensable means of "securing important societal goals": securing "the perception that justice will be done in individual cases . . . and maintaining the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule".[80]

See also in that respect the following passage from the judgment of Lamer C.J. in *Lippé*:

> The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a 'means' to this 'end'. If judges could be perceived as 'impartial' without judicial 'independence', the requirement of 'independence' would be unnecessary. However, judicial independence is critical to the public's perception of

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77 *CUPE, supra* note 60.

78 2005 CarswellNB 405, 2005 CarswellNB 406, [2005] 2 S.C.R. 286 (S.C.C.) at paras. 166-170.

79 *Ontario Deputy Judges Assn. v. Ontario* (2006), 2006 CarswellOnt 3137, 268 D.L.R. (4th) 86 (Ont. C.A.).

80 *PEI Reference*, *supra* note 2 at paras. 9-10.

> impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality.[81]

And from the judgment of Binnie J. in *CUPE*, *supra*:

> It is now clear that the independence as well as the impartiality of the decision-maker is a component of natural justice: IWA v. Consolidated-Bathurst Packaging Ltd., at p. 332, per Gonthier J.; Matsqui Indian Band, supra, at para. 79, per Lamer C.J.; and R. v. Généreux, at pp. 283-84. As the purpose of the independence requirement is *to establish a protected platform for impartial decision making*.[82]

The answer to the constitutional question in *SFL v. Saskatchewan* depends on whether the SLRB is seen to fall within the reach of the *PEI principle* as that reach is defined in *Ell* – that is, whether the SLRB must be seen to be exercising "judicial functions" that "relate" to the "bases" upon which the principle is founded, which are, as previously noted: "impartiality in adjudication", "preservation of our constitutional order", and "public confidence in the administration of justice".

With reference to *Ell's* use of the term "judicial functions", it is important to note the definition the Supreme Court has given to that phrase in the past. Dickson J., as he then was, speaking for the Court in its 1981 decision in *Reference re Residential Tenancies Act (Ontario)*, said this:

> . . . the hallmark of a judicial power is a lis between parties in which a tribunal is called upon to apply a recognized body of rules in a manner consistent with fairness and impartiality. The adjudication deals primarily with the rights of the parties to the dispute, rather than considerations of the collective good of the community as a whole.[83]

In our view, even a cursory review of the SLRB's jurisdiction, responsibilities and powers, as set out in the Saskatchewan *Trade Union Act*,[84] its constituent statute, establishes that the SLRB's primary function is a judicial function that relates to all three of the bases of the *PEI principle* defined in *Ell*. (For a full analysis of how a typical labour relations board compares to a court, and of why institutional independence

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81 *R. c. Lippé*, 1990 CarswellQue 98, 1990 CarswellQue 1875, [1991] 2 S.C.R. 114 (S.C.C.) at para. 48.

82 *CUPE*, *supra* note 60 at para. 189 [emphasis added, citations omitted].

83 1981 CarswellOnt 623, 1981 CarswellOnt 623F, [1981] 1 S.C.R. 714 (S.C.C.) at 743 [hereinafter "*Residential Tenancies Reference*"].

84 *Trade Union Act*, *supra* note 16.

for such a board is essential, see the 2004 decision of the B.C. Labour Relations Board in *Farmer Construction*.[85])

The SLRB deals typically with a "*lis*" between unions or employees, and employers. In that *lis*, it decides the rights of the parties to the dispute. It can only meet its responsibilities and exercise its powers by first making evidence-based findings on a myriad of justiciable issues of fact, and then interpreting and applying the "recognized body of laws" set out in the *Trade Union Act* to those facts, and all of that in hearings that must, in law, be governed by the principles of natural justice; in short, by adjudicating in a way that is not fundamentally different than the manner in which a court would adjudicate in similar cases.

In *Residential Tenancies Reference* (*supra*), Justice Dickson addressed the objection that the Ontario Residential Tenancy Commission could not be said to be exercising "judicial powers" because it had been accorded a measure of "discretion" in its adjudicative work. It is an objection that is classically voiced against the proposition that what tribunals such as the SLRB do is effectively the work of courts. Dickson J. said this:

> It is true that the Commission is given a certain degree of discretion when performing its adjudicative function. Under s. 93(1) for example, the Commission is instructed to decide "upon the real merits and justice of the case"; s. 93(2) provides that the Commission "shall ascertain the real substance of all transactions and activities. . ."; s. 110(3) states that the Commission "may include in any order terms and conditions it considers proper in all the circumstances". Yet such terminology is certainly not foreign to courts within the purview of s. 96. The County Court under The Landlord and Tenant Act has the power to "make such further or other order as the judge considers appropriate" (s. 96); to make an order "granting relief against forfeiture on such terms and conditions as the judge may decide" (s. 106(1)); and to "refuse to grant the application [for possession] unless he is satisfied, having regard to all the circumstances, that it would be unfair to do so (s. 107(2)). . . ."[86]

In Farmer Construction, the B.C. Labour Relations Board also had occasion to consider how its "policy" role might be seen to affect the case for its need of institutional independence. It had this to say:

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[85] *Farmer Construction Ltd. v. B.C. Provincial Council of Carpenters*, 2004 CarswellBC 3350, [2004] B.C.L.R.B.D. No. 214 (B.C. L.R.B.) at paras. 33 to 44. In *Farmer Construction*, the B.C.L.R.B. also relied in this connection on the Ontario Court of Appeal's decision in *Hewat v. Ontario* (1998), 1998 CarswellOnt 806, 7 Admin. L.R. (3d) 257 (Ont. C.A.).

[86] *Residential Tenancies Reference*, *supra* note 83 at 744.

> While the Board has considerable scope to develop labour relations policy consistent with Code provisions and principles, we find this fact enhances rather than detracts from the need for institutional independence. In our view, the Board's policy-making function in the area of labour relations is not the sort of policy implementation function which the Court in *Bell* indicated would cause a tribunal to require a lesser degree of institutional independence. Even if we are wrong on this point, we find that, on a consideration of the functions of the Board as a whole, the Board clearly falls at the high end of the spectrum for tribunal institutional independence.[87]

As we have seen, the need for an *unwritten* constitutional principle of judicial independence was first recognized by the Supreme Court in *PEI Reference* with respect to provincial, civil-law courts, particularly those adjudicating family law matters – courts which, in that capacity, were not covered by the written principles of judicial independence.[88] In considering the intended reach of the *PEI principle* relative to the SLRB, it would, therefore, seem particularly pertinent to compare the SLRB's functions with the functions of the Saskatchewan Provincial Court as those functions relate to that court's role in a civil-law context – the type of court to which the *PEI principle* was first applied.

Given *PEI Reference*'s particular focus on provincial family law courts, an especially relevant point of comparison would be the Saskatchewan Provincial Court's functions in respect of its role in the administration of the Saskatchewan *Child and Family Services Act.* In making that comparison, we will refer to the Provincial Court as the "Family Court".[89]

There are, we argue, no constitutionally relevant distinctions that can be drawn between the decision-making roles/functions of the SLRB and those of the Saskatchewan Provincial Family Court. Both are statutory creatures of the Provincial Legislature. Neither have any inherent or residual powers. Each has been assigned by statute the judicial function of authoritatively determining justiciable disputes in a *lis* between parties about legal rights defined in a particular statute and of substantial importance to those parties and their affiliates. Their hearing powers are essentially the same, and, while the Board does not have the direct enforcement powers of the Family Court, its decisions are, by law, enforceable as though they were decisions of the Queen's Bench.[90]

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87 *Supra* note 85 at para. 40.

88 *PEI Reference*, *supra* note 2 at para. 86.

89 *Saskatchewan Child and Family Services Act*, c. C-7.2 of the Statutes of Saskatchewan, 1989-90, as amended [hereinafter "CFSA"].

90 TUA, s. 13.

In both cases, the necessary "political brokering of public policy" – to quote Trebilcock (*supra*) – is already reflected in the tribunal's detailed statutory mandates, and both are focused on the rights of the parties to the dispute, rather than on "the collective good of the community as a whole" – to quote Justice Dickson in *Residential Tenancies Reference* (*supra*).

The "purpose" of the *Child and Family Services Act* – aspects of which the Family Court is charged with administering – is said ". . . to promote the well-being of children in need of protection by offering, wherever appropriate, services that are designed to maintain, support and preserve the family in the least disruptive manner".[91] The *Trade Union Act* does not define its purpose as such, but similarities may be divined in its "short" title – "An Act respecting Trade Unions and the Right of Employees to organize in Trade Unions of their own choosing for the Purpose of Bargaining Collectively with their Employers".

Clearly, however, neither the Family Court nor the SLRB are authorized to "craft policy", to use the *Bell* language, but both make judgments on broadly defined questions. And, in that regard, both can be said to be doing what Dickson J. referred to in *Residential Tenancies Reference* as exercising "a certain degree of discretion", which, with respect, might be more appropriately characterized as making judgments of a particularly broad nature.

Thus, for example, the Board must decide the *appropriateness* of a proposed bargaining unit and in doing so must consider, amongst other things, whether, in the case before it, an "employer unit, craft unit, plant unit or a subdivision thereof or some other unit" would be *most* appropriate;[92] while the Family Court must decide the "best interests of a child", and in doing so must consider, amongst other things, the "importance of continuity in the child's care and the possible effect on the child of disruption of that continuity".[93] The Board must determine whether an impugned action of an employer or a union constitutes a "labour practice" that is "unfair",[94] and the Court, whether a child is "in need of protection";[95] the Board, whether an application by employees is the result of

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91 CFSA, s. 3.
92 TUA s. 5.
93 CFSA, s. 4.
94 TUA, s. 4.
95 CFSA, s. 37.

"influence" by the employer,[96] and the Court, whether a "contact" between a child and a "person" would cause the child to be "in need of protection"[97].

While these are dramatically different subject matters, the judgments the Court and Board are required to make in the course of their decision-making are not qualitatively different in any substantive way.

The Labour Relations Board's function, like the function of the Family Court, is quintessentially "judicial" – a function for which our system of laws demands "impartiality". It thus clearly "relates" to *Ell*'s first "basis".[98]

It ought also to be self-evident that, in the labour relations field, the Saskatchewan public's "confidence in the administration of justice" must depend on its confidence in the SLRB exercising its judicial function impartially. That confidence will clearly depend, in turn, on the public perceiving the SLRB to be independent of the government and its influential friends. This is particularly true of a labour board, whose decisions regularly affect the interests of the government, and where the government itself is frequently one of the parties before the Board. How can such a Board attract *any* public confidence in its administration of justice if the very government that appears before it, or whose political fortunes are inextricably entwined in what it decides, can terminate, at any time and without cause, the decision-maker?[99] Thus the Board's judicial function also "relates" to the third of *Ell*'s three "bases" of the *PEI principle*.[100]

Moreover, while *Ell* does not require the functions of office holders to relate to all three bases of the *PEI principle* before they attract the protection of the principle, the SLRB does also satisfy the second, "institutional" basis in the *Ell* analysis. The SLRB must surely be seen as intended to stand as a "shield against unwarranted deprivations by the state of the rights and freedoms of individuals" – to use *Ell*'s somewhat colourful language – and is, thus, one of the "courts *or tribunals*" – also *Ell*'s language – whose "institutional independence from the legislative and executive branches of government" must be maintained if our "constitutional order" is to be "preserved".[101]

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96 TUA, s. 9.

97 CFSA, s. 16(5)(c).

98 *Ell*, *supra* note 57 at paras. 21 and 24.

99 By way of example of the particular importance of a labour board's independence, see *Service Employees International Union, Local 204 v. Johnson* (1997), 1997 CarswellOnt 4486, 35 O.R. (3d) 345 (Ont. Gen. Div.).

100 *Ell*, *supra* note 57 at paras. 23 and 24.

101 *Ibid.* at paras. 22 and 24.

Before closing the doctrinal argument in support of the application of the *PEI principle* to the SLRB, it is important to return to *McKenzie*, currently the one decision, other than *Bell*, in which we know that the applicability of the *PEI principle* to a tribunal was fully argued, and the first decision in which the principle was held to apply to a tribunal. The views of the Supreme Court of B.C. on the constitutional nature of the requirement of judicial independence as it relates to adjudicative tribunals are summarized in these passages from *McKenzie*:

> [33] The fact that a jurisdiction that would otherwise remain with the courts is amenable to the efficiencies of a specialized tribunal does not alter the character of the fundamental task of the tribunal. Nor does the fact that there is a social need for an inexpensive forum for the resolution of such disputes, because the issues are often repetitive and the amounts involved are often low, alter the fundamental importance of the work of arbitrators. This was explicitly recognized by the Attorney General in the Legislature when he spoke of the "profound" effect tribunal decisions have on the everyday lives of citizens.
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> [150] . . . If the Respondents [the B.C. government] are correct, the same function, *depending solely on whether it is located in a court or in a tribunal*, may require the constitutional protection of a fair and independent arbiter, or may be left to whatever cowed or needy sycophant the government, in its absolute discretion, thrusts into the judgment seat. This is such an affront to the notion of "a fair and public hearing by an independent and impartial tribunal," guaranteed in writing elsewhere in the constitutional firmament, and is so fundamentally illogical and arbitrary, that it cannot be reconciled with the concept of the rule of law itself. [Emphasis added.]
>
> [151] The principles of natural justice are rules developed by judges that may be modified or ousted by a clear expression of legislative intent. There is surely a distinction between such rules, however, and natural justice itself, by whatever rubric or rationale it is described. The fundamental principles upon which justice and democracy rest must infuse both judge-made law and legislation. The rules of natural justice are drawn from a wellspring of fundamental principles. Any modification or ouster of those rules by legislatures must logically tap into the same sources in order to be constitutional. Legislation ousting the rules of natural justice must, in other words, still comport with the fundamental premises, written in some contexts, unwritten in others, infusing the concept of the rule of law.
>
> [152] A tribunal, constituted to try issues of law as between private citizens that is equipped with none of the indicia of independence required to ensure impartiality or to engender public confidence or respect, must necessarily run afoul of the unwritten principle of independence identified in the PEI Reference and in Ell. . . .

This completes the doctrinal argument in support of the application of the unwritten constitutional principle of judicial independence to

tribunals such as the SLRB. The argument is equally persuasive from a policy perspective.

(d) The Policy Perspective

There could be no principled, policy-based controversy about the application of the *PEI principle* to tribunals like the SLRB, nor any valid policy reason to resist it, were it not for the concern that subjecting such tribunals to a court-centric concept of judicial independence might lead to an unwanted *judicialization* of those tribunals – to making tribunals more and more court like, and less and less flexible.[102]

The response to this concern is straightforward. The judicialization threat, such as it is, has long been recognized and has already been put to rest – by the courts themselves.

Why is the concern about judicialization unwarranted? First, it is, perhaps, counter-intuitive, but nevertheless true, that the constitutional requirements of judicial independence are not more onerous than the common law requirements of judicial independence – both are defined by the *Valente* principles. See, for example, *Matsqui*.[103] One example is that neither requires life-tenured appointments of tribunal members. The only difference is that the common law's independence requirements can be overridden by legislation.

Secondly, and this is especially important, the law of judicial independence as it applies to tribunals already contains the unique feature of having a malleable content, of being idiosyncratically adaptable. The courts have made it clear that what the principle of independence will require of the structure and administration of particular tribunals is variable and will be adapted in practical ways to fit the nature and purpose of each tribunal and its operating circumstances.

This principle has been affirmed by the Supreme Court of Canada in numerous cases, but perhaps most to the point in *Ell*. "The manner in which the essential conditions of independence may be satisfied", the Court said, "varies in accordance with the nature of the court or tribunal and the interests at stake". The Court cites its own decisions in *Matsqui*

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[102] In the papers referred to earlier that oppose having a constitutional principle of judicial independence apply to tribunals of any kind (Whitaker and Wyman, *supra* note 3), the policy concern is the judicialization danger – the risks the authors argue that independence requirements will present to the flexibility of the structure and process that tribunals require if they are to maximize the usefulness of their special role in the administrative justice system.

[103] *Matsqui*, *supra* note 75.

and *Therrien* for the following statement of the "contextual approach" to the constitutional requirement of judicial independence:

> . . .although it may be desirable, it is not reasonable to apply the most elaborate and rigorous conditions of judicial independence as constitutional requirements, since s. 11(d) of the Canadian Charter may have to be applied to a variety of tribunals. These essential conditions should instead respect that diversity and be construed flexibly. Accordingly, there should be no uniform standard imposed or specific legislative formula dictated as supposedly prevailing. It will be sufficient if the essence of these conditions is respected . . .[104]

And adds:

> The ultimate question in each case is whether a reasonable and informed person, viewing the relevant statutory provisions in their full historical context, would conclude that the court or tribunal is independent: Valente, supra, at p. 689. *The perception of independence will be upheld if the essence of each condition of independence is met.* The essence of security of tenure is that members of a tribunal be free from arbitrary or discretionary removal from office. See Valente, supra, at p. 698 . . .[105]

Moreover, the courts have not paid mere lip service to this principle. Consider the *Consolidated Bathurst* line of cases[106] in which, to ensure the consistency and coherency of tribunal decisions, the Supreme Court of Canada adapted the principle of judicial independence to allow tribunals to institutionalize their members' decisions in ways that would not be tolerated in the courts.

On its facts, *Ell* itself is a prime example of the "contextual approach" at work. In *Ell*, legislation directed at improving the qualifications of Alberta's justices of peace led to the removal of justices who could not meet the new qualification requirements. The removed justices applied for a declaration that the statutory application of the new standards to them contravened their constitutionally mandated independence.

They were successful in the lower courts, but, on appeal, while the Supreme Court agreed that the unwritten constitutional principle of judicial independence applied to them, it allowed the government's appeal. The Court's reasons for doing so provide an especially revealing look at its commitment to the contextual approach to the content of the

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104 *Ell*, *supra* note 57 at para. 30.

105 *Ibid.* at para. 32.

106 *I.W.A. v. Consolidated-Bathurst Packaging Ltd.*, 1990 CarswellOnt 2515, 1990 CarswellOnt 821, [1990] 1 S.C.R. 282 (S.C.C.) [hereinafter "*Consolidated Bathurst*"]; and *Québec (Commission des affaires sociales) c. Tremblay*, 1992 CarswellQue 114, 1992 CarswellQue 108, [1992] 1 S.C.R. 952 (S.C.C.).

constitutional principle of judicial independence – to applying the principle of independence in a flexible and sensible manner. Paragraph 37 reads in part as follows:

> . . . it is evident that a reasonable and informed person would perceive the [statutory] amendments to strengthen, rather than diminish, the independence and qualifications of Alberta's justices of the peace. It is evident that the Legislature concluded that the positive impact of the reforms on the interests that underlie judicial independence outweighs any negative impact of the respondents' removal from office. Their removal was necessary to give effect to those reforms. As such, the respondents' removal cannot be said to be arbitrary, and does not violate the principle of judicial independence.

Other examples of the courts sensibly fashioning the independence requirements to fit a tribunal's practical needs include at least four Supreme Court decisions in addition to *Ell*: *Matsqui*; *Bell*; *Katz v. Vancouver Stock Exchange*;[107] and *CUPE*.[108]

Finally, in both *Imperial Tobacco*[109] and *Charkaoui*,[110] we have seen the Supreme Court of Canada demonstrate a strong measure of deference to the role of legislatures in fashioning special procedural regimes in response to uncommon adjudicative challenges.[111]

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[107] (1995), 1995 CarswellBC 969, 128 D.L.R. (4th) 424 (B.C. C.A.), affirmed 1996 CarswellBC 2165, 1996 CarswellBC 2166, [1996] 3 S.C.R. 405 (S.C.C.).

[108] In *CUPE*, *supra* note 60, the Supreme Court intimated that, in the unique circumstances of Ontario's labour relations sector, the status of labour arbitrators who have no security of tenure and no financial security would nevertheless satisfy the principles of judicial independence. The Court took particular note in this regard of the special fact that individual labour arbitrators were selected for the adjudication of particular disputes by the parties to those disputes. See *CUPE*, para. 192.

[109] *British Columbia v. Imperial Tobacco Canada Ltd.*, *supra* note 57.

[110] *Charkaoui v. Canada (Minister of Citizenship & Immigration)*, *supra* note 57, paras. 32-47. (These are the paragraphs in which the Court considers and rejects the appellant's argument that the procedural regime specified by the legislation was inconsistent with the unwritten constitutional principles of judicial independence.)

[111] See also in this respect, *I.B.E.W., Local 1739 v. I.B.E.W.* (2007), 2007 CarswellOnt 4014, 86 O.R. (3d) 508 (Ont. Div. Ct.), in which in special circumstances the Ontario Divisional Court upheld an uncommon Ontario Labour Relations Board procedure involving the Board refusing an oral hearing even in the face of a credibility issue. For a case comment noting the implications of this case for the flexibility of tribunal procedures generally, see David A. Wright, "Master of its Own House: Procedural Fairness and Deference to Labour Relations Board Procedure . . ." (2008) 21 C.J.A.L.P. 361.

Thus, through their adoption and intelligent application of this "contextual approach" to the application of the independence requirements to tribunals, the courts have already resolved any concerns there might have been about the judicialization dangers presented by a constitutional principle of judicial independence.

It should also be noted that constitutionally mandated tribunal independence is not new in Canada. Since 1982, all tribunals covered by the written constitutional requirements in sections 11(d) and 7 of the *Charter*, and, since 1960, all federal tribunals covered by section 2(e) and (f) of the *Canadian Bill of Rights*,[112] and, since 1975, all Québec tribunals[113] must be independent and impartial.

With respect to the particular indicia of independence at issue in *SFL v. Saskatchewan* – the prohibition of at-pleasure appointments – it may be noted that the practice of appointing members of adjudicative tribunals only to fixed-term appointments is commonplace in several provinces and in the federal jurisdiction.[114]

In summary, both the doctrinal argument and the policy analysis support the conclusion that the *PEI principle* applies to protect the judicial independence of the Saskatchewan Labour Relations Board and thus renders Saskatchewan's statutory regime of at-pleasure appointments to the SLRB, including the post-election at-pleasure provision, constitutionally invalid.

CONCLUSION

What must not be lost sight of or forgotten in this discussion is that tribunal decisions *matter*. To quote the B.C. Attorney General's statement to the B.C. Legislature cited by McEwan J. in *McKenzie*, "they have a profound effect on the everyday lives of citizens". They matter for the same reasons, in the same ways, and to *at least* the same degree as the decisions of most courts.

In her 1998 speech to the BCCAT Conference, Madam Justice McLachlin discussed the "principle that societies governed by the Rule of Law are marked by a certain *ethos of justification*". She said:

> Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of

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112 S.C. 1960, c. 44.

113 Section 23 of Québec's *Charter of Human Rights and Freedoms* specifies that adjudicative tribunals must be independent and impartial.

114 See, *e.g.*, *Hewat v. Ontario*, *supra* note 85.

> rationality and fairness. Arbitrary decisions and rules are seen as illegitimate. Rule by fiat is unaccepted. But these standards do not just stand as abstract rules. Indeed, most importantly, the ability to call for such a justification as a precondition to the legitimate exercise of public power is regarded by citizens as their right, a right which only illegitimate institutions and laws venture to infringe. The prevalence of such a cultural expectation is, in my view, the definitive marker of a mature Rule of Law.[115]

We believe that this is precisely correct. However, such a cultural expectation cannot flourish in an at-pleasure appointments system in which parties are left to wonder, when faced with tribunal hearings involving, for example, landlord/tenant disputes, worker's compensation claims, human rights issues, social benefits appeals, and yes, labour relations matters, whether adjudicative decision-makers, lacking any structural safeguards for their independence, will in fact be impartial. In our view, an administrative justice system that is unable to deliver on that score cannot command public confidence in the rationality and fairness of its decisions.

The final say on this constitutional question will come from the Supreme Court in a future case. Meanwhile, with the meaning of *Ocean Port* still unresolved, and the legacy of *McKenzie* as yet unknown, the legitimacy of the decisions of adjudicative tribunals now operating under at-pleasure appointments regimes will remain an open question.

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[115] *McLachlin BCCAT speech*, *supra* note 51 at 174.