The Puzzle of Independence and Parliamentary Democracy in the Common Law World: A Canadian Perspective

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This chapter explores the relationship between partisanship and independence in administrative law in Canada and the common law world. Partisanship is endemic to Parliamentary democracy. The fusion of legislative and executive roles means that the leadership of the executive branch of government (i.e. the Prime Minister and Cabinet) is selected from the political party that leads the legislative branch of government through the confidence of Parliament. At the same time, as the Crown, the executive leadership cannot exercise public powers in ways intended to benefit one party or one partisan perspective on public policy matters. Partisanship thus drives the process that produces the executive branch, but has no legitimate role as a goal or motivation in the exercise of public authority. Consequently, it should come as no surprise that a key tension in the development of administrative law in Canada, and elsewhere in the common law world, is how to ensure executive decision-making is sufficiently independent –that is, not unduly influenced or undermined by partisan considerations.

Independence can be eroded by partisanship from the executive branch in at least two distinct (and interrelated) ways – first, through the exercise of executive discretion over appointments and second, through the attempts directly or indirectly to influence the

[1] This chapter builds on an earlier study (see Sossin 2008), including a paper prepared for the first Workshop on Comparative Administrative Law, Yale University, May 2009, where I benefited from constructive and thought provoking comments on my paper and a lively exploration of comparative administrative law more generally. I am grateful to Vasuda Sinha and Danny Saposnik for their excellent research assistance on the original version of this paper.

actions of executive agencies. There are few legal constraints which preclude the executive from acting on partisan motivations but strong cultural aversions to this in the common law world. In this look back at a tumultuous decade for Canada, I explore what happens when those cultural aversions cease to be effective.

Independent administrative bodies do not fit easily into the political, constitutional or legal landscape of parliamentary democracy as it is practiced in many parts of the common law world. These administrative bodies are generally established to fulfill policy mandates but without the usual forms of hierarchical accountability to the government that prevailing conceptions of parliamentary democracy normally demand. Independent administrative bodies are not courts and are not government, but have significant impact both on the rights and interests of individuals and groups and advancement of public policy objectives.[2] Administrative bodies, in this sense, must stand apart from and yet be knit together with legal and policy accountability mechanisms. They have been said to "span the constitutional divide between the judiciary and the executive."[3]

Similarly, the notion of the independent exercise of executive discretion in the area of appointment to tribunals and courts reflects an inherent tension. How can the apex of executive government remain independent in this key function - and from whom?

[2] There is no obvious definition for "independent administrative body." In Canada, for example, the range of administrative bodies at both the federal and provincial/territorial level that could be fairly characterized as "independent" would be vast. The term is used here to cover, at a minimum, executive bodies with an adjudicative mandate and bodies (both executive and legislative) with a mandate of oversight over executive decision-making (see generally Ratushny 1990).

[3] *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch),* [2001] 2 S.C.R. 781, at para. 32. As discussed below, while these bodies are viewed as part of the executive branch in Canada and Australia, they are part of the judicial framework in the UK. In the significance of *Ocean Port*, see Jacobs 2008).

While the Canadian Constitution creates robust protections for judicial independence, these protections are triggered the moment *after* appointment. They do not constrain the executive's power to appoint judges and other adjudicators and regulators or the process employed to make such appointments. Rather, whatever limits are set out by the statutes empowering executive appointment and common law administrative law constraints provide the only rule of law bulwark against partisan considerations infiltrating merit-based appointment.

These hybrid settings where the political realities of partisanship and the legal structures of autonomy from partisan considerations create what I term a "puzzle" of independence in common law Parliamentary democracy. My focus here is on how this puzzle has manifested itself in the Canadian experience, where both independent administrative bodies and judicial appointment have risen to national prominence due to several high-profile and high-stakes crises.

During a decade in office (2006-2015), Prime Minister Harper's governments in particular attracted allegations of partisanship in appointments to the Courts and attempts to influence independent administrative bodies (including the Canadian Nuclear Safety Commission, discussed as a case study below). The Harper Government came to power in a particularly acrimonious period of Canadian politics with a strongly ideological policy agenda. In no small way as a reaction to this confrontational and ideologically divisive period, the Liberal Government of Justin Trudeau, elected in October 2015, has been at pains to reiterate respect for independent institutions of accountability (whether

Parliamentary, judicial or administrative bodies). In February of 2016, the Government issued the following press release setting out its commitments to federal appointments:

> The Government of Canada is moving quickly to apply a more rigorous approach to Governor in Council (GIC) appointments. The selection process will reflect the fundamental role that more than 1500 Canadians play in our democracy as they serve on commissions, boards, Crown corporations, agencies, and tribunals across the country.
>
> The Prime Minister, Justin Trudeau, today announced the new approach – one where an open, transparent, and merit-based selection process will support Ministers in making appointment recommendations for positions within their portfolio. The new strategy will result in the recommendation of high-quality candidates who truly reflect Canada's diversity.
>
> The new approach will apply to the majority of non-judicial appointments, and will make hundreds of part-time positions subject to a formal selection process for the first time.
>
> Until the new approach has been implemented, appointments or re-appointments will only be made to positions essential to government business or to those that deliver important services to Canadians. These appointments and re-appointments will be for up to one year in length, subject to legislative provisions.[4]

Prime Minister Trudeau was quoted in the press release as stating, "We are committed to raising the bar on openness and transparency in government to make sure that it remains focused on serving Canadians as effectively and efficiently as possible. Government must serve the public interest, and remain accountable to Canadians."

[4] (February 25, 2016) http://pm.gc.ca/eng/news/2016/02/25/prime-minister-announces-new-governor-council-appointment-process.

While yet to map out its approach to judicial appointments, the new Canadian Government has expressed similar commitments both to diversity and transparency.[5] With a recently announced retirement of a Supreme Court Justice (Thomas Cromwell), the new Government will have its first opportunity to (re)shape the Court in the Fall of 2016.

So, how did we get here? The allegations of interference during the decade under review in this brief study suggest a need for a more coherent approach to the administrative law constraints on executive power. To what extent and in what ways should a government in a parliamentary democracy be constrained from such interference? To what extent and through what mechanisms may the government legitimately seek to influence the direction, approach and decision-making of independent bodies? Does independence enhance or limit the accountability of these bodies? Should independence be seen as simply independence from the government or do these bodies similarly need independence from other potential sources of undue influence, from stakeholder groups to political parties? If these bodies are independent of everyone, to whom are they accountable and in what ways? And how (if at all) does the independence of administrative bodies differ from that of Courts? These are the questions I seek to explore in this chapter.

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[5] See the Liberal commitment during its 2015 election campaign for a more fair and open government, including an "inclusive, representative, transparent and accountable process to advise on appointments to the Supreme Court of Canada." (p.5) https://www.liberal.ca/files/2015/06/a-fair-and-open-government.pdf. Indeed, this zeal for the avoidance of partisanship in executive appointments has even extended to the appointed Canadian Senate, which for the first time in its history is now being filled by appointments through a merit-based screening process – see "Board of Professionals to Advice Trudeau on Senate's Merit-Based Appointments" Toronto Star (January 19, 2016) http://www.thestar.com/news/canada/2016/01/19/board-of-professionals-to-advise-trudeau-on-senates-merit-based-appointments.html.

I view these case studies in light not only of the law of administrative independence in Canada specifically but elsewhere in the common law world of parliamentary democracy. I focus in particular on analogous developments in the United Kingdom, Australia and New Zealand. These other common law parliamentary jurisdictions have avoided the kinds of problems that have arisen in Canada, I conclude, because political leadership in those countries have approached administrative justice and oversight systemically and have made clear, as a legislative and policy priority, that independent bodies have the ability to function in the public interest without political interference.

The analysis below is divided into two parts. Part I examines two case studies from the tumultuous decade of Conservative Government in Canada (2006-2015) including the unprecedented partisan confrontation between Prime Minister Stephen Harper and Chief Justice Beverley McLachlin over an appointment to the Supreme Court, and the removal of Linda Keen, the Chair of the Canadian Nuclear Safety Commission. Part II then puts these recent disputes in a broader legal context and attempts to reconcile the status of independent administrative bodies in public law across the common law world where forms of parliamentary democracy prevail.

I. Two Canadian Case Studies: Partisanship, Politics, and Independence

The greatest threat to the independence of courts and tribunals in parliamentary systems, arguably, is partisanship. Partisanship in politicsit is in many respects the

lifeblood of elections and parliamentary politics. Partisanship in Canada has been fueled by the centralization of political life at the federal level within the office of the Prime Minister and evidence of growing influence and intervention by the political staff within the Prime Minister's Office. At the same time, Canada has witnessed the erosion of any shared sense of the boundaries of partisanship, or respect for certain "no-go zones" that need to be (at least relatively) non-partisan if democracy is to work (for example, Elections Canada, the non-partisan body which regulates Canadian federal elections also came under attack during the period under review).[6] As then Chief Justice Lamer of the Supreme Court of Canada observed with respect to the non-partisan nature of the courts in the *Provincial Judges Remuneration Reference*,

> What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized. When I say that those relationships are depoliticized, I do not mean to deny that they are political in the sense that court decisions (both constitutional and non-constitutional) often have political implications, and that the statutes which courts adjudicate upon emerge from the political process. What I mean instead is the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice.[7]

While judicial independence is said to require "depoliticization," courts have recognized that there is little they can do to compel governments to abide by this

[6] Kate Heartfield, "The Harper Conservatives and Elections Canada" Ottawa Citizen (February 3, 2014) at http://ottawacitizen.com/opinion/the-harper-conservatives-and-elections-canada.

[7] [1997] 3 S.C.R. 3 at para. 140.

direction. If a government tries to subvert the impartiality and independence of the courts by appointing party hacks and fellow travelers to the bench, or by underfunding courts, for example, there is little that courts could do to resist politicization, beyond relying on public outrage to constrain political action. Recent headlines from Pakistan to Zimbabwe demonstrate the futility of legal process and the rule of law in the absence of political buy-in (Sharpe 2010)

The Supreme Court of Canada has applied the framework of judicial independence to the common law requirement of independence before administrative decision-makers – this framework consists of (i) security of tenure; (ii) financial independence and (iii) administrative autonomy.[8] Because this framework only guides the application of the common law requirement of procedural fairness in the administrative decision-making context, it can also be altered through clear statutory provisions.[9] Because of the interrelated principles around adjudicative independence in the court and tribunal context, a partisan infringement in one context creates ripple anxieties in the other. As discussed in the two case studies below, this dynamic was particularly salient during the decade of Stephen Harper's Conservative Government in Canada.

A. Partisanship & Appointments to the Supreme Court of Canada

[8] These legal requirements were recognized as constitutional imperatives in *Valente v. The Queen*, [1985] 2 SCR 673, and applied to the context of administrative tribunals in *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3.

[9] See *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)* 2001 SCC 52.

Canada saw the nadir of depoliticization (and the apex of its opposite) in 2014 with an unprecedented confrontation between Prime Minister Harper and Chief Justice Beverley McLachlin (Sossin 2014). The root of what has come to be known as the Nadon affair was the appointment of Federal Court of Appeal Justice Marc Nadon to the Supreme Court of Canada on September 30, 2013.

Unlike the U.S. (and now the U.K.), the executive's discretionary appointment power is virtually unfettered in Canada. When exercising this discretion, the Government is engaged in an application of public authority governed by administrative law. In *CUPE v. Ontario (Minister of Labour)*,[10] discussed below, the Supreme Court reaffirmed that no executive discretion to make appointments can truly be "untrammeled" in a Parliamentary democracy governed by the rule of law,[11] but at the same time concluded that only a "patently unreasonable" exercise of an appointment power would attract judicial interference. A patently unreasonable appointment could be one based on ulterior motives or motivated by improper purposes, or as in the *CUPE v. Ontario (Minister of Labour)*, fail to consider necessary criteria (in that case, whether interest arbitration Chairs were drawn from a roster of neutral arbitration Chairs mutually agreed upon by management and labour). The Court observed that even if the discretion was framed in the broadest terms, it had to be interpreted as bounded by the purpose and objects advanced by the statute conferring the appointment power. That said, a judicial

[10] 2003 SCC 29.

[11] This reference to the bounded nature of all executive discretion derives from the Supreme Court's decision in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, often cited as the foundation for Canada's Rule of Law doctrine.

appointment had never been challenged on legal grounds in the past, much less one to the Supreme Court of Canada.

The *Supreme Court Act* provides some minimum threshold requirements intended to guide appointments to that Court (including, principally, that all those appointed have at least 10 years experience as a lawyer in Canada) and further requirements where the judge is filling one of the three seats (out of nine) required to be from Quebec. The relevant provisions of the Act provide as follows:

> **5.** Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.
>
> **5.1** For greater certainty, for the purpose of section 5, a person may be appointed a judge if, at any time, they were a barrister or advocate of at least 10 years standing at the bar of a province.
>
> **6.** At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.
>
> **6.1** For greater certainty, for the purpose of section 6, a judge is from among the advocates of the Province of Quebec if, at any time, they were an advocate of at least 10 years standing at the bar of that Province

While Justice Marc Nadon grew up in Quebec and practiced for more than 10 years there, at the time of his appointment he was based outside Quebec as a Federal Court Judge (not one of the Courts listed in s.6), thus giving rise to a measure of ambiguity as to his eligibility.[12]

[12] The Supreme Court of Canada, in an unprecedented review of an appointment to the Court, concluded that Justice Nadon was not eligible, and quashed the appointment. See *Reference re Supreme Court Act, ss. 5 and 6* 2014 SCC 21 (the "Nadon Reference"). Justice Nadon returned to the Federal Court of Appeal.

Almost immediately after the appointment was announced, a lawyer in Toronto announced he would bring a legal challenge to the appointment. Within two weeks, the provincial government in Quebec announced it would join the legal challenge. Faced with a looming crisis, the federal Government issued a reference to the Supreme Court of Canada to provide an advisory opinion on the scope of the relevant sections of the *Supreme Court Act* which would determine the eligibility of the Nadon appointment. In so doing, the Supreme Court would opine not only on the proper scope of the appointment authority at issue, but also on the quasi-Constitutional nature of such appointments.

While the legal challenge centred on Justice Nadon's Quebec status, the broader issue was the subtext of partisanship accompanying the appointment. Justice Nadon's best-known judgement was a dissent in the Federal Court of Appeal decision in the Omar Khadr case (Hopper 2014), in which Nadon took the government's side in the most notorious disputes of the post 9/11 era[13] (the case involved the Canadian Government's obligations to protect the rights of a Canadian who as a teenager was alleged to have killed a U.S. soldier in Afghanistan and was incarcerated in the U.S. facility at Guantanamo Bay). Moreover Justice Nadon, while generally well-regarded, was seen as far less distinguished in his legal and judicial record than several other higher profile Quebec candidates. As one prominent Quebec legal academic observed "He was on nobody's short list… or on anybody's long list" (Hopper 2014)

[13] 2009 FCA 246.

In a remarkable rebuke, the Supreme Court held Justice Nadon was ineligible for an appointment to the Supreme Court (Justice Michael Moldaver dissenting).[14] Of the six justices in the majority, three had been appointed by Harper's government. Moreover, the Nadon decision was one of a series of high profile losses for the Government in the Court which rolled back key aspects of the Government's agenda from mandatory minimum sentences to attempts to close down safe injection sites (Sossin 2014)

On May 1, 2014, just as the drama over the Nadon judgment was subsiding, a *National Post* headline stated that, "Tories incensed with Supreme Court as some allege Chief Justice lobbied against Marc Nadon appointment." John Ivison reported that "senior conservatives" advised that Chief Justice Beverley McLachlin may have lobbied against Nadon's appointment.

Chief Justice McLachlin released a reply statement to the press through her executive legal officer: "Given the potential impact on the Court, I wished to ensure that the government was aware of the eligibility issue. At no time did I express any opinion as to the merits of the eligibility issue. It is customary for Chief Justices to be consulted during the appointment process and there is nothing inappropriate in raising a potential issue affecting a future appointment." The statement was hardly inflammatory, but nothing like it had ever transpired in Canada between a sitting Prime Minister and Chief Justice.

Not to be out-press-released, the PMO issued its own follow-up statement:

[14] [2014] 1 SCR 433 (the "*Nadon Reference*").

> Neither the Prime Minister nor the Minister of Justice would ever call a sitting judge on a matter that is or may be before their court. The Chief Justice initiated the call to the Minister of Justice. After the Minister received her call he advised the Prime Minister that given the subject she wished to raise, taking a phone call from the Chief Justice would be inadvisable and inappropriate.

The opposition, and the legal community and many political observers were stunned by the allegations. The Canadian Bar Association Presidents (past and present) and the Canadian Council of Law Deans condemned the PM's conduct. Hundreds of lawyers, academics and concerned citizens signed an open letter deploring the PM's "baseless insinuation."[15] University of Manitoba professor Gerald Heckman and other legal academics, brought a complaint to the International Committee of Jurists in Geneva.[16] Ultimately, neither the Prime Minister nor the Chief Justice backed down. A new Justice was appointed to the Court (a well-known appellate judge with no ties to the Government or track record of supporting its priorities) and both the Chief Justice and Prime Minister moved on (albeit with lingering unease) to other priorities.

This episode reflected both the absence of a consensus on "no-go zones" for partisanship in Canada's system of Parliamentary democracy, and the need for some quasi-independent structure to buffer executive discretion over appointments from partisan politics. These issues do not arise in a system of institutional constraints (as in the U.S. where the legislative branch constrains executive (Presidential) discretion) or in

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[15] Tonda MacCharles, "Legal Community Demands Stephen Harper Withdraw Criticism of Beverley McLachlin" Toronto Star (May 13, 2014) at http://www.thestar.com/news/canada/2014/05/13/canadas_legal_community_steps_up_its_demand_that_stephen_harper_withdraw_criticism_of_chief_justice.html.

[16] The ICJ responded that the Chief Justice's conduct was appropriate and that "the criticism [by Harper] was not well-founded, and amounted to an encroachment upon the independence of the judiciary and integrity of the Chief Justice."

systems which have instituted buffer entities, as in the U.K. which moved to a Judicial Appointment Commission through the *Constitutional Reform Act 2005* (which also covers appointments to certain administrative tribunals, discussed below). While a system of federal Judicial Advisory Committees function in Canada, they engage only in a screening to determine competent candidates and play no role in the actual judicial selection process (and can be altered by the Federal Government at any time).[17]

B. The Case of the Canadian Nuclear Safety Commission

While most would agree that democratic politics requires courts as independent arbiters of social, economic and political disputes, recent events in Canadian politics raise the question of whether or not that same logic applies to regulatory and adjudicative bodies like the Canadian Nuclear Safety Commission. Does the public care if the independence of these bodies, which are themselves extensions of the executive branch of government, is preserved? These bodies are expected to be impartial and objective and to act only to advance the legislative purposes for which they were created. Beyond this, where a government acting with a public mandate challenges the decision of an administrative body acting in the public interest, where does the public good lie? Unlike public servants, the members of these independent bodies owe no duty of loyalty to the government, but at the same time they are funded by taxpayers, and bound by a variety of governmental standards and policies.

[17] See http://www.parl.gc.ca/Content/HOC/Committee/391/JUST/Reports/RP2970953/391_JUST_Rpt14/391_JUST_Rpt14_Pg01-e.html.

While they may bridge the worlds of independent decision-making and government policy-making, the Court in *Ocean Port* was clear that administrative tribunals and executive agencies do not enjoy the constitutionally protected status of judicial independence. Unlike judges, who have security of tenure (until the age of 75), appointees to administrative bodies typically serve fixed terms as set out in their governing statutes. *Ocean Port* further stands for the proposition that such statutes may even provide for the appointment of adjudicators "at pleasure."

These questions go to the very heart of the Canadian concept of separations of powers. Under the conventional view, the legislature makes laws, the executive applies laws and the judiciary interprets laws. That conventional view, however, misconstrues the executive as a monolithic whole. The executive is more properly understood, at least in Canada, as a web of constitutionally mediated relationships (Sossin 2005). The relationship between the political executive, represented by the Cabinet, and the civil service, for example, is mediated by the Constitutional convention of bureaucratic neutrality.[18] Independent administrative bodies are similarly in a complicated relationship, both with the political executive and sometimes also with the civil service. In this sense, independent administrative bodies are neither an integrated part of a single executive whole, nor do they constitute a headless fourth branch of government unaccountable to the executive.[19]

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[18] Ibid.

[19] As Katrina Wyman put it, "The doctrine of tribunal independence is not concerned with establishing administrative tribunals as a fourth branch of government": (Wyman 2001, at 100). I have argued elsewhere that we ought to develop a distinct place for administrative justice in Canada's legal and constitutional system (Sossin 2009).

As the case studies below suggest, the very uncertainty of the status of these bodies means that there are no clear mechanisms for resolving disputes with the government when they arise (other than mutual posturing, dueling interviews in the media and threats of litigation). Independence, it turns out, works remarkably well in Canada as long as supported by Government and remarkably poorly when that Government support erodes.

By far the most contentious and noteworthy incident of the Conservative Government's interference in the decision making of an independent body occurred in January 2008 when Natural Resources Minister Gary Lunn removed Linda Keen as the head of the Canadian Nuclear Safety Commission (CNSC), Canada's nuclear safety watchdog. Lunn justified Keen's removal on the basis that she had lost the government's confidence over the way she handled the shutdown of the medical isotope-producing nuclear reactor in Chalk River, Ontario, owned and operated by Atomic Energy of Canada Limited, a Crown corporation, in December 2007 (CBC News 2008).

The CNSC ordered the reactor to close on November 18, 2007 over safety concerns about the emergency power system not being connected to cooling pumps, as required to prevent a meltdown during disasters such as earthquakes. The closure of the 50-year-old reactor, which generates two thirds of the radioisotopes used around the world in medical procedures and tests, resulted in a worldwide shortage of the crucial medical material.

In December 2007, the Government resolved the medical crisis by using the legitimate instrument always available to government to interfere with independent administrative agencies: Parliament. On December 11, 2007 an emergency measure passed through the House of Commons that ordered the reactor to be restarted for a 120-day run as of December 16.[20]

Keen was removed as President of the CNSC on January 15, 2008, the day before she was scheduled to appear before the House of Commons' Natural Resources Committee to offer her version of the events leading up to the shutdown of the reactor. Critics were quick to condemn the Minister's decision as a blatant political maneuver aimed at silencing a federal employee's criticism of a controversial Government decision. For example, Liberal Member of Parliament David McGuinty accused the Conservatives of "U.S. Republican-style tactics" by having Keen removed in the "dark of night," just hours before she was due to testify.[21]

Two weeks after her dismissal Keen proceeded to testify in front of the Committee, stating that the safety risks arising from restarting the nuclear reactor were 1000 times greater than permitted by accepted international standards. She added that while the decision to keep the facility closed may have precipitated a health crisis, such considerations were not the purview of a nuclear regulator to remedy. Keen insisted that public safety was the only consideration the CNSC was legally allowed to consider vis-à-vis its decision to shut down the Chalk River reactor.

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[20] Bill C-38, *An Act to permit the resumption and continuation of the operation of the National Research Universal Reactor at Chalk River*, 39th Parl. 2nd Session.

[21] Ibid.

The committee, and the country, heard the government's contrary version of the applicable law loud and clear. Gary Lunn maintained that the extended shutdown of the reactor threatened a national and international health crisis. He characterized the issue as, literally, one of life and death: "Had we not acted, people invariably would have died … We could not let that happen. We had to act, and we did" (CBC News 2008). Additionally, comments by Conservative members of the Natural Resources Committee attempted to establish that it was within Keen's mandate to consider the medical fallout of shutting down the reactor and therefore also isotope production. According to Conservative MP Brad Trost, Keen's mandate as President of the CNSC did "not specifically exclude being concerned about cancer patients and their treatments."

While Keen remained a CNSC commissioner following her termination as President of the CNSC (she subsequently resigned in September of 2008), she challenged the Government's action in court. In April of 2009, the Federal Court dismissed her claim, based largely on the *Ocean Port* argument, that the position of President of the CNSC is an "at pleasure" appointment.[22] The politics of independence, however, is unlikely to be resolved by judicial fiat, no matter who may leave the last courtroom vindicated. While the Court addressed the issue of whether the Government had the *right* to dismiss Keen, it sidestepped the broader and deeper question of whether the Government was *right* to exercise this power, whether or not they possessed it.

The decision to remove Linda Keen in the middle of her second five-year term as President threatened the independence of the CNSC and the integrity of independent

[22] See *Keen v. Canada (Attorney General)* 2009 FC 353.

administrative agencies and quasi-judicial tribunals generally. The government's decision to reverse the CNSC's shutdown order in relation to Chalk River can be justified on public health grounds – however, the decision to remove Linda Keen was not necessary to ensure a steady supply of medical isotopes. This appeared to be payback. Indeed, in a December 27 letter from Lunn to Keen (leaked to the *Ottawa Citizen*), the Minister indicated that he questioned Keen's judgment and was considering having her removed (Reuters 2008). Keen responded by accusing the Minister of improper interference and threatened litigation if she were removed. It was left to the Prime Minister, who noted that Keen was a "Liberal appointee," to complete the task of political retribution (CBC News 2008). Following Keen's removal, an assistant deputy minister within the Ministry of Industry was named interim president (Natural Resources Canada 2008). The fact that the Government chose a civil servant who emerged from a culture of loyalty to the government of the day was telling.

In my view, during the Chalk River dispute the legal and political system functioned as it should have, at least until the Minister took steps to terminate Ms. Keen as President for reaching a decision that the Minister did not like and did not believe was in the public interest. In December, 2007, the regulatory body reached a decision it believed was appropriate in light of its expertise in the field of nuclear safety and the non-compliance of the Chalk River facility. The government stepped in to ensure its overriding public health concerns and the global shortage in medical isotopes were addressed by recalling Parliament and winning support for reopening the facility. Parliament's reopening of the facility was not political interference but rather an exercise in Parliamentary sovereignty. The Minister's subsequent attack on Ms. Keen, however,

like Prime Minister Harper's attack on the credibility of Chief Justice McLachlin, appeared rooted more in partisanship than public policy.

And yet, in a final, ironic twist, the Chalk River facility was once again shut down indefinitely in May of 2009 due to safety concerns (CBC News 2009). This time, the decision was not the CNSC's but the operational managers of the facility. Following this development, the Government indicated that perhaps it was time for Canada to move out of the field of medical isotopes altogether. In a little-noticed press release issued in March of 2015, Canada announced the world's oldest operating nuclear reactor in Chalk River would be shuttered for good in 2018.[23]

II: The Legal and Political Context of Independence in the Common Law World

As I address the broad questions raised at the outset of this chapter, it is necessary to resolve what is meant by "independence" in the context of administrative bodies or those who exercise executive discretion? These decision-making structured, after all, are created by legislative act in order to further policy ends. These decision-makers are not free to adopt the mandate they believe is most appropriate, but must discharge the responsibilities provided to them in order to ensure democratic accountability. These bodies do not choose the people best able to carry out this mandate; rather, the executive makes appointments to these bodies, and in doing so is bound by the criteria set out in the

[23] Ian McLeod, "World's Oldest Operating Nuclear Reactor, in Chalk River, to Close in 2018" *Ottawa Citizen* (March 15, 2015) at http://ottawacitizen.com/news/politics/historic-nru-reactor-to-close-in-2018.

bodies' empowering statutes, and by whatever other criteria the government of the day deems appropriate, as supervised by the courts under the rule of law. Lastly, these bodies do not control free-standing budgets to meet their needs, but rather must make do with the resources that the government of the day (or, in some cases, the legislature) provides.

As the case studies above demonstrate, however, the very idea of independence has been under siege in Canada. While the politics of independence is apparent, the law governing constraints on the executive branch in this regard is uncertain at best. While judicial independence enjoys robust and constitutionally grounded protection, it applies only to judges post-appointment and does not constrain the executive in exercising its discretion to appoint judges.

Canadian administrative law hints at the nature and scope of independence rather than addressing it expressly. The point of departure for this jurisprudence, as indicated above, is the Supreme Court's decision in *Ocean Port*. There, the Court affirmed that administrative bodies are not subject to the protections of judicial independence as a matter of constitutional law.[24] Or, more accurately, those who are affected by the decisions of these administrative bodies do not have a constitutional right to an independent decision-maker, as do litigants who have their disputes adjudicated in courts. Independence, in other words, is a right enjoyed by parties, not adjudicators.[25] The test

[24] An exception to the non-constitutional nature of the independence of administrative bodies is where an administrative body is deemed to be making a decision which engages rights under the Canadian Charter of Rights and Freedoms, Canada's constitutionally entrenched bill of rights. For example, where the Immigration and Refugee Board is determining whether a refugee should be deported, the affected party's section 7 rights are engaged and the requirement of independence is elevated to that of a constitutional right. For an application of this principle, see *Singh v. Canada*, [1985] 1 S.C.R. 177.

[25] See *Mackin v. New Brunswick (Minister of Finance)* 2002 SCC 13.

for whether the requirements of independence are satisfied by a given dispute-resolution mechanism in Canada is closely related to the test for judicial impartiality – namely, would a reasonable person, who is informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically, conclude that the tribunal or court is independent.[26]

The Supreme Court held that the common law principles of procedural fairness, which include a measure of independence for administrative bodies modeled on judicial independence,[27] can be negated by a clearly worded statute and that this is what occurred in the context of appointees to the adjudicator at issue in *Ocean Port*.

The Supreme Court of Canada subsequently made a similar point in *Bell Canada v. Canadian Telephone Employees Assn.*[28] The Court confirmed that "[t]he fact that the Tribunal functions in much the same way as a court suggests that it is appropriate for its members to have a high degree of independence from the executive branch." But also that the independence of administrative bodies did not extend to immunity from direction from those bodies given delegated authority by Parliament. Specifically, the Court found that the Canadian Human Rights Tribunal could be bound by guidelines issued by the Canadian Human Rights Commission. Although the Commission was often a party of interest before the Tribunal, the Court found that the Commission's power to issue

[26] *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394 (De Grandpré J.).

[27] The application of judicial independence to administrative bodies was established in *Canadian Pacific v. Matsqui* (SCC 1995) per Lamer C.J.

[28] [2003] 1 S.C.R. 884.

guidelines to the Tribunal was part of the scheme expressly established by Parliament for elaborating human rights law. In the course of this decision, the Court noted:

> A high degree of independence is also appropriate given the interests that are affected by proceedings before the Tribunal - such as the dignity interests of the complainant, the interest of the public in eradicating discrimination, and the reputation of the party that is alleged to have engaged in discriminatory practices.[29]

These cases, however, do not explore the issue of politically motivated interference with the decision-making of administrative bodies. Much of the appellate case law addressing political interference has concerned the issue of government attempts to remove or not reappoint members or leaders of independent administrative bodies. As in the Keen case, these disputes reflect the tension between the legitimate government direction for administrative tribunals on the one hand and illegitimate political interference on the other. They also reflect the willingness of Court's to intercede on behalf of preserving the integrity of independent administrative bodies.

Perhaps the most notorious example of the Supreme Court's intervention in the executive's appointment discretion prior to the *Nadon Reference* was *CUPE v. Ontario (Minister of Labour)*, mentioned above.[30] In that case, the Supreme Court of Canada quashed a provincial Labour Minister's politically charged appointment of retired judges to serve as chairs of hospital labour arbitration boards, but for significantly different reasons than the Ontario Court of Appeal. Whereas the Ontario Court of Appeal had viewed the case principally as one about independence (and concluded the retired judges,

[29] Ibid. at para. 24.

[30] 2003 SCC 23.

paid on a per-diem basis, lacked the necessary protections of independence), the Supreme Court viewed the case principally as one about the scope of executive discretion. The relevant legislation provided that, where the management and labour nominees to a board of arbitration cannot agree on the appointment of a Chair, then "the Minister shall appoint as a third member a person who is, in the opinion of the Minister, qualified to act."[31] The Court held that "qualified to act" in the labour relations context included an implicit requirement that the arbitrators be mutually acceptable to labour and the employer. Because the minister had no basis to conclude that the retired judges he wished to appoint met these criteria, the majority of the Supreme Court held that the appointment of the retired judges was "patently unreasonable." For the Court, the credibility of the arbitration process trumped political expediency.

While the Court did not invoke similar principles in the *Nadon Reference*, its decision can be seen as part of a similar enterprise to clarify clear legal constraints on Government in exercising its appointment discretion. Importantly, in the *Nadon Reference*, the Court confirmed that any future alteration of the appointment process would be treated as a Constitutional amendment requiring unanimous consent of all the Provincial governments in addition to the Federal government.

With respect to protecting the independence of administrative bodies, the high water mark for a Canadian court arguably was the British Columbia Supreme Court's decision in *McKenzie v. British Columbia (Minister for Public Safety and Solicitor General)*. In *McKenzie*, the Court ruled that the rescinding of the reappointment of a

[31] *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14, s.6(5).

member of a residential tenancy board violated the rule of law, as part of Canada's unwritten constitution.[32] The Crown had conceded that the Government's conduct failed to adhere to the requirements of procedural fairness.[33]

Notwithstanding the judicial willingness to affirm the independence of administrative bodies in *McKenzie*, however, the chill created by the very public disputes in the Nadon Affair and CNSC cases persists. Governments in Canada, whether federal or provincial, appear less constrained than ever to exert political influence over such bodies. For example, a dispute has arisen in Saskatchewan regarding the limits of politics in the appointment of that province's labour board, and whether a new government elected on a mandate of change may advance its policy agenda by changing the composition of key tribunals.[34] Conversely, threats to the independence of administrative bodies may also come from overly close relationships between the government and the administrative body. In Alberta, for example, that province's federation of labour challenged the impartiality of that province's labour board because of its lack of independence from the government after it was learned that the Chair of the Board had

[32] 2006 BCSC 1372.

[33] On appeal, the B.C. Court of Appeal noted that the statutory provision empowering arbitrators as part of the dispute resolution process for residential tenancy disputes meant that the appeal and the issues it raised were moot. See 2007 BCCA 507.

[34] Shortly after its electoral victory in March of 2008, the Saskatchewan Party government announced that the chair and two vice chairs of the board were to be fired and that a new chair was being appointed. The Government also appointed a new Chair of the Workers' Compensation Board. (Wood 2008); and (Hall 2008).

been consulted in the development of controversial labour legislation which would have the effect of removing the right to strike from certain health sector workers.[35]

As the discussion above suggests, the law regarding the independence of administrative bodies in Canada remains unsettled, especially when viewed through the lens of peer jurisdictions in other parts of the common law world. Below I explore briefly the systemic approach adopted in common law parliamentary jurisdictions such as the UK, Australia and New Zealand. In each case, a major legislative and policy initiative proceeded from a comprehensive review dedicated to systemic concerns with administrative justice generally. In these other countries, in other words, political leadership led to systemic reform which would appear to have the effect in those jurisdictions of insulating tribunals from political interference more effectively than in the Canadian context. This is precisely the political leadership that Canada (at least so far) has lacked.

A. United Kingdom

While independence in dispute resolution was recognized in tribunals in the UK as early as the 19th century (Stebbings 2006 at 329), the issue first rose to political prominence over the course of the middle third of the twentieth century. The first instance was the 1932 Donoughmore Report, which focused on delegated legislation and judicial or quasi-judicial decision-making made by appointees of the Crown (Report of the Committee on Ministers' Powers 1932; Williams 1982). The report arose amid

[35] See *C.E.P., Local 707 v. Alberta (Labour Relations Board)* 2004 ABQB 63.

growing concerns regarding the power of government departments and the perception of increasing arbitrariness in executive decision-making (Williams 1982 at 278-9). The second in-depth review of the system of administrative justice in England and Wales was the Franks Report of 1957 (Franks 1957). While it entailed an extensive study of administrative tribunals, its focus was on the process of decision-making in tribunals and the values of openness, fairness, and impartiality. The Franks Committee arose in the aftermath of the Crichel Down Affair, a British political scandal that raised concerns regarding maladministration (Griffith 1955).

Ultimately, however, it was only in the Report of the Leggatt Review of Tribunals in 2001 that the independence of tribunals was finally brought into the limelight in a substantive way (Leggatt 2001, at para. 2.1). Part of the Leggatt Review mandate was to examine "[t]he administrative and practical arrangements for supporting those decision-making procedures meet the requirements of the European Convention on Human Rights (ECHR) for independence and impartiality." Thus, the terms of reference for the Leggatt Review itself established that the fate of tribunals in the UK would be tied to the administrative law of Europe. Article 6 of the ECHR states in part:

> (1). In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Article 6(1) provides that the tribunal must also be "independent." Independence requires that decision making bodies be free to exercise their powers without interference from the state's executive or legislature or from the parties to the dispute. In the seminal

case of *Campbell and Fell*,[36] the European Court of Human Rights (ECtHR) sought to determine whether a prison's "Board of Visitors," charged with supervising the administration of a prison and adjudicating prisoners' alleged violations of prison regulations, was independent. In determining whether a tribunal is independent, the ECtHR held that three criteria were relevant: the manner of appointment of the tribunal's members and their term of office, the existence of guarantees against outside pressure and whether the tribunal presents an appearance of independence. In turning to the facts of the case, the Court observed that the fact that tribunal members are appointed by the executive does not deprive them of independence. The executive can even provide them with guidelines regarding the performance of their functions without imperiling their independence as long as they are not subject to instructions in their adjudicatory role. While the three-year term of members of the Board of Visitors in *Campbell and Fell* was relatively short, the Court made allowance for the fact that they were unpaid, and might refuse longer appointments.[37]

The fact that the executive may not remove judges during their term of office is generally a corollary of independence as it is understood within the meaning of Article 6(1) of the ECHR. Formal recognition in a statute or regulation that tribunal members are not removable is the strongest indicia of independence. In the absence of formal guarantees of independence, such as security of tenure, the Court examines whether these

[36] *Campbell and Fell v UK* [1985] 7 EHRR 165 (EctHR Appeal nº 7819/77;7878/77) [hereinafter "*Campbell and Fell*"]

[37] *Campbell and Fell*, ibid at 199, paras 79-80. But see *Belilos* v. *Switzerland* (1988), 10 E.H.R.R. 466, where the European Court determined that a complainant before a police board could legitimately doubt the board's independence and organizational impartiality because it consisted of a single member, a municipal civil servant likely to return to other departmental duties.

guarantees are recognized in practice and whether other guarantees are present. A tribunal may still be regarded as independent provided its members are irremovable in practice.[38] In *Campbell and Fell*, the Board's independence was not threatened by the Home Secretary's power to require Board members to resign because, in practice, he could only exercise it in exceptional circumstances.

The presence of additional guarantees against outside pressure played a crucial role in the European Court's assessment of the independence of military tribunals in the United Kingdom. In *Morris* v. *United Kingdom*,[39] the permanent president of the Court Martial, appointed for a four-year term to serve on panels with an independent judge advocate and two serving officers, did not enjoy formal security of tenure. However, the European Court found that the permanent president's presence on the Court Martial did not call into question its independence for several reasons: permanent presidents had never been removed from office and thus enjoyed *de facto* security of tenure; officers accepted the position of permanent president as the last appointment of their careers, which meant that they could not be influenced by any reports and promotions concerns; and permanent presidents worked outside the chain of command.[40] In contrast to the permanent president of the Court Martial, serving officers were appointed on an *ad hoc* basis for individual proceedings. Relatively junior officers with no legal training, they remained subject to army discipline and reports and were not protected by statute from external army influence while hearing a case. Despite rules governing their selection, the

[38] *Campbell and Fell*, ibid. at para. 80.

[39] (2002) 34 E.H.R.R. 52 [hereinafter *Morris*].

[40] *Morris*, ibid. at paras. 68-9.

requirement that they swear an oath promising impartiality, the right of the accused to object to any member of the Court Martial, the confidentiality of deliberations, and the rule that the most junior members expressed their view on verdict and sentence first, the Court found that there were insufficient safeguards against outside pressure being brought to bear on serving officers.[41] These officers were exposed to outside pressure that jeopardized their independence because they belonged to the army, which takes its orders from the executive, and more importantly because they were subject to military discipline and assessment reports that impacted on their careers.

The ECtHR revisited this decision in *Cooper* v. *United Kingdom*,[42] which dealt with the Royal Air Force Court Martial. Considering additional safeguards newly disclosed by the United Kingdom, the Court was satisfied the independence of the ordinary members of the Court Martial (equivalent to the serving officers in *Morris*) was sufficiently protected. The most important safeguard was the distribution by the Court Martial Administration Unit of training material to the members of the Court Martial. Briefing notes provided the ordinary members a step-by-step guide to Court Martial procedures, their role in the proceedings and those of the Judge Advocate and Permanent President. Most importantly, the briefing notes underlined the importance of independent decision making. As the Court described:

> [T]he … Briefing Notes fully instructed ordinary members of the need to function independently of outside or inappropriate influence or instruction and of the importance of this being seen to be done, providing practical and precise indications of how this could be achieved or undermined in a particular situation. The Court considers that these instructions served not

[41] *Ibid*., at para. 72.

[42] (2003) 39 E.H.R.R. 8.

> only to bring home to the members the vital importance of independence but also to provide a significant impediment to any inappropriate pressure being brought to bear.[43]

Finally, the Court noted that Court Martial members were prohibited from disclosing any opinion expressed or vote cast during court martial proceedings, a fact which effectively prevented the ordinary officers' superiors from subjecting their performance to assessment reports.[44]

This European case law, drawn from disputes arising in the UK, thus framed the Leggatt Review's mandate on the values of independence, coherence, and accessibility. It was particularly responsive to a general sense that tribunals were not perceived as independent by making recommendations with respect to (a) the appointment process of tribunal members, (b) the role of government departments in providing administrative support and funding to tribunals tasked with reviewing those departments' decisions, and (c) institutional separation (Cane 2009, at 109). The thrust of the report was that tribunals should be treated as courts are in terms of their independence. Thus, its recommendations included that the appointment process for tribunal members should be the same as for judges, that the array of tribunals be amalgamated into one general tribunal, and that the tribunal be integrated with the court system.

[43] *Ibid*., at para. 124.

[44] *Ibid*., at para. 125. See also *Incal* v. *Turkey* (1998), 29 E.H.R.R. 449 at para. 68; *Çiraklar* v. *Turkey* (2001) 32 E.H.R.R. 23 at para. 39.

The response to the Leggatt Review's recommendations was a law reform initiative, leading to the *Tribunals, Courts and Enforcement Act 2007*,[45] which in effect judicialized tribunals in the UK. The *Tribunals Act* created a First–tier Tribunal and an Upper Tribunal, each divided into various chambers, into which most existing tribunal jurisdictions were transferred over the course of 2009 and 2010. In addition, a Tribunals Service was created in 2006 as an executive agency of the Ministry of Justice and was mandated with establishing a unified administration for the tribunals system. Finally, the legally-qualified members of tribunals were made into judges and other judicial office-holders were made into tribunal members. I have suggested Canada has much to learn from the U.K. experience in viewing tribunals as part of an administrative justice system, rather than a disparate collection of arm's length administrative bodies (Sossin 2011).

As demonstrated above in the Canadian example, the cloak of judicial independence will not always preclude partisan interference. The U.K. also engaged in arguably the most dramatic reformation of judicial appointments anywhere in the common law world around the same time as the creation of the Tribunal Service. With the Constitutional Reform Act, 2005, the U.K. brought to an end the ability of the executive branch to control the judicial appointments process in England and Wales for all but the most senior positions. As Joanna Harrington wrote at the time of the contretemps between Prime Minister Harper and Chief Justice McLachlin, "There's a lesson in here for Canada."(Harrington 2015)

The U.K. established an independent body for the appointment of judges and tribunal members to ensure that those holding judicial office are selected solely on the

[45] (UK), 2007, c. 15 [*Tribunals Act*].

basis of merit, through a fair and open competition. The members of the Judicial Appointments Commission are themselves selected through open competition, other than the three members from the judiciary. The Commission does more than screen candidates for competence – it engages in interviews, role-playing and ultimately recommends just one candidate for each vacancy (which the minister can accept or reject, or seek commission reconsideration).

As noted above, Canada requires a minimum of 10 years at the bar to be a judge. In the U.K reforms, the time period post-qualification has been reduced to seven years (five years for the District Court). The desire for diversity has been a motivating factor, premised on the aspiration that judicial officers should reflect the public they serve. This means the appointment of women judges, as well as judges from ethnic minorities (what are known in England as BAME appointments to increase judges from black, Asian, minority ethnic communities) and judges from varied professional backgrounds (including legal academics), and indeed, the appointment of a number of High Court judges under the age of 50. Remarkably, over this same period, Canada – an immigration country of far greater multicultural diversity – witnessed a period in which 98 of 100 federal judicial appointments over the period 2009-2012 were white (Makin 2012). A study analyzing judicial appointments over the period 2012-2014 found over two thirds of the 107 appointments were male and only one candidate was identified as racialized.

As the U.K.'s House of Lords Select Committee on the Constitution concluded in its 2012 report, there is a clear link between judicial independence and the retention of public confidence in the justice system. The cross-party body recommended against the

use of pre- and post-appointment hearings for senior judicial appointments for fear partisanship would inevitably inform both the selection of parliamentarians to sit on the relevant committees or panels, and the choice of questions to be asked.

B. Australia

As in Canada, the challenge in Australia is how to stake out meaningful independence with the oversight body is part of the executive branch of the government it is overseeing (Fleming 2009, at 90).

Australia is a federation made up of a Commonwealth government and separate governments in Australia's states and territories. Government at the federal or Commonwealth level is characterized by a strict separation of powers, between the legislature, the executive and the judiciary, imposed by the Constitution, which is less prominent in the context of state governments. At the federal Commonwealth level, executive tribunals cannot exercise judicial power. The distinction leads to a simple, but very important, consequence for tribunals. Not being courts, tribunals cannot exercise the judicial power of the Commonwealth. Courts are bodies that can enforce their judgments and are made up of judges with tenure to a retirement age imposed by the Constitution. Tribunals do not generally satisfy these tests. Judicial power is the power to determine disputes between parties, both public and private.

Australia’s analogue to the UK’s Franks study was the report published by the Kerr Committee in 1971 (Kerr 1971). The major features of the Australian system of administrative review derive largely from the Kerr Committee’s recommendations

(Administrative Review Council 1971, at 4.9). These include (a) the framework for judicial review,[46] (b) the Administrative Appeals Tribunal (AAT), which provides independent merits review of administrative decisions,[47] (c) the Ombudsman, which investigates and resolves complaints about Government departments and agencies,[48] and (d) the Administrative Review Council (ARC), which advises the Australian Attorney General on strategic and operational matters relating to administrative law.[49] Unlike the Franks Report in the UK, however, the Kerr Committee took the view that complete independence of the administrative review system was not necessary (Kerr 1971, at para. 321). Thus, for example, it recommended that tribunal panels could include a member of the body whose decision was being reviewed (Kerr 1971, at para. 292).

Australia has taken a generally different approach to tribunal independence relative to the UK. In *Better Decisions*, a 1995 ARC review of Commonwealth merits review tribunals initiated at the behest of the Minister for Justice, the council stressed that tribunals are distinct from courts in both form and function (Administrative Review Council 1971, at 4.2). While tribunals were acknowledged as engaging many of the same issues with respect to independence, such as the importance of ensuring that there is no perception – nor reality – of undue influence, the processes of guaranteeing that independence could reasonably differ. Thus, the independence of tribunal members would not require the salary and tenure protections that attach to the judiciary

[46] As implemented through the *Administrative Decisions (Judicial Review) Act 1977* (Cth.).

[47] See the *Administrative Appeals Tribunal Act 1975* (Cth.).

[48] See the *Ombusdman Act 1976* (Cth.).

[49] While the ARC remains in existence, it has lost its secretariat and had its functional capacity reduced in recent years.

(Administrative Review Council 1971, at 4.6). Similarly, the ARC was untroubled by performance monitoring with respect to the quality of reasoning or the timeliness of decision making, and the involvement of the relevant minister in making appointments to the various specialist divisions.[50]

In line with its variegated approach to independence between tribunals and courts, the Australian system also applies different standards among tribunals. While the AAT enjoys strong independence protections, that is not necessarily the case for specialist tribunals. Peter Cane, in his definitive work on the topic, points to the fact that AAT members can be appointed for longer periods, the AAT operates at a greater distance from the executive, it has its own constitutive legislation, and is administered by the Attorney General rather than whomever the relevant minister happens to be. (Cane 2009, at 111). Cane finds these double-standards puzzling, since a relaxed independence requirement does not naturally follow from a characterization of the tribunals' function as merits review. (Cane 2009, at 112). If they are meant to provide an external means of vindicating the concerns of individuals, rather than simply a mechanism for internal policy review, it seems unclear why the independence of their members should not always be protected vigorously.

While the Australian approach to the independence of tribunals has resulted in fewer of the types of confrontations discussed above in the case studies, Australia boasts cautionary tales of its own. For example, in December of 1996, the Refugee Review Tribunal held against the arguments of the now-Department of Immigration and Citizenship, and approved the claims of two woman seeking asylum on the basis of a

[50] It did, however, object to monitoring review outcomes and performance-based pay.

claim that their respective home governments had been unwilling or unable to prevent spousal abuse at the hands of their husbands (Legomsky 1998, at 248-49). The Minister heading the department responded with public criticism of the tribunal members and later denied reappointment to sixteen of thirty five members who applied for reappointment in 1997. Arguably as a consequence of a threatening atmosphere, the set-aside rate of department decisions under review fell from around 17% to 2.7% (Legomsky 1998, at 249-50).

While Australia locates its tribunals firmly in the executive sphere (as in Canada, but in contrast to the UK), tensions surrounding the independence of adjudicative tribunals appears rare. Is this purely a function of political buy-in from the governments of the day in Australia? The Kerr Report seemed to have set in motion legislative and policy change that reframed the government's approach to administrative tribunals. The Kerr Commission itself was a product of political leadership, and was a response to the perceived inadequacy of judicial review to provide oversight over the machinery of the regulatory state. This is precisely the kind of leadership, I would suggest, that Canada has lacked.

C. New Zealand

Developments in New Zealand's administrative tribunal system have largely tracked those in the UK. In 2004, New Zealand's Law Commission published *Delivering Justice for All*, the culmination of a three-stage inquiry into the structure, jurisdiction and processes of New Zealand's system of courts and tribunals. In the report, the commission

recommended establishing a judicially-led, independent and unified tribunal framework that would exist at the same level as a Primary Court (N.Z. Law Commission 2004, at 284). It suggested that this would address concerns regarding standing, competence, authority, and independence.

As had been identified in Australia and the UK, New Zealand had an unnecessarily great diversity of tribunals, many of which were staffed by inexperienced tribunal members meeting infrequently and dependent on the resources of the departments whose decisions they were mandated to review. By rationalizing the roster of tribunals, the Law Commission hoped to build up a core of experienced tribunal members within a unified tribunal system (N.Z. Law Commission 2004, at 284-5). This structure would be led by a judge and protected from outside interference by handing over responsibility for all tribunal administration to the Ministry of Justice. Appeals from the tribunal structure would go to an appellate panel and from there to a full bench of the High Court.

The Government of New Zealand presented a response to the Law Commissions report to the House of Representatives where it accepted the need to establish a unified tribunal framework administered by the Ministry of Justice (N.Z. Government 2004). While the government was unwilling to commit to sweeping changes in the administration and operation of tribunals without first developing a set of guidelines to assist in a transition, the factors it directed the Ministry of Justice to take into account were notable in their inclusion of independent decision-making. This process has resulted in the establishment of a Tribunal Reform Program, which released “Tribunals in New Zealand, the Government’s Preferred Approach to Reform Public Consultation

Document" in July 2008 in order to seek agreement on the program's scope and direction (N.Z. Government 2008). Key components of the preferred approach include the implementation of a new legislative framework and the establishment of a unified Tribunals Service located within the courts structure, on the same level as a District Court, headed by a Principal Judge, and administered by the Ministry of Justice. Through judicial oversight, separation, and a neutral administration, the new tribunal structure would enjoy significant systemic and structural protections to its independence.

New Zealand's commitment to a systemic approach has not completely removed the specter of political interference from administrative tribunals. In January of 2008, New Zealand's Energy Minister was "in the firing line" following allegations he had interfered with the decision of the Electricity Commission in order to speed up approvals of new transmission lines to Aukland (Fisher 2008). A residence group alleged bias on the part of the Minister and the matter proceeded to judicial review. In its decision, the High Court of New Zealand, Justice Wild reached the following conclusion:

> I reiterate that the common denominator in the interactions between the Government and the Commission was Government's concern about the process of assessing the Amended Proposal; not about its substance. In both meetings between the Ministers and the Commission was the Ministers' anxiety and concern about progress in finding a solution to the problem of supply of electricity to the North Island. That was justified: it would be they who were politically accountable should supply fail or be threatened. Accordingly, the Ministers spoke bluntly. But what they said was directed to the process of analysing the Amended Proposal, not about its merits. This is demonstrated by one of the more contentious comments made by Minister Parker to the Commission, recorded in handwritten notes he made for the meeting on 20 June 2006:
>
> > You should, in my opinion, be striving to consider the new proposal, when it arrives, as related to the Original Proposal. I have heard it said that it should be treated as a new proposal in terms that make me and my officials worry that unduly lengthy process will follow. If so, then I would find that surprising given the we already know that it will follow the same or similar line and most other aspects will have the same or similar outcomes…

> I accept that a lay observer would interpret this as the Government putting pressure on the Commission not necessarily to protract its consideration of the Amended Proposal. I do not accept that the same observer would go the further step of interpreting this as indicating bias on the part of the Commission. Pressuring the Commission to expedite its process is not the same thing as pressuring the Commission to accept a particular outcome, leading to an apprehension of bias.[51]

This kind of case demonstrates that even progressive measures to protect and promote the independence of tribunals cannot shelter tribunals from the political storm.

What are the common themes linking Canada's peer common law jurisdictions? In my view, there are at least two that together explain why so many of our colleagues elsewhere, when told about the Canadian controversies discussed above, would assert "that would never happen here!" I have alluded to each of these themes already. First, in the common law jurisdictions outside of Canada, governments have approached administrative justice as a system. Tribunals, for example, enjoy a certain minimum set of appointment standards, among other indicia of independence. Thus, appointments "at pleasure" as in the CNSC case, likely would not be acceptable in other common law jurisdictions. The second and related trend in these jurisdictions is to treat administrative justice as a policy sphere, and one appropriate for independent review and recommendations, as in the case of the Leggatt Review or the New Zealand Law Commission's Report. In my view, Canada's chequered record of assuring the independence of tribunals may be explained, in part, by the absence of these dynamics.

[51] See *New Energy Era Inc. v. The Electricity Commission*, HC WN CIV 2007-485-002774 4 May 2009 at paras. 88-89

Conclusions

The discussion above raises the broader question, in Canada and throughout the common law world, as to how to demarcate a sustainable boundary between a government's desire to achieve its policy objectives and independent decision-making. One view of the recent disputes during the Harper Government in Canada is that it is ultimately self-defeating for government to attack independent agencies, or to politicize the Court. Partisanship begets more partisanship. The result is public cynicism, a corrosion of parliamentary democracy, and the undermining of the policy goals that motivated the establishment of independent agencies in the first place. As Gabriel Fleming has observed: "The power to depart from government policy is central to a discussion of the independence of tribunals" (Fleming 2009). If governments want the longer term benefits of a system of administrative justice, they must be prepared to live with the short term costs.

The other view of the recent disputes in Canada is that the government used the power at its disposal to achieve its objectives, and this will embolden other governments to do the same. To the extent the firing of Keen generated negative press or awkward moments during Question Period, this storm lasted only a few news cycles and may soon be forgotten. Both Prime Minister Harper and Chief Justice McLachlin continued to play their respective roles long after the dueling press releases. To the extent there is a negative assessment of the Government's partisanship, it usually occurs in hindsight, often when a new government looks to chart a different course of policy.

The recent confrontations show that there is little to compel Canadian governments to constrain their discretion to make appointments based on partisan motivations or to respect the independence of administrative agencies if they do not want to do so. These controversies reveal the hard but important truth about independence in administrative decision making in a parliamentary democracy: while the rule of law and principles of fairness and impartiality may require independence, only political leadership can sustain it.

Political leadership created independent agencies in order to ensure that important areas of the public interest (such as regulating nuclear power) are served by people and institutions that are not caught up in partisan politics. As the experience of other common law jurisdictions makes clear, it takes political leadership and a systemic approach to administrative justice to safeguard the boundaries of partisanship and ensure that administrative bodies are free to operate without fear of political repercussions for decisions that do not accord with the policies of particular governments. Canada's current Government came to power, at least in part, as a reaction to the decade of partisanship discussed in this study. The current Government's commitments both during the election and subsequently to usher in a new era of respect for the independence of executive appointments and administrative bodies is noteworthy. The question remains whether a Government in a common law, Parliamentary democracy can institute the kind of legal and political reform that leads to structures of independence (e.g. buffer organizations such as appointment commissions or tribunal services) capable of binding future Governments with differing partisan commitments.

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