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INDEPENDENCE, IMPARTIALITY, & THE ONTARIO SOCIAL ASSISTANCE REVIEW BOARD IN 1997

TODD JEFFREY WEILER*

RÉSUMÉ

Cet essai étudie l'indépendance juridique et institutionnelle de la Commission de révision de l'aide sociale de l'Ontario (CRAS) dans le contexte d'une révision à grande échelle du gouvernement conservateur des organismes, conseils et commissions de la province. L'auteur aborde la théorie juridique de l'indépendance telle qu'interprétée par les cours canadiennes et examine deux théories conflictuelles en ce qui a trait à la prestation de l'aide sociale. Il arrive à la conclusion que, bien que le gouvernement soit certainement capable d'abolir l'indépendance des jugements en matière des litiges liés à l'aide sociale, tels que ceux émis par le CRAS, il ferait aussi bien d'en calculer les coûts politiques et juridiques avant de s'avancer inutilement sur un terrain inconnu.

How it looks and acts are of course critical incidents to being independent, but most important is how it feels. From a secure feeling of independence comes the confidence to look and act independently, and, most significantly, comes the capacity to educate interested actors and observers to distinguish between behaviour that threatens the heart of the system. In this way, independence becomes the conductor of the whole justice symphony, co-ordinating the players, redefining the sounds, and controlling the ultimate product. What is the essence of independence, this concept that demands hegemony over the justice system? It is the right to be free from external control or influence, and the right to be seen that way.¹

On October 31, 1996, the Ontario Labour Relations Board was asked by the applicant union to hold the Chairman of the Ontario Cabinet's Management Board, David Johnson, in contempt, and to declare itself incapable of adjudicating an on-going unfair labour practice complaint filed by Service Employees

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1. R.S. Abella, "The Independence of Administrative Tribunals" (1992) 26 *Law Soc. Gaz.* 113 at 113.

Union International, Local 1587 against the Ontario Government (acting as an employer), because the Board lacked institutional independence and was tainted by a reasonable apprehension of bias.² It was alleged that Mr. Johnson and the Government of Ontario selected four Board Vice Chairs to be removed from office before their terms had expired, that two replacement Vice Chairs were appointed only at the pleasure of the Government (an unprecedented action), that Johnson had made public remarks suggesting that he would review membership of the Board prior to this change, and that Vice Chairs would be beholden to the government for future work as arbitrators (once their terms had expired).³ The government denied the accusations, asserting that the Chair of the Board had selected which Vice Chairs would be removed from office.⁴

Interestingly enough, the government's denial led to the actual reason why the Board did declare itself incapable of continuing in this case, because of a reasonable apprehension of bias. The denial involved an assertion of fact (i.e. that it had been the Chair of the Board, not the Minister nor Cabinet, who had decided which Vice Chairs would lose their positions) of which each possible board decision-maker had personal knowledge. This is because Vice Chairs meet regularly with the Chair to discuss Board administration, and at one of those meetings, the removal of the four Vice Chairs had been discussed and explained. Because this information, to which each Vice Chair was privy, contradicted the information put forward by one, or both, of the parties to the present application (the Board would not say), the Board declared itself unable to proceed in adjudicating the application, because of a reasonable apprehension of bias (in that its members each had personal knowledge of key facts at issue).⁵

This declaration was made in spite of the arguments of the applicant union local, which, ironically, had been left to contend that the Board should not declare itself biased because it was privy to such information. Rather, the union local wanted the Board to address the merits of the union's application to have the Minister found in contempt, and for the Board to declare itself unable to proceed in the unfair labour practice complaint because of a reasonable apprehension of bias stemming from its lack of institutional independence (i.e. the Minister's direct participation in the removal of the four Vice Chairs).

2. *Ontario Realty Corp.*, [1996] O.L.R.D. No. 4189 (November 27 1996) (Walker) (QL).

3. *Ibid.* at para. 10.

4. *Ibid.* at para. 11.

5. *Ibid.* at para. 47-51.

The experience of the Ontario Labour Relations Board may not be isolated to that tribunal. In fact, the election of the current provincial government, in June of 1995, leaves one to ponder the future of other independent, adjudicatory boards. In this paper, I shall focus on the experience of the Ontario Social Assistance Review Board ("SARB"). The SARB is a statutory quasi-judicial tribunal⁶ that provides a *de novo* hearing of appeals of social assistance determinations under the Ontario *Family Benefits Act* [the "FBA"],⁷ the Ontario *General Welfare Assistance Act* [the "GWAA"],⁸ and the Ontario *Vocational Rehabilitation Services Act* [the "VRSA"].⁹

Given the current tumult evident in Ontario politics, the purpose of this essay will be to consider the qualities of independence of the SARB as it is currently configured, with an eye to the possible alternatives posited for it by members of the Ontario Government. I will begin by explaining the Ontario Government's current interest in reviewing the SARB. Next, I will consider the nature of independence; apply it to the SARB; and consider the political context within which it operates. I will then turn to two aspects of adjudicatory independence — one relating to a tribunal's interaction with the executive/legislative branch of state (through the appointment's process), and the other relating to a tribunal's interaction with the judicial branch (through appeal or review of its decisions) — to offer conclusions about the SARB (or its alternative) and its future as an independent administrative tribunal.

6. The SARB is subject to the provisions of the Ontario *Statutory Powers Procedures Act*, R.S.O. 1990, c. S.22 [the "SPPA"], and is continued and configured under s. 15 of the Ontario *Ministry of Community and Social Services Act*, R.S.O. 1990, c. M.20 [the "MCSSA"].

7. R.S.O. 1990, c. F.2, s. 14.

(6) Where, after a hearing, the board of review has reviewed the decision of the Director, the board may,

- (a) affirm the decision;
- (b) rescind the decision and direct the Director to make any other decision that the Director is authorised to make under this Act and the regulations and as the board considers proper, and for such purpose the board may substitute its opinion for the opinion of the Director; or
- (c) refer the matter back to the Director for reconsideration in accordance with such directions as the board considers proper under this Act and the regulations.

8. R.S.O. 1990, c. G.6, s. 11.

9. R.S.O. 1990, c. V.5, s. 10.

The WOOD COMMISSION

One of the commitments we made during the last election campaign was that we would use all means possible to downsize the government and to provide services at less cost or more efficiency. We think [that] privatisation will be a big factor in that.¹⁰

You very correctly raised the point of the existence of [the SARB] being at issue, and it is very much at issue. We're going to look at whether or not having this board is the most effective way of dealing with this problem [of delivering social assistance adjudication in a fair, but economical, manner].¹¹

In its Fall 1995 Economic Statement, the Conservative Government took steps towards delivery on its promise to "downsize" by creating a commission, led by M.P.P. Bob Wood, Legislative Assistant to David Johnson, Chairman of the Management Board Secretariat, to undertake a detailed review of Ontario's agencies, boards and commissions.¹² The Wood Commission, already well underway before its terms of reference were drafted, completed its review of adjudicative agencies — such as the SARB — and reported to Cabinet in December 1996.¹³ At time of writing, the contents of the Commission's Report had not yet been made public.

Interviews with knowledgeable parties, including the Chair himself, and the recommendations published by the Commission thus far¹⁴ suggest that the

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10. David Johnson, Ontario M.P.P., Chair of the Management Board of Cabinet, in: "Tories eye private firms for government services" *Toronto Star* (10 October 1995) A1. Included in a list of possible targets for privatisation mentioned in this article was issuance and control of welfare cheques.
 11. Bob Wood, Ontario M.P.P., Parliamentary Secretary to the Chair of the Management Board of Cabinet, Chair of the Review Commission examining Agencies, Boards and Commissions, speaking to Maureen Adams, (then) Chair of the SARB, in: Ontario, Legislative Assembly, Standing Committee on Government Agencies, "Social Assistance Review Board" in *Debates*, No. A-8 (7 February 1996) at 136.
 12. Ontario, Ministry of Finance, *1995 Fiscal and Economic Statement* (Toronto: Queen's Printer, 1995) at 15.
 13. Bob Wood, M.P.P., telephone interview (2 April 1996); Office of Bob Wood, M.P.P., telephone interview (29 January 1997).
 14. The second phase of the Government Task Force on Agencies, Boards and Commissions, which produced a January 29 1997 Report on 62 Operational Agencies, included recommendations to: eliminate 12 operational agencies over the next two years; redesign the way 30 agencies deliver their services, including immediate privatization of the Metro Toronto Convention Centre, Ontario Place Corporation, and Ortech Corporation; review 14 agencies to improve efficiency and effectiveness.

Wood Commission was not circumspect in its review of adjudicatory agencies. Rather, it is quite possible that wholesale change may be in store for the adjudication of social assistance appeals. Illustrative of what the Commission may recommend is an alternative posited by Chairman Wood himself.¹⁵ While stressing that this alternative has not yet been endorsed by him,¹⁶ the Commission, or the Government, Wood suggested that the Government might entrench a level of administrative appeal within the social benefits bureaucracy¹⁷; contract-out further appeals to a private arbitrator; and create a higher level of administrative appeals court to hear appeals from the new, private arbitrator, as well as from a number of other different administrative regimes (such as Workers' Compensation). A further, limited appeal might also lie to the Ontario Divisional Court¹⁸ — but only with regard to matters such as those involving application of the Charter of Rights.¹⁹ This scheme is the alternative which will be considered in this paper.

INDEPENDENCE

Independence may be characterised as the relative autonomy of a decision-maker to exercise her discretion free of constraint. Independence is a "critical" means of ensuring the public perception of an adjudicator's impartiality.²⁰

15. *Supra*, note 13.

16. Wood's opinion of the existing mechanism was illustrated by his having put the same question to the Chair of the SARB, Maureen Adams, six times, in a recent review of the SARB by the Ontario Legislature Standing Committee on Procedural Affairs: "Do you see any reason why what this board does couldn't be done by a Small Claims Court Judge?" *Supra*, note 11 at 145.

17. This level of appeal would apparently be implemented by each municipal social services department (who are soon to be responsible for the delivery of general welfare assistance and family benefits allowance, as they are presently known) despite the fact that no such administrative structure, or expertise, necessarily exists in each municipality).

18. Whether this rather complicated, hypothetical, regime meets with Premier Mike Harris' stated goal is an open question. See: M. Harris, "Welfare Should Offer a Hand Up, Not a Hand Out" *Policy Options* (May 1995) 33 at 34. "A fundamental restructuring of the welfare distribution system will also be required as a key component of welfare reform. Decentralisation and delayering [sic.] of the decision-making process will be essential."

19. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

20. *R. v. Lippe*, [1991] 2 S.C.R. 114; 64 C.C.C. (3d) 513 at 530. See also: *R. v. Valente*, [1985] 2 S.C.R. 673; 24 D.L.R. (4th) 161 at 204-5; "[b]oth independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without

Impartiality has been referred to as a practical condition for the actualisation of the rule of law. "If a dispute is to be governed by general rules, the rules must be impartially interpreted and applied."²¹ While not courts,²² independent administrative agencies are nonetheless expected, and required, to exercise their jurisdiction in a manner free of all influence or political pressure.²³

Where a tribunal is undertaking an essentially adjudicative task [i.e. the making of an individualised decision through application of general standards to determinations of fact]²⁴ there needs to be the greatest concern for independence. Here, the analogy to the judiciary is most appropriate. That is not to say that the precise methods of the judiciary have to be adopted, but that structural measures, somewhat analogous to those applied to the judiciary, need to be adopted to ensure that, in actuality and in public perception, administrative tribunal adjudication is made on an independent basis.²⁵

In interpreting language guarantees under s. 133 of the *Constitution Act 1867*,²⁶ the Supreme Court of Canada has recently acknowledge the strong similarities between adjudicative administrative agencies and courts, and the significant role of such agencies in the provision of administrative justice.²⁷ This acknowledgement is useful in that it encourages the use of jurisprudence concerning judicial independence and impartiality in application (or, at least, by analogy) to cases of administrative adjudication. Moreover, much like public faith in the judicial

that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial ...".

21. W. Renke, "Invoking Independence: Judicial Independence as a No-cut Wage Guarantee" (Edmonton: Centre for Constitutional Studies, University of Alberta Faculty of Law, 1994) at 5.
22. *J.R. Théberge Ltée v. Syndicat national des employés de l'aluminium d'Arvida Inc.*, [1966] S.C.R. 378 at 382. The court also concludes that they neither exercise purely executive nor legislative functions.
23. See, e.g.: *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 185; or *Re Canada (Anti-Dumping Tribunal)*, [1976] 2 S.C.R. 739 at 742.
24. H.N. Janisch, "Independence of Administrative Tribunals: In Praise of "Structural Heretics" (1987) 1 *C.J.A.L.P.* 1 at 3.
25. *Ibid.* at 3. See, also: M. Rankin, "Perspectives on the Independence of Administrative Tribunals" (1992) 6 *C.J.A.L.P.* 91 at 92; R.S. Abella, "The Independence of Administrative Tribunals" (1992) 26 *Law Soc. Gaz.* 113 at 116; and Canada, Law Reform Commission, *Independent Administrative Agencies* (Ottawa: Minister of Supply and Services, 1980) at 75.
26. (U.K.), 30 & 31 Vict., c. 3.
27. *Quebec (A.G.) v. Blaike*, [1979] 2 S.C.R. 1016 at 1028.

system, if the public perception of the independence of an administrative, adjudicative process is strong, unsuccessful participants in the process will generally respect it nonetheless, despite their particular disapproval with a decision made. It also follows that if the legitimacy of an agency is brought into question (because of questions concerning its impartiality) in one instance, deleterious effects may be felt throughout the entire system of administrative justice.²⁸

Without this legitimacy, derived from an earned reputation for independent behaviour, a board that is required by statute to reach its decision in an impartial manner will no longer be perceived as anything more than a conduit for transmitting the will of the government of the day.²⁹

Abella notes that both governments and independent agencies have “a sphere of legitimate power and influence.”³⁰ The government or legislature make the rules and the adjudicator applies them. It is in the best interests of both (for the smooth operation of the statutory regime) that the integrity of each sphere is respected. Integrity is reinforced by the aforementioned perception of independence, and through the proper functioning of the administrative scheme in question. The agency provides decision-making in a de-politicised atmosphere, thereby permitting delegation (from the politicians) of many unpopular decisions — such as whether to provide social assistance, or the adjudication of their appeals.³¹

The Law Reform Commission of Canada has identified eight values to which independent agency structures and procedures should confirm³²: (1) accountability; (2) effectiveness, economy and efficiency [in executing the agency’s statutory mandate]; (3) fairness [in the overall interest of social cohesion]; (4) integrity [that the purported decision-makers are also the *de facto* decision-makers]; (5) authoritativeness [that decisions assume an air of finality]; (6) principled decision-making [in the interest of correctness and accuracy]; (7) comprehensibility [process transparency]; and (8) openness [accessibility]. This statement of values provides a useful checklist against which goals such as agency independence can be measured. For example, achieving and maintaining institutional independence primarily supports the values of fairness — by legitimising the process designed to achieve the statutory mandate — and

28. Rankin, *supra*, note 25 at 94; and Abella, *supra*, note 25 at 113.

29. *Ibid.* at 92.

30. Abella, *supra*, note 25 at 117.

31. Rankin, *supra*, note 25 at 92.

32. Law Reform Commission of Canada, *supra*, note 25 at 13–15.

integrity. Conversely, overt political pressure — even if only intended to maximise the effectiveness, economy and efficiency of the process — serves to weaken application of these values. Reference to these values will be made throughout the remainder this paper.

The SARB

The SARB's mandate "is to provide an independent review of administrative decisions, and thereby ensure that the social assistance provided for people in need operates fairly and in accordance with the law."³³ This role is particularly important because, in deciding whether to provide, withhold, or terminate social assistance, administrators are exercising *de facto* discretion (i.e. the discretion that inevitably comes through interpretation of statutory language).³⁴ This discretion is complicated by the complex nature of the statutory and regulatory provisions of the province's social assistance regime, and by its frequent amendment.³⁵ Of course, administrations have developed policies to assist in structuring discretion (whether *de facto*, or explicitly authorised through permissive statutory wording), but such policies have neither the force, nor the legitimacy and accountability, of a law or regulation. If the application of a policy adversely affects a recipient, she or he has recourse to the SARB. In conducting a *de novo* review, the SARB also provides the recipient with an objective, and usually thorough, review, which might provide for better case-by-case decision-making than can be maintained by social assistance administrations which must process a much higher volume of cases within a short period of time.³⁶

While institutional independence is intended to support the resolution of social assistance disputes within the traditional legal paradigm (where there are two equal parties and an impartial adjudicator), the reality that less than one third of claimants³⁷ are represented presents a practical problem. One of the specialised duties of SARB decision-makers, as well as the SARB staff, is therefore to

33. Ontario, Social Assistance Review Board, *1993–94 Annual Report* (Toronto: Queen's Printer, 1994) at 9.

34. Ontario, Legislative Assembly, Standing Committee on Government Agencies, "Report on Agencies, Boards and Commissions (No. 8)" 4th Session, 32nd Parliament (1994) at 20. The SARB's jurisdiction is both to interpret legislation (or delegated legislation) as required (addressing the use of *de facto* discretion), and to review the exercise of express statutory discretion, where it exists.

35. Maureen Adams, *supra*, note 11 at 136.

36. The SARB is currently receiving approximately 12000 to 13000 notices of appeal per year. This represents only 1.8% of the caseload handled by the province's social assistance administrations. Maureen Adams, *supra*, note 11 at 140–1.

communicate with appellants in such a manner as to facilitate the articulation of their claims.³⁸ To further accommodate claimants, SARB hearings are usually relatively informal and are often conducted in surroundings that are less intimidating than those of a court. These characteristics are exactly the kind of feature that distinguishes a tribunal such as the SARB from a court, and yet reinforces its independence (as an expert adjudicator)³⁹ at the same time.⁴⁰

Though always a matter of negotiation (and therefore subject to more uncertainty than the administration of a court), the SARB's relationship with the Government has been regulated, each year, by a memorandum of understanding between it, the Ministry of Community and Social Services, and the Management Board of Cabinet, that is to be tabled in the Legislature. The memorandum essentially sets the SARB's budget, and allows its Chair to determine how its resources should be employed. In the past, the institutionalised character of the agreement required to produce the memorandum lent a degree of certainty to the administration of an independent agency such as the SARB.⁴¹ Achieving firm control through the execution of a memorandum allowed the Chairperson

37. *Ibid.*

38. Joanne Leach, Senior Counsel and Manager, Legal Unit, Ontario Social Assistance Review Board, telephone interview (19 April 1996).

39. While I have referred to the SARB as an expert tribunal, it is important to note that this characterisation has not led the Courts to view its decisions as deserving judicial deference. Rather than allowing the SARB to make any decision it sees fit to make, so long as the result is not patently unreasonable, the Court will require the SARB to be correct in its interpretation. See: *Wedekind v. Ontario (Ministry of Community & Social Services)* (1994), 21 O.R. (3d) 289 (C.A.); app'l den'd. S.C.C. File no. 24564, S.C.C. Bulletin, 1995, p. 1086. However, it should nonetheless be noted that, in finding that the SARB did not deserve curial deference, the Court of Appeal based its decision (at least partially) on the conclusion that review on a "reasonableness" standard would produce the same result as would the application of a rule of interpretation that social welfare legislation, where ambiguous, should be read in favour of the social welfare recipient. While the Court of Appeal's conclusion arguably misapplies the standard of patent unreasonableness (suggesting that review based on this standard requires the court consider the reasonableness of a board's decision, rather than simply determine whether the decision is rationally connected to the board's authority to make it), it leaves the door open for the Court to choose the SARB's interpretation whenever the merits of the case demand such a result (through application of this rule of interpretation).

40. These features were also called for by a previous subcommittee examining the SARB. *Supra*, note 34 at 25.

41. *Supra*, note 34 at 25. However, approximately nine months into the reign of the new Government, a new memo had not been negotiated. See: Debates, *supra* note 36 at 141. The result is probably uncertainty for the administration of the SARB, and — to some degree — uncertainty as to its continued independence.

of the SARB to address the effectiveness, economy, and efficiency of its administrative process in manners that did not conflict with more important values, such as fairness and openness.

For example, between 1990 and 1995, appeals to the SARB increased 170%. In response to this overwhelming increase in caseload, a number of measures were implemented, including: the institution of one-person panels; a short decision format; computerised scheduling and decision-writing; teleconferencing for simple, but remote, hearings; and case management.⁴² As a result, the SARB attained a 180% increase in decision output over the same period. In 1995–1996, the SARB instituted further measures to eliminate its backlog completely by the second quarter of fiscal 1996 — despite a continued increase in appeals.⁴³

The significance of the SARB's recent successes in managing its caseload is heightened by further consideration of its adjudicative role. Noting that the rules (which the SARB must apply to individual, and often unique, findings of fact) are "complex" is hardly sufficient. How should the issue of joint custody be addressed where eligibility rules only contemplate single custody?⁴⁴ What does it mean to "live with" another person, in the context of determining eligibility for single-parent social assistance?⁴⁵ Does the provision of R.R.O. 537, respecting social assistance eligibility based on age, violate s. 15 of the *Charter*⁴⁶ and if so, is such justified in a free and democratic society?⁴⁷ From determining the

42. It should also be noted that the SARB is advocating changes to the process managed by the Government to further improve effectiveness, economy and efficiency. These include: development of a consistent, province-wide, internal review system (to reduce multiple appeals on the same issue); an earlier disclosure process; and a better record of attendance by Ministry official at hearings (the respondent is represented in only 40% of appeals). *Ibid.* at 136.

43. *Ibid.* at 135.

44. In *Lauren v. Director, Income Maintenance Branch, Minister of Community and Social Services* (10 October 1995), Toronto 565/93 (Ont. Div. Ct.) [unreported] and *Wilkinson v. Director, Income Maintenance Branch, Minister of Community and Social Services* (10 October 1995), Toronto 170/94 (Ont. Div. Ct.) [unreported], the SARB's interpretation (overruling the policy of the Director) was wholeheartedly endorsed by the Divisional Court.

45. In *Nicolitsis v. Director, Income Maintenance Branch, Minister of Community and Social Services* (24 July 1995), Toronto 777/92 (Ont. Div. Ct.) [unreported] and *Arbour v. Director, Income Maintenance Branch, Minister of Community and Social Services* (24 July 1995), Toronto 674/93 (Ont. Div. Ct.) [unreported], the Court again preferred the SARB interpretation over that of the administrators.

46. *Supra*, note 19.

47. See another decision endorsed by a majority of the Court: *Mohamed v. General Manager, Department of Social Services, Municipality of Metropolitan Toronto & Director,*

meaning of “shared accommodation” to considering how to calculate eligibility based on net versus gross figures for Unemployment Insurance payments,⁴⁸ the SARB has become expert in interpreting social assistance legislation, and frequently changing regulations, in a fair and expeditious manner.

The Political Environment

No discussion of institutional independence can be complete without reference to the political environment within which an agency operates. Often, it is particularly because of the political sensitivities of decision-making that the independent body is created. (If only expertise was required, it could be provided by a government department within the bounds of normal ministerial responsibility). In the case of social assistance, the political environment has become a crucial factor. While conventional wisdom suggests that the majority of citizens support the idea of social assistance programmes,⁴⁹ the present Government was elected with a strong majority, and has retained sufficient support to win another,⁵⁰ despite — or perhaps, in part, because of⁵¹ — its extremist stance on social assistance.⁵² Some have suggested that this stance merely reflects popu-

Income Maintenance Branch, Minister of Community and Social Services (22 February 1996), Toronto 609/93 (Ont. Div. Ct.) [unreported].

48. *Supra*, note 39 at 34.
49. For example, a Vector Research and Development December 1994 National Poll found that 74% of Canadians would pay higher taxes if they were guaranteed that the money was used to provide food and medical care for poor children. (May 1995) 2:1 *Canadian Centre for Policy Alternatives Monitor*.
50. The most recent poll by the Angus Reid Group, (31 January 1997) reveals a 43% margin of support for the Ontario Progressive Conservative Party, among those surveyed. This level of support has largely remained stable over the past 18 months.
51. The results of a recent Insight Canada Poll, “Common Sense for Ontario” (December 2 1995), clearly indicate overall support for the new Government’s policies with regard to social assistance. For example over 85% of those surveyed agreed that there should be “workfare for the able-bodied;” 85% agreed with requiring identification cards to reduce welfare fraud; and over 76% agreed that “welfare benefits” should be reduced.
52. This stance is reflected in the policies of the Government, since its election, as well as the errors of its representatives. See, e.g.: “The Ontario Axeman” *Economist* (16 December 1995) 40; “\$90 a month enough for welfare diet Tories say” *Toronto Star* (21 October 1995) A3 [This diet provides information for welfare recipients on how to spend benefits on groceries. Scientific opinion regarding its sufficiency is mixed, but it includes such elements as provision for eight servings of pasta, but no seasoning]; “1,289 Squeaky Wheels” [*Toronto*] *Globe & Mail* (20 January 1996) D1 [This article outlines how the Government was failing to fully consult most interested parties in much of its decision-making]; “Ontario Tories find workfare more difficult to implement” [*Toronto*] *Globe & Mail* (23 January 1996) A5 [Workfare, as a policy issue, was

list sentiments, and that even the previous social democratic Government could be seen as having catered to them.⁵³ Others recognise it as a shift in the manner in which social assistance is conceived.

Professors Des Rosiers and Feldthusen advance two theories for the provision of social assistance: the “public largesse model” and the “citizen entitlement model.”⁵⁴ Under the former, social assistance is a matter of public charity, and little more than a privilege for the recipient. Under the latter — which is arguably the model upon which the Ontario social assistance regime has been based⁵⁵ — the provision of social assistance is part of an obligation of the Government to meet the basic human needs of all Ontario citizens.⁵⁶

It seems that, in subscribing to the populist concept of the “deserving” and “undeserving” poor (i.e. the unlucky versus the lazy),⁵⁷ the current Government

a part of the Government’s campaign platform.]; “Province’s welfare rules penalise ‘family help’” *Toronto Star* (12 October 1995) A1 [Existing regulations do not permit family assistance to recipients, though the Premier advised that such activity be encouraged.]; “Seniors, welfare recipients to pay user fees under drug benefits plan” [*Toronto Globe & Mail* (1 October 1995) A6 [Regulations have been amended to adopt user fees for use of prescription drugs by recipients, though such measures violate a campaign target for spending decreases.]; “Tsubouchi rules out welfare earnings grab” *Toronto Star* (4 October 1995) A9 [This article contains examples of dubious (if not patronising) advice provided by the Minister of Community and Social Services concerning recipient grocery purchasing. “In fact, even if [a tin of tuna] is not priced at 69 cents [an unrealistic expectation] quite often you can make a deal and get it for 69 cents. People have to shop a little more wisely”]; “Welfare benefits cut 21.6%” [*Toronto Globe & Mail* (22 July 1995) A4]; “Welfare crackdown targets housemates” *Toronto Star* (21 October 1995) A1; “Welfare snitch line yields uncertain results” *Ottawa Citizen* (23 April 1996) A3.

53. See: D. Cameron, “Welfare Politics” editorial, *Canadian Forum* (July/August 1995) 5 at 5–6. See also: Ontario, Legislative Assembly, Standing Committee on Government Agencies, “Intended Appointments” in *Debates*, No. A-51 (7 September 1994) at 1001.
54. N. Des Rosiers & B. Feldthusen, “Discretion in Social Assistance Legislation” (1992) 8 *J. Law & Soc. Pol’y.* 204 at 210.
55. *Ibid.*, referring to: Ontario, Social Assistance Review Committee, *Transitions*, summary, (Toronto: Queen’s Printer, 1988) at 9, 11–12. Moreover, the wording of the legislation, *supra*, notes 3–5, establishes entitlements under which the administrator is obligated to satisfy if certain requirements are met. See, e.g. GWAA s. 7. “A municipal welfare administrator shall [emphasis added] provide assistance in accordance with the regulations to any person in need who resides in the municipality and who is eligible for such assistance.” The discretion of the administrator lies only in determining eligibility within the strictly prescribed bounds of the regulation R.R.O. 537.
56. See, generally: J. Struthers, *The Limits of Affluence: Welfare in Ontario, 1920–1970* (Toronto: University of Toronto Press, 1994).

of Ontario⁵⁸ has undertaken a policy course that is contrary to the entitlement model reflected in legislation, and has embraced the largesse model instead. The significance of this policy shift cannot be underestimated. If, in its rush to implement this new policy, the Government fosters an adjudicatory system which lacks the functional trappings of independence, it is submitted that the public's perception of its impartiality may wane.

Independence and the Appointments Process

A number of elements have been advocated for the success of the independent administrative agency. While no two agencies are alike — and the degree of institutional independence of any particular one may vary due to the great diversity of functions exercised by them⁵⁹ — these elements are most commonly put forward: sufficiency of tenure (both in length and security of appointment); a predetermined, rigorous appointment process; adequate compensation; immunity from civil proceedings for actions taken in good faith; and exclusivity of employment / responsibilities.⁶⁰

Whether one accepts tribunals as being an aid to or implementer of public policy, it is crucial that they be seen as credible by the parties who rely on their decisions. And one of the ways they are seen as credible is if their appointments are made in a way which reflects respect for their independence. If the appointments to tribunals are made without sensitivity to the objective qualifications of the appointees, or bear little or no relationship to the needs of the tribunal, both the motives of the appointing body and the decisions of the tribunal become suspect.⁶¹

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57. See: L.A. Jacobs, "What Are the Normative Foundations of Workfare?" *Policy Options* (May 1995) 10. See, also: I. Morrison & G. Pearce, "Under the Axe: Social Assistance in Ontario in 1995" (1995), 11 *J. Law & Soc. Pol'y*. 1.
58. Harris, *supra*, note 18 at 35. "Our benefit reduction plan is aimed at ensuring that social assistance (with all the related drug plans and dental benefits) is not more attractive than honest work — while fairly recognising the need to support those temporarily unable to support themselves."
59. *Energy Probe v. Atomic Energy Control Board*, [1985] 1 F.C. 563; 15 D.L.R. (4th) 48 at 64 (C.A.); app'l. ref'd. (1985), 15 D.L.R. (4th) 48n (S.C.C.).
60. See: Rankin, *supra*, note 25 at 110; Janisch, *supra* note 19 at 2–4; W.J. Atkinson, "The Independence and Impartiality of Administrative Tribunals After the Charter" in N.R. Finklestein & B.M. Rogers, eds., *Administrative Tribunals and the Charter* (Toronto: Carswell, 1990) 87 at 94–95; Ratushny *et al*, *The Independence of Federal Administrative Tribunals and Agencies* (Ottawa: Canadian Bar Association, 1990); and W. Renke, "Invoking Independence: Judicial Independence as a No-cut Wage Guarantee" (Edmonton: Centre for Constitutional Studies, University of Alberta Faculty of Law, 1994).

While it should not be concluded that a poor appointment process makes for poor appointees, the effect of a purely partisan — or otherwise inappropriate — appointment “all too often attaches sadly and lingeringly to the tribunal’s reputation.”⁶² While difficult to quantify, the public perception of independence is certainly fragile. In 1983, the SARB had a reputation for members chosen for their party affiliations, rather than their abilities.⁶³ It also had a undistinguished reputation with overseeing courts regarding its decision-making.⁶⁴

By 1989, following a review of Ontario’s regulatory agencies, a number of recommendations had been adopted that altered the way appointments had been handled.⁶⁵ In particular, a secretariat within the Premier’s office was tasked to seek out potential agency candidates (including candidates for SARB positions) and to participate in the interview process. The chair of an agency would be consulted prior to appointment or re-appointment of a member, and the chair would be responsible for review and recommendation of the candidate’s performance.⁶⁶ In fact, in the case of the SARB, its chair (or a designated representative) was included as an interviewer, and the SARB became active in recruiting interested parties.⁶⁷

61. Abella, *supra*, note 25 at 115.

62. *Ibid.* at 116.

63. “Board unfair, insensitive to poor, critics say” [*Toronto*] *Globe & Mail* (2 February 1983) 4.

64. *Infra* note 72.

65. R.W. Macaulay, *Directions: A Report to the Management Board of Cabinet* (Toronto: Queen’s Printer, 1989) at 8–31 – 68–43.

66. This system, adopted under the Liberal Government (1985–1990), was maintained for the duration of the NDP Government (1990–1995). Moreover, a proactive appointments policy was encouraged for the secretariat and, for the SARB in particular, candidates were sought for their expertise in relation to reducing the SARB’s backlog of cases. Pat Daly, former Chief of Staff to the Ontario Minister of Community and Social Services, telephone interview (25 April 1996).

67. The last three appointments reviewed by legislative committee are instructive of the SARB’s finding proper people. Charinee J. De Silva, a community legal clinic counsel, applied and was interviewed, but was not chosen. Two years later, she was contacted, re-interviewed and selected. See: Ontario, Legislative Assembly, Standing Committee on Government Agencies, “Intended Appointments” in *Debates*, No. A-51 (7 September 1994) at 833. Janis Sarra, a long time member of the Pay Equity Tribunal and Labour Board (appointments made by previous governments), was contacted by the SARB about a part time position many months after her initial expression of interest. See: Ontario, Legislative Assembly, Standing Committee on Government Agencies, “Intended Appointments” in *Debates*, No. A-57 (5 October 1994) at 999. Judy Aikman-Springer, a community legal clinic counsel, applied, was interviewed, and chosen. See:

Unfortunately, the new Government seems to have forsaken a process that had apparently sought out those with expertise relevant to SARB adjudication, (at least) in addition to partisan affiliation. Far from being interviewed or consulted concerning appointments, the last Chair⁶⁸ was told that the SARB's empty positions would remain empty in order to reduce costs, only to find the positions filled a short time later.⁶⁹ Three of the four new appointees are said to have run as candidates for the same party as that of the new Government,⁷⁰ and one of the appointees was reputed to have expressed many strong views regarding social assistance policy, as well as towards members of distinct groups likely to appear before the SARB as claimants.⁷¹ In fact, at least one appointee was not even interviewed for the position.⁷² Regardless of how these new appointees perform,⁷³ the public perception of SARB independence — the clearly partisan nature of these appointments — cannot be said to have been strengthened.

Ontario, Legislative Assembly, Standing Committee on Government Agencies, "Intended Appointments" in *Debates*, No. A-58 (6 October 1994) at 1054.

68. Her resignation was accepted, and her appointment terminated early, through O.C. 2471/96.
69. "Tory candidate appointed to welfare board" *Toronto Star* (11 October 1995) A14.
70. Pat Daly, *supra*, note 66.
71. See, generally: Ontario, Legislative Assembly, Standing Committee on Government Agencies, "Intended Appointments" in *Debates*, No. A-5 (13 December 1995) at 61–65. These alleged statements include: "The plain fact is that some of us don't want to pay \$2500 for a social service funeral" alleged by M.P.P. David Cooke (at 61) to have been stated at a meeting of the Thunder Bay City Council. Another example attributed to Ms. Dodds by M.P.P. Bruce Crozier (at 64), was: "single mothers living in subsidised housing who allow their boyfriends or ex-husbands to move in; this is tantamount to a subsidised bordello." Crozier noted that the statement had been reported in an article by J. Coyle in the *Ottawa Citizen*, on October 13, 1995. Ms. Dodds suggested (at 61 and 64) that these quotations were being used improperly out of context. M.P.P. Peter Kormos also noted in his questioning of Ms. Dodds (at 65), that she was a strong supporter of an English-only by-law in Thunder Bay, Ontario (as city alderman), and that she supported the view that "child benefit programs will encourage social assistance recipients to have more children," a statement attributed to her in the *Thunder Bay Chronicle Journal* on July 9, 1993. Because Mr. Kormos did not disclose whether the quotation was direct, Ms. Dodds did not answer whether she agreed with the statement (at 65). However, Ms. Dodds did acknowledge (at 63) that she fully endorsed the Government's election platform that resulted in a 21.6% cut to welfare rates following its victory.
72. *Ibid.* at 60. After having submitted a resume following her failed bid to be elected to the Legislature, Ms. Dodds stated that she was contacted by the Premier's office and simply offered the position.
73. And they appear to have been performing their roles well thus far. Joanne Leach, *supra* note 38.

Of course, it has also been suggested that the previous governments' having sought out those with experience in the social welfare policy or advocacy fields itself created more than an apprehension of bias, but an actual bias in favour of those who appear to the SARB.⁷⁴ The evidence of this bias, it has been suggested,⁷⁵ lays in the SARB's high rate of allowing appeals (recently reported by former SARB Chair Adams as being approximately 50% for all appeals heard over the past few years⁷⁶). Four points should be made in response to this position. First,⁷⁷ simply because an individual is demonstrated to have experience in dealing with a particular segment of society does not lead to the conclusion that she is biased. It simply suggests that she may be better informed than those without similar experience. However, whereas bias cannot be perceived from experience alone, it can certainly be perceived in statements made publicly about a certain issue or segment of society.

Second, there is very little utility in attempting to tally the relative successes and failures before a particular tribunal, because there are simply too many variables in play in every adjudication. One such variable, not mentioned by those who have made this argument, is the difference in result depending upon whether the applicant to the SARB is represented, or is proceeding alone. Third, focusing exclusively on the appointments' process is not useful in determining the degree of institutional independence enjoyed by a tribunal. While the appointments' process may be edifying in this regard, and certain minimum legal standards must be met,⁷⁸ other factors may be equally as important.⁷⁹ Finally, while it may be true that some see appointments of social assistance advocates

74. E.R. Sabatini, *Welfare + No Fair: A Critical Analysis of Ontario's Welfare System (1985-1994)* (Vancouver: Fraser Institute, 1996) ch. 2.

75. *Ibid* at 43. However, the arguments set out in this tract are lacking in legal analysis regarding independence. In fact, the author demonstrates a surprising lack of legal analysis throughout the chapter. For example, at 48-49, he is highly critical of the notion that an adjudicatory tribunal can interpret the *Charter* in reference to its constituting legislation and the case before it. He incorrectly refers the SARB's conclusion that it can do so (*supra*, note 47) as an attempt to expand its jurisdiction. No mention of the Supreme Court's landmark decision in *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, respecting the jurisdiction of a tribunal to hear and determine *Charter* issues, is made.

76. Maureen Adams, *supra*, note 11 at 140-141. Sabatini, *ibid.* at 38-43, disputes this figure as underestimating the actual rate of appeals allowed by the SARB.

77. This argument was provided by Professor Janet Mosher.

78. *Supra*, note 21.

79. It should be noted that in the case of the SARB, changes to the appointments' process followed upon the administrative changes which have been attributed to the SARB's improved decision-making.

to a social assistance review board as creating apprehension of bias, more so than appointments of those with no such expertise and strong views in favour of the government of the day, it is submitted that the appointments' process should be guided by the same principles as those governing interpretation of social welfare legislation — namely, that one should err on the side which favours the recipient, for it is the recipient who is, by definition, in need of assistance.⁸⁰

Independence and Court Supervision

Abella has charged that court supervision represents a threat — albeit more qualitative than quantitative — to the independence of an administrative tribunal.⁸¹ This is so because the manner in which a court regards the capacity and jurisdiction of a particular tribunal significantly affects the reputation of the tribunal with its constituent groups — the legal profession, the legislature, and interest groups. In short, a few negative reviews can seriously impair the perceived value of authoritativeness in tribunal decision-making.⁸²

While Abella goes on to explain the problem of lack of deference by courts to tribunals through examination of the “generalist” judicial mind set, and a legal culture amenable to interference with non-curial decision-making,⁸³ it must be noted that importing basic legal principles, found in the common law rules of natural justice, can be a positive step, so long as the court is mindful of the agency's institutional differences and the (often) unique context of its decision-making. In review of SARB decisions on appeal, the Divisional Court appears to have employed this approach, ensuring that basic legal principles will be respected in its decision-making.⁸⁴ While such strenuous review may initially weaken the functional independence of the SARB, inviting appellants to not regard its decisions as particularly determinative, it is submitted that if the Court's criticisms are accepted and acted upon, they may be used to strengthen the legitimacy of SARB decision-making.⁸⁵

80. *Kerr v. Metropolitan Toronto (Department of Social Services)* (1991), 4 O.R. (3d) 430 at 445 (Div. Ct.); cited with approval in *Wedekind, supra*, note 39 at 297.

81. *Supra*, note 25 at 118.

82. Rankin, *supra*, note 25 at 91–92.

83. *Supra*, note 25 at 119–120.

84. Section 15 of the FBA (ref'd to in GWAA and VRSA) provides for appeals to the Divisional Court on a question that is not a question of fact alone, within a 30 day time limit. Decisions are also subject to judicial review under s. 2 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

85. In its recommendations for changes to the SARB appeal process, the authors of *Transi-*

Faced with a series of stinging rebukes by the Divisional Court for its poor decision-making,⁸⁶ and fierce criticism from concerned interest groups for the appointment of untrained members and their inappropriate queries during hearings,⁸⁷ the SARB was reformed between 1987 and 1989, just prior to the time its appointments' process was improved. The most notable improvements were the addition of a professional legal unit and the institution of a member training programme. The substantive value of these administrative additions — in the realization of functional independence — cannot be underestimated. Regular legal unit review of decisions, five-week training sessions for new members, ongoing seminars (and presumably better selection of candidates) has turned the reputation of the SARB around within less than a decade.⁸⁸ While by no means indicative of the quality of its overall decision-making, it may be worth noting that, in the past year and a half, the SARB has not experienced a reversal by the

tions, *supra*, note 55 at 62, suggested improvements which seem to conform with the court's approach to applying basic legal principles to ensure that natural justice is observed: "The SARB has been severely and properly criticised for its procedures, the content of its decisions, and its lack of impartiality. Notwithstanding a number of recent improvements, the procedures of the board fall far short of those required in light of the serious decisions it makes. Board members should be highly qualified, well trained, and effectively supported by in-house counsel. More decisions should be appealable, the right to legal representation should be guaranteed, and there should be full disclosure of all relevant information. The rules of evidence should be followed, and a complete record of the evidence should be available. Adequate reasons should be given for all decisions, with rehearings permitted only in exceptional cases. These are only some of the improvements to the appeal process that we see as a high priority."

86. See, e.g.: *Re Warwick v. Ministry of Community and Social Services* (1978), 21 O.R. (2d) 528; 91 D.L.R. (3d) 131 (C.A.); *Re Willis v. Ministry of Community and Social Services* (1983), 40 O.R. (2d) 287; *Dowlut v. Ontario (Ministry of Community and Social Services)* (1985), 8 O.A.C. 136; 11 Admin. L.R. 54 (Div. Ct.); *Re Warwick v. Ministry of Community and Social Services* (1985), 51 O.R. (2d) 302 (Div. Ct.); *Re Pitts v. Director of Family Benefits Branch, Ministry of Community and Social Services* (1985), 51 O.R. (2d) 302 (Div. Ct.); and *Re Burton v. Ministry of Community and Social Services* (1985), 52 O.R. (2d) 211 (Div. Ct.).
87. *Supra*, note 63.
88. Leach, *supra*, note 38. In fact, the SARB training manual is used as a basis for the training materials of the Ontario Society of Adjudicators and Regulators. See, also: Adams, *supra* note 11 at 136-9, and 149. "Our goal in the training program at the board is to talk in depth and at length about the impartiality and neutrality of decision-making, about the biases that one brings to the tribunal to be set aside and to decide the issue before you based on the evidence and the facts that you hear at the hearing. That's historically been a difficult transition for some people at the board. There's legal protection for that... judicial review." Adams also mentioned that the SARB maintains an internal line of communication for those who wish to raise issues of bias immediately upon completion of a hearing.

Division Court, despite the difficulty of some of the decisions before it.⁸⁹ Just as poor decision-making can weaken a reputation and the degree of independence granted through deference, the addition of proper administrative measures can bolster decision-quality, reflecting in enhanced reputation and solidified independence (i.e. freedom of a decision-maker from the constraint of court interference).⁹⁰

The SARB, Its Would-be Alternative, and Judicial Review

Numerous improvements in SARB administration have restored its reputation and re-gained it some degree of functional independence within its statutory process of appeal. However, the recent developments in the new Government's appointments' process, and its new policy direction, may result in a weakening of the SARB's legitimacy. Given these developments, it would not be surprising to hear a recipient of social assistance casually question the impartiality of one of the new appointees, even though each has had access to reputedly excellent training. If a recipient wishes to act upon such concern, the official avenue for it is the process of judicial review.⁹¹

When a human being is placed in the position of judging the fates of other human beings, the credibility of the decision rendered will largely rest upon the impartiality of the decision-maker. If even the appearance of self-interest is construed by the affected parties, any wisdom previously evident in the ruling will immediately become tainted. All affected parties must be assured that the judge, under whose judgement they must live, had no personal stake in the outcome of the controversy.⁹²

(a) *Individual Bias*

The common law principles which make up the so-called "laws of natural justice" are that parties before a tribunal are entitled to a disinterested and unbiased observer, and that they are entitled to a right to be heard. From the former principle is drawn the test for bias: "what would an informed person,

89. *Supra*, notes 43–47. In fact, it seems quite common for the Divisional Court to quote the SARB at length in its approval of decisions.

90. It is interesting to note that most of Wood's criticism and questioning of the Adams during committee review concerned his apparent dislike for the quality and legal review programmes employed by SARB to ensure the release of high-quality decisions. *Supra*, note 11 at 136.

91. This option was noted by former Chair Adams, for those decision-makers who were unable to check their biases at the door. *Supra*, note 88.

92. D.P. Cofer, "The Question of Independence Continues: Administrative Law Judges within the Social Security Administration" (1986) 69 *Judicature* 228 at 228.

viewing the matter realistically and practically — and having thought the matter through — conclude?⁹³ Bias is the functional antecedent of impartiality. Impartiality is the end towards which independence is the means.

(b) *Institutional bias*

To suggest that judicial review is available for cases of the apprehension of bias, on the part of a particular member, is to relay only half of the story. “The objective status of the tribunal can be as relevant for the ‘impartiality’ requirement as it is for ‘independence.’ Therefore, whether or not any particular judge harboured pre-conceived ideas or biases, if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met.”⁹⁴ The test for institutional bias, therefore, becomes whether the same well-informed, “reasonable” person would conclude that a presumption of bias exists, if presented with a substantial number of cases.⁹⁵

It would be useful, at this point, to recall how the classification of a tribunal’s function is relevant for a determination of its independence.⁹⁶ The more a tribunal acts like a court, the more the requirements of procedural justice affecting it will resemble those of a court.⁹⁷ Moreover, the standard of procedural justice applied to ensure impartiality should be strict because the matter at issue is one which could conceivably involve a breach of s. 7 of the *Charter*, the right to fundamental justice.⁹⁸ Recent Supreme Court of Canada decisions

93. *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; 68 D.L.R. (3d) 716 at 735.

94. *Ruffo v. Conseil de la Magistrature* (1995), 130 D.L.R. (4th) 1 at 19 (S.C.C.).

95. *Ibid.* at 20.

96. *Supra*, notes 24 & 25.

97. See: *Ruffo*, *supra*, note 94; and *Newfoundland Telephone Company v. The Board of Commissioners of Public Utilities*, [1992] 1 S.C.R. 623 at 634–39; 89 D.L.R. (4th) 289 at 296–99.

98. While no Ontario Court has yet to find that s. 7 affords any protection for welfare rights (see, e.g.: *Fernandes v. Director of Social Services* (1992), 7 Admin. L.R. (2d) 153 at 166; *Falkiner v. Ontario (Minister of Community and Social Services)*, [1996] O.J. No. 3737 (October 29 1996) (Q.L.) (Gen. Div.); *Masse v. Ontario (Minister of Community and Social Services)*, [1996] O.J. No. 363 (February 8 1996) (Q.L.) (Gen. Div.)), it may yet be successfully argued that s. 7 protects the “security of the person,” which includes protection of the capacity to satisfy basic human needs, such as food and shelter. While it may not provide a substantive right, it could confer a procedural right not to be deprived of social assistance that might otherwise be forthcoming under statute. See: R.A. MacDonald, “Procedural Due Process in Canadian Constitutional Law: Natural Justice and Fundamental Justice” (1987) 39 *U. Fla. L. Rev.* 217 at 249; *Singh v. Min. of*

concerning interpretation of a similar section to s. 7 in the Québec *Charter* indicate that the *Charter* might yet become an added element in determinations of issues and independence and impartiality for administrative tribunals.⁹⁹

The forgoing analysis indicates that courts will provide rather close scrutiny to an adjudicative tribunal — such as the SARB — if it is engaged in the finding of fact, to which statutory rules are interpreted and applied, in the determination of an individualised complaint concerning the provision of social assistance, particularly where provision is made by statute for a right of appeal. What are the chances for a successful application for judicial review based on an allegation of individual bias against any of the new appointees? The most recent decisions on individual bias in Ontario seem to indicate that general statements about an issue area, however inflammatory, would not be sufficient — in the mind of the mythical reasonable person¹⁰⁰ — to raise an apprehension of bias.¹⁰¹ Are the chances for a finding of institutional bias any better?

The fact of the matter is, this board is in a mess. It takes one year from the start of an appeal to a decision. We need people like [new appointee] Evelyn Dodds to fix that mess. She supports the government agenda, and that's what we need on the board.¹⁰²

While appointments of those who are apparent adherents to the “public largesse” model of social assistance may speak to their perceived bias as individual decision-makers, such appointments also speak to institutional impartiality. The

Employment and Immigration, [1985] 1 S.C.R. 177 at 206–7. Note also that *Reference Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 512, requires a s. 7 analysis to take account of the basic tenants of common law [such as *audi alteram partem*] and the rule of law [impartiality being a prerequisite for the actualisation of the rule of law], *supra*, notes 20–21.

99. See: *Lippé*, *supra*, note 18 at 531–532. See also, *Ruffo*, *supra* note 91 — where consideration of s. 7 and an equivalent section (s. 12) of the Québec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, are assumed to have application in determination of issues of impartiality in a disciplinary tribunal; and *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] S.C.J. No. 112 (21 November 1996) (Q.L.); *rev'g* (1994) 122 D.L.R. (4th) 553 (Quebec C.A.) — where the same reasoning was extended by the majority to the determination of a provincial liquor board to revoke a license.
100. One wonders why the test is not whether a reasonable and well-informed social assistance recipient perceives bias.
101. See: *E.A. Mining v. Ontario Securities Commission* (1995), 23 O.R. (3d) 257 (C.A.); or *Large v. Stratford (City)* (1992), 9 O.R. (3d) 104 at 108–9; *rev'd* on other grounds.
102. Bob Wood, *supra*, note 11 at 67, speaking for Ms. Dodds, whose appointment was strongly opposed by each non-government representative on the legislative committee (a rarity in the last decade of appointments to the SARB) FN the HANSARD too.

Government has apparently dispensed with a more transparent system of appointments for a closed, partisan one which involves no real opportunity for consultation with the SARB, much less with members of interested policy communities.¹⁰³ Implicitly accepting a model of social assistance that runs contrary to the purposes of the existing legislation — one based on the notion that social assistance is simply a form of public largesse, rather than a necessary societal entitlement¹⁰⁴ — the Government won an election with a platform that included an oft-spoken policy against the preservation of the existing social assistance scheme. Moreover, since its election, the Government has demonstrated little sympathy for alternative viewpoints in its — sometimes flawed — execution of that policy.¹⁰⁵ Bob Wood, Legislative Assistant to the Management Board Chairman, has publicly placed the SARB on notice that he feels that the Small Claims Court could possibly do its job more efficiently.¹⁰⁶ However, these indicia are probably not sufficient either, in and of themselves, to lead a reasonable person to conclude that the SARB might decide a number of cases differently than it otherwise would have, in order to appease the Government.

The analysis becomes more interesting, however, when one acknowledges that the additional charge of the individual bias of a new appointee might colour (and therefore augment) the argument for institutional bias. While such arguments might be phrased in the alternative, they are more likely (if argued well) to be evaluated together. The analysis becomes even more interesting if one considers the alternative scheme that has been posited by Mr. Wood. The alternative suggested for the SARB is a private arbitrator,¹⁰⁷ with no expertise, *per se*,¹⁰⁸ but with a clear adjudicative function.

The position would be a contracted one. Therefore either the individual arbitrator, or the arbitration firm for whom she works, is subject to a short- or medium-length term, and possibly provisional, contract. Unlike a SARB appointment, which provides for a renewable term of three years in statute,¹⁰⁹

103. *Supra*, notes 69–72.

104. *Supra*, note 58.

105. *Supra*, note 52.

106. *Supra*, note 14.

107. Leave aside the obvious problems in applying an arbitration model to SARB decision-making (i.e. that the arbitration model assumes two equal parties and a legal issue which involves little consideration of the policy-development implicit in the exercise of discretion under social assistance legislation).

108. This is a common basis for curial deference. See, generally: T.J. Weiler, "Curial Deference and NAFTA Panel Review" 1 *J. Int'l. Lgl. Stds.* 83.

109. MCSSA, s. 15.

the new adjudicator would most likely be dismissable at pleasure¹¹⁰ (perhaps with the promise of damages in contract for premature breach). Unlike the SARB, the new agency may enjoy its position by virtue of a regulation, but more than likely it would be by virtue of an order in council or by simple contract with the crown. It probably would not exist by operation of a statute. Finally, the new adjudicator would be seen as mindful of the demise of the SARB, with its 50/50 ratio of rulings in favour of a claims that proceeded to a hearing.¹¹¹

Would the reasonably well-informed, thoughtful, bystander perceive the potential for bias in a number of cases? Would the bystander conclude that the private arbitrator, mindful of reaching his performance targets for numbers of applications processed (as stipulated, most likely, in his arbitration contract), be as disposed to ensuring that unrepresented social welfare recipients are treated with either substantive, or procedural, fairness — as would the SARB? It is submitted that, if this alternative to the SARB becomes a reality, institutional independence will become a very real concern.

CONCLUSION

The subject of independence crosses disciplinary boundaries, involving politics, law, and administration. It supports the function of impartiality, which in turn supports the foundations of the rule of law. Recent developments in Ontario suggest that the Government no longer regards the provision of social assistance as a matter of entitlement, and if it does, it seems to consider the pursuit of effectiveness, economy, and efficiency as superior to ensuring respect for other procedural values — whether they be fairness, integrity or authoritativeness in decision-making.

It has been suggested by some within the legal community that the Ontario government is systematically destroying the basis of politically independent adjudication through its clearly partisan approach to the appointments process. It has also been suggested that whatever happens to the SARB may be seen as a touchstone for our commitment, as a society, not only to independence and impartiality in adjudication, but to justice in a larger sense.¹¹²

110. In *Ontario Realty Corp*, *supra* note 3, appointment at pleasure was argued as a ground to find lack of institutional independence, and therefore reasonable apprehension of bias. Similarly, control of the tenure and remuneration of a tribunal's member was cause for a finding of a lack of institutional independence by a majority of the Supreme Court of Canada in *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at 56-59.

111. *Supra*, note 76.

112. These ideas were contributed by Ian Morrison, Director of the Ontario Legal Clinic

Nonetheless, the Government was elected by a majority of the population, and its agenda, short-sighted though it may be, was well-known. It may therefore eliminate the SARB, and throw over the “citizen entitlement model” through which it was created. But if it does so, the government should be ready to respond to complaints that the new system lacks institutional independence, and it must also be ready to accept that its alternative system, and the values it will represent, will most likely be far from just.

Resource Office. This contribution, and his other thoughtful comments, are much appreciated.