Since I come from a province where events recently made this topic fodder for public discussion, both locally and nationally, one might expect me to have come to some more precise conclusions about the nature of tribunal independence and the features of tribunal structure and status that are necessary to protect that independence. I must confess that I am still not sure exactly what the full range of criteria should be to guarantee independent decisions from statutory tribunals, but I can state my version of some principles that I think must be considered when tribunal independence is under discussion.

To begin with, in general I think the Supreme Court of Canada was correct in a number of important respects in its decision in *Ocean Port Hotels v. British Columbia* 2001 SCC 52. The Court held in that decision that statutory agencies occupy a different constitutional position than courts (and should therefore not be held to the same standards of independence as courts); that it is open to legislatures to specify the features they wish a tribunal to have – and to place restrictions on their independence if it wishes; and that practical realities may limit the capacity of government to provide the “Cadillac” model of administrative justice replete with full-time members enjoying lengthy tenure. Where a tribunal plays an adjudicative role, there would be an expectation, of course, that it would operate within the framework of the duty of procedural fairness, and this in itself suggests qualities of openness, even-handedness and ability to make up its own mind that are often associated with the slightly separate concept of independence.

My view is that these are important observations about statutory agencies, including labour tribunals. The statutes under which administrative tribunals make their decisions represent important statements of public policy which have been adopted by the elected representatives of the public. The tribunals created by these statutes are intended to put the legislated policy into effect. This seems to lead to the conclusion that it is open to a government to assess the degree to which public policy is being advanced by the operation of a tribunal, and to make modifications if it seems it is not.

I would suggest, however, that the vehicle available for a government that wishes to do this is to amend the legislation. What was objectionable about the decision of the government of Saskatchewan to remove the Chair and Vice-Chairs of the Saskatchewan Labour Relations Board was not that the government thought public policy would be better served by introducing more “balance” into the industrial relations system. If the government thought that more “balance” was required, it was open to them to amend the
legislation to impose new or clearer requirements to serve that objective. The allegiance of the members of a tribunal is to the statute, not to the government, and there has to be a presumption that those members are interpreting the existing legislation in good faith. To assail the tribunal and its members directly, which was the option chosen by the government in the Saskatchewan case, does cast doubt on the ability of the tribunal to operate independently – particularly in a case such as this, where the government in its employer guise is actually a party whose interests can be affected by board decisions.

One way of looking at this is to frame it in constitutional terms – to make analogies to the work of the courts and to decide to what degree administrative tribunals must align themselves with or may deviate from the structures or procedures that characterize a court. Another way to think of it is to recall that, when a government made the choice of asking the legislature to establish an arm’s-length agency for the purpose of making certain kinds of public decisions, rather than having them made in-house in a department or some other way, this choice must have been based on the premise that the attribute of independence contributes in some way to the credibility – and thus to the effectiveness – of the decision-making. Once the legislature has sanctioned the creation of such an arm’s-length decision-maker, government intervention in the work of the tribunal can only impair the credibility that is vital currency for public decision-makers.

Where a member or members of the tribunal disagree that amended legislation represents a positive direction for public policy, it is open to them in turn to resign, and I would go as far as to say they have an obligation to do so if they do not feel in good conscience that they can work productively within the altered legislative framework.

Intervention by a government in particular controversies or summary removal of members of a tribunal do, in my view, impair the independence of a tribunal, but I do not think the correct response to this is to insist that tribunal members be granted life tenure. I think it is a mistake for tribunal members to think of tribunal membership as a career, though there does need to be an element of predictability and fairness in setting up terms for tribunal members. It may be that the best guarantor of a tribunal member’s independence is the opposite of unlimited tenure – it is the ability of the member to walk away from the tribunal if political interference or other factors make it necessary or make continuing to sit on the tribunal unpalatable. This ability to walk away must derive from another characteristic of administrative tribunals – their expertise. It is the member’s expertise that at one and the same time lends credibility to the decisions of the tribunal, makes it difficult for a government to simply dispense with the services of members, and permits a member to deploy their knowledge or qualifications elsewhere.

The points I have made are, of course, relevant to labour boards, although those boards have their own histories and their own peculiar features. Labour boards have been both the beneficiaries and the victims of the fact that their decisions affect a constituency that is focused, vocal and strongly linked to debates on issues of social and economic policy. The presence of such a constituency has for long periods reinforced the independence of labour boards; because they are explicitly represented in the decision-making process, unionized employers and unions have seen the labour board as a credible and useful
forum for resolving many of their disputes. As with any truly independent body, however, labour boards are bound to disappoint. They are almost bound to interpret the statute in a way that is regarded as unacceptable, and the temptation to resort to political pressure – to call for a more balanced statute or a more balanced board – seems to be irresistible. Because of the noise and heat generated by disputes in this area, it is also almost irresistible for governments to respond, and to take steps that confirm their ideological bona fides for one side or the other.

In addition to the effect of the acquiescence of the labour relations community, the independence of labour boards has also been safeguarded by a degree of public credibility as well. Labour boards have enjoyed deference from the courts, and have usually received – all things considered – relatively measured coverage from the media. Because they tend to be busy tribunals, they give the impression – usually based on reality – that they know what they are doing, and this image means that they are generally permitted to proceed with confidence.

This reserve of good will cannot be taken for granted, and the periods when labour boards are under intense or unfriendly scrutiny, or those periods when their own internal compass falters, do pose a threat to their ability to act independently. It is perhaps anomalous that at these high temperature points – when Wal-Mart or replacement workers or other contentious matters are in question – when governments are most tempted and most likely to make efforts to influence the disposition of those issues – that it is most necessary for the board be able to act independently, drawing on its expertise and experience, in the interests of good public policy and fidelity to the legislative will reflected in the statute.