

## Democratic Accountability and the Banff Centre

**By:** Shaun Fluker

**Order commented on:** Order in Council [184/2023](#) (*Post-Secondary Learning Act*)

The [Banff Centre for Arts and Creativity](#), located in the Town of Banff, is an internationally known and respected institution for the study of arts and culture. The Centre [describes itself](#) as “. . . a leader in the development and promotion of creative work in the arts, sciences, business, and the environment.” Many Canadians eventually cross paths with the Centre for one reason or another, even if they do not study the arts, because the Centre hosts a wide range of live performances, conferences, and similar public events annually. The Centre also has a very well-established program in Indigenous Leadership. For me, the Centre is most familiar as the home of the [Banff Mountain Book and Film Festival](#), which is held at this time every year (late October to early November). This past week however, the Centre was in the [news](#) for a very different reason: on October 26 the Alberta government removed the entire board of governors and replaced them with an individual administrator. This change was implemented by the Lieutenant Governor in Council with the issuance of OC 184/2023. This short comment describes the legislative framework for this Order, and I argue that this sort of power over an important institution in our democracy needs some accountability and transparency measures to ensure it is truly exercised in the public interest.

The Banff Centre began in the 1930s as a fine arts program administered by University of Alberta, and later obtained its own institutional autonomy in 1978 (see [here](#)). The Banff Centre is now governed by the *Post-Secondary Learning Act*, [SA 2003, c P-19.5](#). The Act governs the administration and operations of post-secondary education institutions in Alberta, and it categorizes them into groups such as a research university, undergraduate university, polytechnic institution, public institution, private institution, and independent institution (at section 1). Relative to these other categories, the Act says very little about governance of the Banff Centre. For example, the Act does not regulate the setting of tuition fees and other academic matters that are typically addressed for other public institutions. Part 3 of the Act, entitled “The Banff Centre”, consists entirely of sections 50 to 52:

### **Part 3 The Banff Centre**

#### **Definition**

**50** In this Part, “board” means the board of governors of Banff Centre.

#### **Continuation**

**51** The Banff Centre is continued with the object of providing the public with access to a broad range of learning experience with emphasis on the fine arts, management studies, language training and environmental training.

#### **Board of governors**

**52(1)** The board of governors of Banff Centre is continued as a corporation under the name “Board of Governors of The Banff Centre” and consists of the following members:

- (a) the chair of the board appointed by the Lieutenant Governor in Council,
  - (b) the president,
  - (c) 5 persons, in addition to the chair, appointed by the Lieutenant Governor in Council, and
  - (d) 9 persons appointed by the remaining members of the board, one of whom must have been nominated by the Minister of the Crown in right of Canada charged with the administration of the *National Parks Act* (Canada).
- (2) The members of the board may elect one member to act as chair in the absence of the chair or in the event of the chair’s inability to act.
- (3) At least 5 of the 9 members appointed to the board under subsection (1)(d) must be Canadian citizens or lawfully admitted to Canada for permanent residence.
- (4) If a member of the board, other than the president, is absent without the permission of the board from 3 consecutive meetings of the board, the member’s office immediately becomes vacant.
- (5) The members of the board must act in the best interests of Banff Centre.

Section 52 gives the Lieutenant Governor in Council (i.e., provincial Cabinet) the power to appoint board members (and dismiss them; see *Interpretation Act*, [RSA 2000, c I-8 at section 20](#)). This power is largely unconstrained, which is typical of public post-secondary institutions across Canada and makes these institutions vulnerable to political influence. As an illustration, the Parkland Institute published a [research report](#) in May 2022 examining data on appointments made by the Alberta government between 2019 and 2021, with results that show significant differences in the backgrounds, political orientations, and economic interests of appointees made by the Alberta NDP and UCP governments. This power also potentially allows those with close ties to government, like the oil and gas sector in Alberta, to influence the governance of post-secondary institutions.

Sections 100 and 101 of the *Post-Secondary Learning Act* give the Lieutenant Governor in Council even greater powers to dismiss and replace an entire board of governors with an individual administrator, who then exercises the statutory powers of a board:

#### **Administrator of public post-secondary institution**

**100(1)** If in the Lieutenant Governor in Council’s opinion it is in the public interest to do so, the Lieutenant Governor in Council may appoint an administrator for a public post-secondary institution.

- (2) The administrator shall be paid the remuneration and expenses that the [Minister](#) prescribes out of the funds of the board of the public post-secondary institution.
- (3) The administrator holds office until the appointment is terminated by the Lieutenant Governor in Council.

### **Effect of appointment of administrator**

**101(1)** On the appointment of an administrator for a public post-secondary institution, the terms of office of the members of the board of the public post-secondary institution terminate.

(2) During the period of the administrator's appointment and with respect to the public post-secondary institution for which the administrator has been appointed,

(a) the administrator is the sole member of the board and may exercise the powers and shall perform the duties of the board, in the name of the board,

(b) in carrying out the president's responsibilities under this Act, the president is subject to any directions given to the president by the administrator,

(c) if the office of the president is or becomes vacant, the administrator may exercise the powers and shall perform the duties that the president otherwise would have had,

(d) a reference in this Act or any other document to

(i) the board or the board of governors of the public post-secondary institution,

(ii) the chair of the board, or

(iii) the president, where the office of the president is vacant,

shall be read as a reference to the administrator, and

(e) the operation of [sections 16, 43, 44, 52, 55 to 58 and 81\(2\)](#) and, if the office of the president is or becomes vacant, [section 81\(1\)](#), is suspended.

Notably, the sole legal constraint on this significant power of the Lieutenant Governor in Council (and the powers thus granted to the appointed individual to govern an educational and research institution) is that the appointment be in the public interest (at section 100(1)). This is the power that was exercised to remove the Banff Centre board of governors and replace them with an administrator. Commentators have [noted](#) that the Alberta government has thus far provided little explanation or rationale for the move, other than the need for a 'refreshed future'. This is not even close to an adequate justification of being *in the public interest*.

The Banff Centre saga is the latest of an apparent policy trend for the UCP to overtly intrude into the governance of public institutions in Alberta. Readers will recall that in November 2022, the Alberta Health Services board was dismissed and replaced with a single administrator (see [here](#)).

More specific to the education sector, journalist Charles Rusnell has [reported](#) on how the UCP has pressured Athabasca University to move away from its distance learning model, and replaced some of its board members who disagreed with this direction in 2022, despite Athabasca University being Canada’s largest online post-secondary institution.

These concerns are amplified when the government is silent on its justification for getting into the muck on institutional governance. In the case of the Banff Centre and as noted above, the *Post-Secondary Learning Act* requires the Lieutenant Governor in Council to be convinced that the move to replace the entire board with an individual administrator is in the public interest. Simply put, the government has a democratic obligation to explain the basis for such an extreme exercise of public power, and increasingly a legal obligation too. The norm or principle of [justification](#) is being applied by courts more frequently to impose a legal obligation on those who wield public power to give a rational and intelligible explanation for their exercise of power. This is a crucially important rule-of-law check in an era like now, where democratically elected governments seem prone to embrace arbitrary and authoritarian rule. I would argue that this type of check is of elevated importance where these powers have significant implications for public institutions that serve a crucial function in our democracy – like public post-secondary institutions in the liberal arts.

However, I am very skeptical that this norm of justification will ever be warmly embraced by the executive branch of government on its own; particularly at the cabinet or ministerial level, whose exercise of power these days seems largely non-transparent in too many cases. I’m likewise doubtful that Canadian courts will impose a norm of justification or additional transparency onto the political executive with much frequency anytime soon, because that would require judges to rethink the separation of powers between the judicial, executive, and legislative branches of our government – something they seem reluctant to engage on (I discuss this indirectly [here](#) in relation to the judicial review of regulations).

So that leaves us with the legislature. The most immediate measure to impose accountability and transparency on decisions with significant democratic implications, such as this one regarding the Banff Centre, would be for the legislature to enact a requirement for published reasons that make a rational connection between a decision under section 100 of the Act and the public interest, and possibly even require a debate on the matter in the elected assembly. I’m not holding my breath waiting for this to happen either.

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