



Report on Findings Based on Comparative Study of Reappointments and Term Limits across Canadian Jurisdictions

PREAMBLE: This report was prepared by Aisha Amode, a law student, at SOAR's request. It outlines key findings and themes following a study of other Canadian jurisdictions on reappointments and term limits. The report discusses the study's findings but does not set out SOAR's views on the best approaches that should be followed in Ontario.

Introduction

This report is a follow up to the study conducted by SOAR regarding the impact of the government directive on term limits, which requires that order-in-council (OIC) appointments not exceed a maximum of 10 years.¹ This report elaborates on some of the key findings in the initial study by undertaking an overview of the practices surrounding reappointments and term limits across Canadian jurisdictions. The study found that currently, only Ontario, Alberta and Manitoba formally engage in a practice of capping reappointments of OIC appointees (see Appendix). While most Canadian jurisdictions do not appear to have a formal practice of capping the number of years in which a member may be reappointed, many of the jurisdictions provide valuable insight as to ideal practices surrounding capped terms as well as reappointments generally. This report will outline some of the key findings and themes that arose during this comparative study.

Research Methodology and Limitations

This study was conducted by gathering data from legislation, policies, guidelines and key related reports. It also involved information obtained through interviews with individuals within the specified jurisdictions. While the study is an accurate reflection of the formal overall practices within each jurisdiction, there may be various informal practices that were not uncovered as well as aspects that are unique to certain types of tribunals and therefore fall outside of the general approach which may not have been captured.

¹ See The Society of Ontario Adjudicators and Regulators "Study on the Impact of the Government Directive on Term Limits for OIC Appointments" (February, 2015) at https://soar.on.ca/images/Files_Not_in_Doc_Library/SOAR_Report_on_the_impact_of_the_Directive-on_term-limits-for_tribunal_members.pdf

Analysis

Reappointments and Term Limits

Staggered Terms

Staggering of fixed terms is a means of ensuring that in any given year, there is a sufficient balance of experienced and new appointees within the agency in order to minimize the potential adverse impact on performance if the terms of a high proportion of members were to expire at once. Such a concern was uncovered in the Manitoba Office of the Auditor General Report in which it found that almost 30% of their ABC's did not have staggered terms for appointments therefore all their members were set to expire at around the same time.² In response to this consequence, the Report encourages the practice of staggering terms stating that such practices help to balance the need for continuity and experience, with the need to refresh the membership and bring on new skills/expertise over time to reflect the challenges faced by the organization.³

The practice of staggering appointments has been codified within policies and legislation or embraced in practice in some agencies across various jurisdictions. Saskatchewan's *Human Rights Code* legislates for the staggering of the Human Rights Commission appointments by specifying that upon the provision coming into force, members would be appointed such that one-third must be appointed for terms of three years, another third for four years and the remaining members for five years.⁴ Another mechanism to allow for staggering based on the agencies' needs can be seen in Manitoba's Human Rights Code. The term of its members is limited by the following provision in its enabling legislation: "Every member of the Commission except the chairperson shall normally hold office for three years from the date of being appointed and thereafter until reappointed or replaced, but in order to assure that three of the appointments shall expire in each year the Lieutenant Governor in Council shall, if necessary, appoint any such members to terms of less than three years."⁵

In implementing Alberta's cap of 10 years for non-adjudicative positions and 12 years for adjudicative positions, their policies require that where new term lengths are being established, staggered appointment termination dates will be used to support succession planning and continuity.⁶ It further specifies that best practice indicates terms be staggered so that no more than one-third of the positions are turning over at once.

Compliance with term limit expiries

In ensuring that term limit objectives are met, the research demonstrates some need for some form of compliance system to ensure that upcoming term expiries are tracked. In

² *Ibid* at p.82.

³ *Ibid*.

⁴ *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, <http://canlii.ca/t/52bl2> at s.21(6).

⁵ *The Human Rights Code*, CCSM c H175, <http://canlii.ca/t/526hx> at s.2(4).

⁶ Agency Governance Secretariat "Public Agencies Governance Framework" (February, 2008) at <http://alberta.ca/albertacode/images/ags-Recruitment-appointment-Public-Agencies-Governance-Framework.pdf> at p.23.

the Manitoba Office of the Auditor General Report, their audit found that over 20% of all members had served on their respective agency for over the 10 year cap (discussed further in 0 below).⁷ As part of ensuring compliance with the maximum term limits, the Report recommends that term limits be reviewed regularly and that the Ministers' offices contact the ABCs sufficiently in advance of term expires, which prompted a new practice of notifying the Minister's office six months in advance in contrast to the previous four months' notice.⁸ New Brunswick has a similar policy which requires that their ABCs advise government six months in advance of upcoming vacancies, and encourages them to prepare position profiles and any other selection criteria.⁹

Transitional Provisions following Term Limit Changes

As can be seen from the experiences of Alberta and British Columbia, a necessary component when making changes to practices regarding term limits is the need for transitional provisions to ensure that the new criterion is met while ensuring a gradual transition to prevent any potential adverse consequence that may result from a sudden change such as the loss of a substantial portion of an agency.

As previously mentioned, the government of Alberta implemented a cap of 10 years for non-adjudicative positions and 12 years for adjudicative positions. As part of the implementation of this cap on reappointments, the *Alberta Public Agencies Governance Act* also includes transitional provisions that permit extensions past their 10 or 12 year cap. Specifically, for those members who held an indefinite term or a term exceeding 12 years for adjudicative members, their terms would be deemed to terminate two years after the day which the *Act* came into force. The legislation provides that the Governor in Council may order a further extension past the two year period. Non-adjudicative members who do not hold an indefinite term will be deemed terminated on the day which the *Act* came into force, subject to an order from the Governor in Council.¹⁰ It appears that such flexibility is intended to account for the needs of a particular agency.

Although less disruptive than a cap on reappointments, the government of British Columbia amended its legislation to impose a practice of capping initial terms to two-four years and reappointments of up to five years.¹¹ In its transitional provisions, the legislation requires that where an appointment was made without a specified term, the member's term would be converted to a four-year term starting on the day the amendment comes into force.¹²

⁷ Office of the Auditor General – Manitoba “Chapter 2 Appointment Process to Agencies, Boards and Commissions” Manitoba Audit (January, 2012): <http://www.oag.mb.ca/wp-content/uploads/2012/01/2-Board-Appt-Process-web.pdf> at p.83.

⁸ *Ibid* at p.92.

⁹ New Brunswick Executive Council “Changing the Way Appointments are Made: An Appointment Policy for New Brunswick Agencies, Boards and Commissions” (2008) <http://www2.gnb.ca/content/dam/gnb/Corporate/pdf/ABCReport-e.pdf> at p.11-12.

¹⁰ See the *Alberta Public Agencies Governance Act*, SA 2009, c A-31.5, <http://canlii.ca/t/521dz> at ss.22-24.

¹¹ *Administrative Tribunals Appointment and Administration Act*, SBC 2003, c 47, <http://canlii.ca/t/jjiv> at s.3.

¹² *Administrative Tribunals Appointment and Administration Act*, SBC 2003, c 47, <http://canlii.ca/t/jjiv> at s.67(1).

Exceptions

Another means of accounting for particular needs of an agency is by building in authority for exceptions to the cap, as has been done in the case of Alberta and Ontario. Alberta's legislation provides that if in the opinion of the responsible Minister it is necessary to ensure the effective operation of a public agency, the responsible Minister may recommend to the Lieutenant Governor in Council that an order be made providing that the cap on reappointment does not apply in respect of a specified appointment to the public agency.¹³ Ontario's policy on term appointments similarly provides an exception by permitting reappointment to a term beyond the maximum of ten years which can be made in "exceptional circumstances in the public interest"¹⁴.

Sample Practices and Guiding Principles for Reappointments

Duty to Consult and Role of the Chair

Some jurisdictions place an emphasis on the role of the Chair in reappointment decisions, emphasizing the active involvement of Chairs in assessing performance and the need for increased dialogue between the Chair and the appointing body. British Columbia has legislated the requirement to consult with the Chair before appointing or recommending the appointment of vice chairs and members.¹⁵ Their Appointments Guidelines further state that this is intended to ensure that the views of the Chair and the operational requirements of the tribunal are key factors that government considers in making tribunal appointments. Ontario has similarly legislated the requirement to consult with the Chair of an adjudicative tribunal prior to reappointment. The provision specifies that a person cannot be reappointed unless the Chair assesses the member's performance of his or her duties on the tribunal and recommends that the person be reappointed.¹⁶ The Manitoba Office of the Auditor General Report also recommends that the Minister's office responsible for the reappointment decisions consult with the responsible Chairs or senior management well in advance in order to garner information about the skills and characteristics necessary to meet the strategic needs of their entity.

Openness and Transparency

Other principles commonly referred to amongst certain jurisdictions are the need for openness and transparency in the reappointment process. Alberta promotes these principles within their policy by requiring that the respective bodies remain open and clear regarding the members' terms and reappointment policies.¹⁷ In placing the responsibility for performance reviews and metrics on the Chair, British Columbia's Appointment

¹³ See the *Alberta Public Agencies Governance Act*, SA 2009, c A-31.5, <http://canlii.ca/t/521dz> at s.14(4).

¹⁴ Management Board of Cabinet "Agencies & Appointments Directive" (October, 2015) (unpublished) at p.42.

¹⁵ *Administrative Tribunals Appointment and Administration Act*, SBC 2003, c 47, <http://canlii.ca/t/jjiv> at s.3(1) & s.5.

¹⁶ *Adjudicative Tribunals Accountability, Governance and Appointments Act*, 2009, SO 2009, c 33, Sch 5, <http://canlii.ca/t/l3p4> at s.14(4)

¹⁷ "Public Agencies Governance Framework" (February, 2008) at <http://alberta.ca/albertacode/images/ags-Recruitment-appointment-Public-Agencies-Governance-Framework.pdf> at p.23.

Guidelines specify the need for regular feedback and clear communication regarding performance expectations.¹⁸ Furthermore, the Guidelines promote openness by recommending that performance expectations should be mutually understood and accepted at the outset of an appointment by both the tribunal Chair and the tribunal's members and ensure that tribunal appointees are to be made aware that their performance will be a factor that is taken into account when reappointment recommendations are made.¹⁹ In promoting openness, the Manitoba Office of the Auditor General Report also recommends that Chairs should be discussing reappointments with their members several months before their term expiry and provide the Minister's office with information regarding that member's intentions as soon as possible.²⁰

Independence

A recurring theme within British Columbia's Appointments Guidelines is the need to remain vigilant of the risk of interfering with the independence of members of the tribunals, for example, while undergoing the reappointment process and conducting performance reviews. In detailing the role of the Chair in conducting performance assessments, the Guidelines specifically require that the process not "compromise the independence and autonomy of individual members or panels of the tribunal in the exercise of their decision making responsibilities".²¹

Continuity of Ongoing Proceedings

In many of the enabling statutes of various tribunals across the Canadian jurisdictions, there are specific provisions that are aimed at ensuring that ongoing proceedings continue without disruption. The provisions generally state that if members were in the process of presiding over a matter and their term expires, they may continue to preside over the matter until a final decision is rendered. Manitoba's Civil Legal Services states that such legislative clauses ensure that there is continuance and stability in the organization and that at no time would it not have a legally, properly-constituted board with the authority to make decisions, if for some reason government was unable to appoint new members by the time of the term expiry.²² However, such legislative clauses should not be used to allow members to serve with no end date in effect.²³

¹⁸ The Board Resourcing and Development Office "Appointment Guidelines" (May, 2007) at <http://www.brdo.gov.bc.ca/appoint/AdminTribGuid.pdf> at p.21.

¹⁹ *Ibid* at p.23.

²⁰ Office of the Auditor General – Manitoba "Chapter 2 Appointment Process to Agencies, Boards and Commissions" Manitoba Audit (January, 2012): <http://www.oag.mb.ca/wp-content/uploads/2012/01/2-Board-Appt-Process-web.pdf> at p. 78.

²¹ The Board Resourcing and Development Office "Appointment Guidelines" (May, 2007) at <http://www.brdo.gov.bc.ca/appoint/AdminTribGuid.pdf> at p.21.

²² Office of the Auditor General – Manitoba "Chapter 2 Appointment Process to Agencies, Boards and Commissions" Manitoba Audit (January, 2012): <http://www.oag.mb.ca/wp-content/uploads/2012/01/2-Board-Appt-Process-web.pdf> at p. 81.

²³ *Ibid*.

Timeliness of decisions and minimum notice requirement

A necessary feature of the reappointment process is the need for timely decisions regarding reappointment decisions and consequently giving the member sufficient notice. The Manitoba Office of the Auditor General Report aptly identifies the underlying concerns with insufficient notice and delays in reappointment decisions: “It is important that government value and respect the time and commitment of their appointees, and ensure the reappointment process allows appointees sufficient notice to manage their personal and professional affairs accordingly. Deficiencies and/or delays in the reappointment process may discourage committed, qualified appointees from accepting renewals of their terms.”²⁴ These comments were made in the context of their audit revealing that it took excessive periods of time to reappoint the exact same members. The Report recommends that appointment processes begin well in advance of the expiry of terms so that turnover of membership occurs smoothly as terms expire, and ABCs are not functioning without full membership for excessive periods of time.²⁵ The Ontario Directive states that appointees will be notified of the expiry date of their appointment at least four months prior to the expiry of their term of appointment.²⁶

Promote Mobility between Agencies upon Expiry of Terms

Another valuable theme that emerged from this study was the importance of retaining skillful and experienced individuals by encouraging mobility between agencies after the expiry of a member’s term with one agency. Notably, the Manitoba Office of the Auditor General Report comments that given that government ought to harness the valuable expertise gained by an individual who has served on an agency for a significant length of time, there should be consideration to appointing the individual to become a member of a different agency, where their experience and expertise could be well utilized and of great benefit to the new agency.

Structured Process for Reappointment Decisions

Most Canadian jurisdictions do not have a formal, documented process for making reappointments decisions. As a tool to assist in reappointment decisions, the Manitoba Office of the Auditor General Report recommends the use of a skills/competency matrix for each agency and also provides a sample template.²⁷ However, British Columbia provides the most comprehensive overview of its reappointments process including the factors and circumstances that are taken into account when making reappointment decisions. Below is a direct excerpt from the Appointment Guidelines:²⁸

²⁴ Office of the Auditor General – Manitoba “Chapter 2 Appointment Process to Agencies, Boards and Commissions” Manitoba Audit (January, 2012): <http://www.oag.mb.ca/wp-content/uploads/2012/01/2-Board-Appt-Process-web.pdf> at p. 57.

²⁵ *Ibid* at p.76.

²⁶ Management Board of Cabinet “Agencies & Appointments Directive” (October, 2015) (unpublished) at p.42.

²⁷ Office of the Auditor General – Manitoba “Chapter 2 Appointment Process to Agencies, Boards and Commissions” Manitoba Audit (January, 2012): <http://www.oag.mb.ca/wp-content/uploads/2012/01/2-Board-Appt-Process-web.pdf> at p.103 (Appendix C – Sample skills/competency matrix).

²⁸ The Board Resourcing and Development Office “Appointment Guidelines” (May, 2007) at <http://www.brdo.gov.bc.ca/appoint/AdminTribGuid.pdf> at p.22-23.

15. Reappointments

While reappointments to administrative tribunals are not guaranteed, an appointee may be considered for reappointment if the appointee's performance has been satisfactory and there are no other considerations that would militate against the reappointment. In this respect, tribunal appointees should be made aware that their performance will be a factor that is taken into account when reappointment recommendations are made. (Note: Part 11, above, "Chair's Obligation to Assess Members".)

Some of the factors that may be considered in determining whether an appointee has performed satisfactorily include:

- the appointee's contribution to the achievement of the tribunal's goals and service plans;
- the general decorum of the appointee in carrying out the tribunal's work;
- the timeliness of the appointee's decisions;
- the appointee's attendance;
- the appointee's other activities in support of the work of the tribunal.

In assessing the performance of an individual appointee against the overall needs of the tribunal, tribunal chairs should weigh the benefits of expertise gained through experience against the fresh views that new appointees can bring to the tribunal's work. If the tribunal chair considers that may be appropriate to recommend an incumbent's reappointment:

- the incumbent should confirm in writing his or her willingness to serve;
- the tribunal chair should advise the host minister that the incumbent is being recommended for reappointment; and
- the incumbent should be advised that his or her reappointment will be recommended:
 - o on an individual basis;
 - o along with any other qualified candidates who have expressed an interest in the appointment; or
 - o as part of a full recruitment and selection process.

Circumstances such as the timing of a reappointment, the availability of other qualified individuals interested in and willing to accept a tribunal appointment, the expertise of the incumbent, the ongoing workload of the tribunal and the costs and commitment required to carry out a formal recruitment process or to train a new appointee will be factors that are taken into account in determining whether to recommend a reappointment without going through the full recruitment and selection process that is set out in these guidelines.

Tribunal chairs should be guided in their recommendations by government's underlying commitment to openness and transparency and to merit as the basis for all tribunal appointments. Tribunal positions should be filled by candidates with the best qualifications to meet the tribunal's requirements.

Additional Feedback

Implementing a cap on reappointments highlights the underlying struggle to balance often competing values. The Manitoba Office of the Auditor General Report describes the balancing between the need for renewal and new skills/expertise and the desire to maintain continuity and retain experience: “the terms of service for members must be long enough for members to gain experience and cultivate sufficient knowledge to understand the organization, but also that there be sufficient renewal of members to bring new perspectives and experience to the organization”.²⁹ While both sets of values are important considerations, there are nevertheless further considerations which interviewees discussed:

- Some interviewees opined that it takes at least two years for members to become well versed within the given tribunal.
- One interviewee suggested that a distinction should be made between those appointments that are historically viewed as being long-term careers as opposed to casual or occasional positions which are more or less in addition to an appointee’s career.
- Some critics have also advocated for some form of independent review of decisions for reappointments decisions.³⁰

²⁹ Office of the Auditor General – Manitoba “Chapter 2 Appointment Process to Agencies, Boards and Commissions” Manitoba Audit (January, 2012): <http://www.oag.mb.ca/wp-content/uploads/2012/01/2-Board-Appt-Process-web.pdf> at p.83.

³⁰ See The Ontario Bar Association “Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009: Cause for Concern” (August, 2010) in Canadian Journal of Administrative Law and Practice

Appendix

Summary Table of Canada-wide Practices on Reappointments

Province/Territory	Term Limits?	Term Cap?	Notes
Alberta	3-5 years	10 years (non-adjudicative) 12 years (adjudicative)	<p>1. Transitional Provisions (see section 2 below)</p> <p>2. Reappointments are to occur only if in the opinion of the responsible Minister, the member meets the requirements of the position.</p> <p>3. Lieutenant Governor retains the power to make regulations respecting the reappointment of members of public agencies (though this has not yet been exercised).</p> <p>4. Discretion to extend appointment: If in the opinion of the responsible Minister it is necessary to ensure the effective operation of a public agency, the responsible Minister may recommend to the Lieutenant Governor that an order be made providing that (the term limit) does not apply in respect of a specified appointment³¹</p>
British Columbia	2-4 years (initial) 1-5 years (re-appointment)	None	Appointments Guidelines provide useful guidance for appointments and reappointments (see section 2 below)
Manitoba	1-3 years or more via	10 years (unless	Manitoba Auditor General Report provides valuable recommendations and

³¹ Alberta Public Agencies Governance Act, SA 2009, c A-31.5, <http://canlii.ca/t/521dz> at s.14(4)

	enabling legislation	specified in legislation)	principles for reappointments practices (see section 2 below)
New Brunswick	3 years	None ³²	Workers' Compensation Appeal Tribunal = Legislated cap of 10 years (see footnote)
Newfoundland & Labrador	2-5 years	None	
Northwest Territories	3-5 years	None	
Nova Scotia	3-4 years ³³	None	Utility and Review Board = Life Tenure (see footnote)
Nunavut	2-5 years	None	
Ontario	2-5 years	10 years	
Prince Edward Island	3 years	None	
Quebec	5 years ³⁴	None	Tribunal Administratif du Quebec = Life Tenure (see footnote)
Saskatchewan	3-10 years	None	
Yukon	3 years	None	
Federal	2-7 years	None 10 years (unofficially)	

Info about the key resource documents referred to in this report

British Columbia: Appointments Guidelines

In British Columbia, the appointments process is a partnership involving the co-operation among the Board Resourcing and Development Office (BRDO), host ministers and ministries and individual tribunals. The Board Resourcing and Development office (BRDO) is responsible for the majority of the administrative aspects of the appointments and reappointments process. The BRDO has published the Appointment Guidelines which

³² With the exception of the Workers' Compensation Appeal Tribunal which prevents a member from serving for more than ten consecutive years. See *Workplace Health, Safety and Compensation Commission Act*, SNB 1994, c W-14, <http://canlii.ca/t/52fg0> at s.20.1(4)

³³ With the exception of the Nova Scotia Utility and Review Board for which its full time members hold a life tenure subject to good behaviour until age 70. See *Utility and Review Board Act*, SNS 1992, c 11, <http://canlii.ca/t/jgng> at s.5(3)

³⁴ With the exception of the Tribunal Administratif du Quebec (TAQ), which has a life tenure until retirement or resignation. The life tenure is subject to good behaviour, which is determined based on a complaints review process described in the Act. It also terminates upon loss of a qualification required by law or permanent disability which prevents performance of duties. See *An Act Respecting Administrative Justice*, CQLR c J-3, <http://canlii.ca/t/52f9l> at s.38 and s.51-54

document the uniform guidelines used to govern appointments to all administrative tribunals. Included in its guidelines are valuable practices pertaining to reappointments including: a requirement to consult with the Chair on reappointment decisions and the duty of the Chair to assess members as well as factors and circumstances to consider for assessing performance for the purposes of reappointment.

Manitoba: Auditor General Report

In 2012, the Auditor General was tasked with assessing the appointments process for Manitoba's agencies, boards and commissions. In addition to assessing the process for transparency and openness, the Report was aimed at analyzing whether appointments were being made in a timely manner with related considerations of compliance with term limits and the reappointment process. While their audit findings are specific to the province, many of their recommendations and analysis have broad applicability for our consideration.