



## **Results of research into the process of appointments and re-appointments to administrative tribunals in Québec**

This paper was prepared for the Society of Ontario Adjudicators and Regulators (SOAR) as part of SOAR's ongoing consideration of the issues of appointments and re-appointments of Order-in-Council appointments in Ontario. It supplements research done in 2014-15 by Aisha Amode, available on the SOAR website

The current paper was prepared by Zinejda Rita in April 2016. Ms. Rita is a law student at Osgoode Hall Law School.

## **Appointments To Québec Tribunals**

The appointment of administrative judges in Québec follows a different regime from other provinces. The tribunals and government agencies with adjudicative and regulatory mandates do not fall under a centralized system of appointments. Québec is also the only province with a constitutional requirement that administrative tribunals be independent and impartial.<sup>1</sup>

Further, Québec offers a special case because it has a specialized monitoring body for administrative justice. Le Conseil de la justice administrative (“Conseil”) was created when the *Act Respecting Administrative Justice* came into force in 1998.<sup>2</sup> The *Act* came into effect as a result of the need for budget cuts in Québec in the 1990s. However, the reform was guided by the principles of safeguarding the specific character of administrative justice, ensuring the quality of administrative justice and promptness of the system.<sup>3</sup> The *Act* has two sets of guiding principles: one applicable to the Administrative Tribunal of Québec (“TAQ”) and the other applicable to other decision-makers.<sup>4</sup> The Conseil is responsible for investigating the conduct of certain administrative law judges and is a unique organization within the context of administrative justice in Canada. The four tribunals the Conseil oversees are: Tribunal administrative de Québec, Commission des lésions professionnelles, Commission des relations du travail and Régie du logement.

A 2014 study of fifteen Québec agencies looked at tribunals where adjudication accounted for the major or predominant part of agency activity.<sup>5</sup> In interviews with twenty-eight adjudicators from the fifteen agencies, the authors of the study found that the process of appointment and re-appointment in Québec suffers from the same perceived political bias and interference common to all provinces. Appointments in Québec take place without the benefit of a single, unified statutory framework based on principles of general application. Part of the legal status of the appointed members is defined by the

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<sup>1</sup> *Charter of Human Rights and Freedoms*, RSQ, c C-12, s.23.

<sup>2</sup> *Loi sur la justice administrative*, RLRQ c J-3.

<sup>3</sup> See France Houle “A Brief Historical account of the Reforms to the Administrative Justice Systems in the Province of Quebec” (2009) 22 Can J. Admin.L. & Prac 47.

<sup>4</sup> *Ibid.*

<sup>5</sup> For more see Pierre Noreau, France Houle, Martine Valois, Pierre Issalys. *La justice administrative : entre indépendance et responsabilité. Jalons pour la création d'un régime commun des décideurs administratifs indépendants* (Cowansville: Editions Yvon Blais, 2014).

enabling statute of the specific agency. One can look for the qualifications, criteria for appointment, length of term and the grounds of procedure for removing adjudicators from office in the specific statute and complementary rules.<sup>6</sup>

## I. Length Of Term

The appointment authority generally enjoys wide discretion when it comes to appointment terms. The fifteen tribunals can be divided into three sub-categories:

### 1. TAQ - Appointment For Life

TAQ deals with applications contesting decisions of government departments (régie, board, hospital) and municipalities and is a court of last resort. When TAQ was created, all members were appointed for a five year renewable term.<sup>7</sup> The procedure for re-appointment was challenged by the Québec Bar and in 2005 the *Act* was amended to appoint members during good behaviour. As such, currently members of TAQ are appointed to serve until retirement during good behaviour. TAQ is divided into four subsections, plus a mental health division.<sup>8</sup>

### 2. Appointment For Five Years Enabled By Statute

There are four agencies that specialize in dispute settlement. These are the Bureau de décision et de révision, Commission des lésions professionnelles, Commission des rela-

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<sup>6</sup> *Ibid.* The study looked at the following tribunals and agencies: Tribunal administratif du Québec (TAQ) - Administrative Tribunal of Québec; Commission des relations du travail (CRT) - Labour Relations Board (Replaced by Le Tribunal administratif du travail - Workplace Tribunal); Régie du logement (RDL) - Landlord and Tenant Board; Commission des lésions professionnelles (CLP) - Workplace and Safety Insurance Board (Replaced by Tribunal administratif du travail - Workplace Tribunal); Bureau de décision et de révision (BDR) - Securities Commission; Régie de l'énergie (RDÉ) - Energy Board; Commission de protection du territoire agricole (CPTA) - Agricultural Land Resources Protection Board; Régie des alcools, des courses et des jeux (RACJ) - Alcohol and Gaming Board; Régie des marchés agricoles et alimentaires du Québec (RMAAQ) - Québec Agricultural and Food Marketing Board; Comité de déontologie policière (CODÉPOL) - Office of the Independent Police Review Director; Commission municipale du Québec (CMQ) - Québec Municipal Board; Commission des transports du Québec (CTQ) - Québec Transportation Board; Commission québécoise des libérations conditionnelles (CQLC) - Québec Parole Board; Commission d'accès à l'information (CAI) - Access to Information Board; Commission de la fonction publique (CFP) - Public Service Commission.

<sup>7</sup> Houle, *supra* note 2.

<sup>8</sup> The departments under TAQ are Social Affairs, Mental Health, Immovable Property Section, Territory and Environment Section and The Economic Affairs Section.

tions du travail, and Régie du logement. For these agencies, the enabling statutes specify that the adjudicators are appointed for five year terms.<sup>9</sup> In addition, a five year term is specified by statute in the case of Régie de l'énergie adjudicators.

### 3. Discretionary Term For Up To Five Years

For nine of the fifteen tribunals, appointment may be for any term up to five years. In practice the term of appointment has been between two to three years.<sup>10</sup> Respondents to the questionnaires of the study said that they were not aware of the criteria by which the appointment length is decided.<sup>11</sup> There are also two general exceptions to the rules of appointment in some of these tribunals. For “community” members to the Commission québécoise des libérations conditionnelles the appointment term is for a maximum of three years. For “surplus” members of Regie des alcools, des courses et des jeux the term limit is three years and two years for Régie de l'énergie.<sup>12</sup>

## II. Re-Appointment

### 1. Agencies Under The Conseil

For the three agencies falling under the authority of the Conseil, the five year rule applies for re-appointments. Therefore, Commission des lésions professionnelles, Commission des relations du travail, Régie du logement enjoy five year re-appointment terms specified in the statute. Members of the three agencies also enjoy the right to receive prior notice that the examining committee intends to make an unfavourable recommendation; but beyond that no clear time-frame applies.

For these agencies, there is a special committee that examines re-appointment. The adjudicator whose term is being evaluated usually appears before the committee for an average of thirty to sixty minutes to answer questions. The questions are often related to recent Supreme Court of Canada cases in their field.<sup>13</sup>

### 2. Agencies With No Terms of Re-Appointment

When it comes to re-appointment, stark contrasts exist between the detailed set of rules in the case of the three agencies under the disciplinary authority of the Conseil and the informal arrangements of the other eleven agencies. For three of the eleven agencies -

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<sup>9</sup> Houle, *supra* note 2.

<sup>10</sup> Noreau et al., *supra* note 5 at 254

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid* at 101.

<sup>13</sup> *Ibid* at 341.

Bureau de décision et de révision, Commission de protection du territoire agricole and Régie des alcoques, des courses et de jeux - there is no mention of re-appointment in enabling statute. The others contemplate re-appointment but do not mention rules that apply. Further, orders-in-council appointing their members provide that the appointee shall be given six months advance notice of the responsible minister's intention to recommend a reappointment.

### **III. Revocation Of Appointment**

#### **1. Agencies Under The Conseil**

For the four agencies coming under the disciplinary jurisdiction of the Conseil, enabling statutes spell out in precise terms the grounds on which revocation proceedings may be instituted.

#### **2. Agencies With Direct Relationship With The National Assembly**

Precise terms for revocation of appointment are also spelled out in the two agencies that have a direct relationship with the National Assembly - Commission d'accès à l'information and Commission de la fonction publique.

#### **3. The Rest**

Orders-in-council for the rest of the appointments specify, as a condition of the appointment, that the appointee "agrees that the government may revoke his or her appointment at any time, without notice or compensation, on grounds of defalcation, mismanagement, gross fault or any ground of equal seriousness, proof of which lies upon the government."<sup>14</sup>

### **IV. General Impressions And Recommendations**

Some of the common themes that emerged out of the responses of the Québec surveys were that the power to appoint and re-appoint and to set the length of their term of office, is regularly used to provide a convenient posting for some favoured candidate, to reassign public officials no longer welcome in their position, or to offer employment to specific individuals on the eve of government change.<sup>15</sup> Of the twenty-eight adjudicators

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<sup>14</sup> Houle, *supra* at note 2.

<sup>15</sup> *Ibid.*

interviewed, fourteen had held public service or political positions before being appointed to a tribunal.<sup>16</sup>

The empirical part of the research showed that the discretion the government retains in the matter of re-appointment has undesirable consequences on the state of mind of adjudicators. The absence of rules concerning the reappointment of adjudicators, and the fact of the reappointment process is conducted by the *Secrétariat aux emplois supérieurs*, a unit placed directly under the Executive Council, are both incompatible with the notions of transparency and legitimacy that should govern the accession to the office of independent administrative adjudicator.<sup>17</sup> For the members of the tribunals under the Conseil, the perception is that re-appointment happens automatically despite serious issues with the work of those evaluated.<sup>18</sup> For the rest of the tribunals, there are no guiding principles and the perception remains that re-appointment depends on political will.<sup>19</sup>

One of the recommendations in the Québec study is that re-appointment should be done based on annual evaluations of members of tribunals and regulatory bodies, along with the Chair's recommendation.<sup>20</sup> The annual evaluation should be based on the qualitative and quantitative criteria. The qualitative criteria outlined should look at the knowledge, ability and behaviour of the member throughout the year. Whereas, the quantitative evaluation should look at the general contribution of the member, while keeping into account the level of difficulty of the files.

## V. Charts

Name of Tribunal	Length of Term	Re-Appointment	Revocation of Appointment	Statute of Ethics
Tribunal administratif du Québec (TAQ) - Administrative Tribunal of Québec	Life (subject to good behaviour)	NA	Grounds for initiation spelled out in enabling statute	<i>Act Respecting Administrative Justice</i>

<sup>16</sup> Noreau et al., *supra* note 5 at 245

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid* at 258.

<sup>19</sup> *Ibid* at 261.

<sup>20</sup> *Ibid* at 384. See Recommendation 19.

Commission des relations du travail (CRT) - Labour Relations Board (Replaced by Tribunal administrative du travail - Workplace Tribunal)	5 year terms	5 years	Grounds for initiation spelled out in enabling statute	<i>Act Respecting Administrative Justice</i>
Régie du logement (RDL) - Landlord and Tenant Board	5 year terms	5 years	Grounds for initiation spelled out in enabling statute	<i>Act Respecting Administrative Justice</i>
Commission des Lésions Professionnelles (CLP) - Workplace and Safety Insurance Board (Replaced by Tribunal administrative du travail - Workplace Tribunal)	5 year terms	5 years	Grounds for initiation spelled out in enabling statute	<i>Act Respecting Administrative Justice</i>
Bureau de décision et de révision (BDR) - Securities Commission	5 year term	Discretionary		<i>Regulation Respecting Ethics and Professional Conduct of Public Office Holders</i>
Régie de l'énergie (RDÉ) - Energy Board	5 year term	Discretionary		<i>Regulation Respecting Ethics and Professional Conduct of Public Office Holders</i>
Commission de protection du territoire agricole (CPTA) - Agricultural Land Resources Protection Board	Any term up to 5 years	Discretionary		<i>Regulation Respecting Ethics and Professional Conduct of Public Office Holders</i>

131 Bloor Street West, P.O. Box 22031, The Colonnade, Toronto, Ontario M5S 1R0  
Tel. 416-623-7454 Fax 416 623-7437 E-mail: [information@soar.on.ca](mailto:information@soar.on.ca)

[www.soar.on.ca](http://www.soar.on.ca)

Régie des alcools, des courses et des jeux (RACJ) - Alcohol and Gaming Board	Any term up to 5 years	Discretionary		<i>Regulation Respecting Ethics and Professional Conduct of Public Office Holders</i>
Régie des marchés agricoles et alimentaires du Québec (RMAAQ) - Québec Agricultural and Food Marketing Board	Discretionary	Discretionary		
Comité de déontologie policière (CO-DÉPOL) - Office of the Independent Police Review Director	Discretionary	Discretionary		
Commission municipale du Québec (CMQ) - Québec Municipal Board	Discretionary	Discretionary		
Commission des transports du Québec (CTQ) - Québec Transportation Board	Discretionary	Discretionary		
Commission québécoise des libérations conditionnelles (CQLC) - Québec Parole Board	Discretionary	Discretionary		
Commission d'accès à l'information (CAI) - Access to Information Board	5 years	Discretionary	Grounds for initiation spelled out in enabling statute	Enabling Statute
Commission de la fonction publique (CFP) - Public Service Commission	5 years	Discretionary	Grounds for initiation spelled out in enabling statute	Enabling Statute