



## **SOCIETY OF ONTARIO ADJUDICATORS AND REGULATORS**

### **STATEMENT OF PRINCIPLES FOR THE REAPPOINTMENT OF ADJUDICATIVE TRIBUNAL MEMBERS**

**November 2018**

#### **P R E A M B L E**

This document sets out principles that apply to the reappointment of members to adjudicative administrative tribunals in Ontario and in particular to the 37 adjudicative bodies with statutory judicial powers governed by the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009* (ATAGAA). Principles that should govern the initial appointment of members of adjudicative tribunals are set out in SOAR's Statement of Principles for the Appointment of Adjudicative Tribunal Members. Many of the principles that should govern the initial appointment of members also apply to reappointments, such as a merit-based and transparent system.

Adjudicative tribunals decide legal disputes about the statutory rights and obligations of Ontarians in a wide variety of matters of often life-altering importance to the individual or corporate parties appearing before them. These matters have been taken out of the Court system and placed under the jurisdiction of specialized tribunals.

Following the initial, merit-based appointment, the process for decisions about reappointment must be demonstrably transparent and based on merit. The process must establish public confidence that, once appointed, individuals will be able to make impartial decisions, even in cases in which the government may have a direct or indirect interest.

Under ATAGAA an OIC appointee may not be reappointed without the recommendation of the tribunal chair

This recommendation should be based on a rigorous performance review system that provides objective data to inform the decision about whether the member should be recommended for reappointment. A mechanism for an independent review of a decision by a Chair to not recommend reappointment will ensure that decisions are fair and based on merit.

When a Chair has made a recommendation that a member should be reappointed, that recommendation should be respected. If recommendations are not accepted, an apprehension may arise that the process of reappointment has been influenced by

factors other than merit which can only undermine the integrity of the tribunal and the administrative justice system as a whole.

## REAPPOINTMENT PRINCIPLES

### **1. The system of reappointments must be designed to preserve the effectiveness, integrity and impartiality of the institution.**

#### **Commentary**

SOAR has noted, in its Principles of Administrative Justice, that “independence is the ability to make decisions free from external pressures and without fear of personal consequences, including reprisals”. Uncertainty and lack of transparency regarding reappointments may interfere with a member’s performance and objectivity.

### **2. Reappointments should be merit-based.**

#### **Commentary**

Members are appointed to adjudicative tribunals in a transparent, merit-based appointment process. To ensure merit-based reappointments, the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009* (“ATAGAA”) provides that an OIC appointee may not be reappointed without the recommendation of the tribunal chair. The tribunal chair’s reappointment recommendation should be accepted as a matter of course. There is no principled reason why the recommendation of the Chair to reappoint that person should not be accepted.

### **3. Tribunals should have rigorous performance assessment programs in place**

#### **Commentary**

To ensure that a chair’s recommendations about whether to recommend appointments are fair and transparent, every tribunal should have a rigorous performance assessment program. This can include measures of performance such as timeliness and efficiency and also, where appropriate, input from colleagues or from parties. For a meaningful system to be established, funding must be dedicated for this purpose in the budget for each tribunal.

### **4. Term limits should be based on the needs of each tribunal**

#### **Commentary**

There are many models of fixed term appointments and re-appointments. In Quebec, appointees to some tribunals are appointed for life in the same way that judges are appointed. In other jurisdictions, terms may be for five years or ten years or some other period.

For some tribunals, term limits promote necessary renewal and the chance for fresh perspectives. However, for other tribunals, this advantage is outweighed by the constant loss of the tribunal's most senior and experienced members.

Some tribunals adjudicate very complex areas of law, requiring a high level of subject matter expertise. Other tribunals require adjudicators with an advanced adjudicative skill set to manage complex hearings (increasingly featuring self-represented parties) while ensuring that cases are adjudicated in an efficient and timely way. Some tribunals require adjudicators with both a high level of subject matter expertise and a high level of adjudicative skill.

These demands mean that the constant loss of the most experienced members through a cap on the number of re-appointments can significantly impair the tribunal's ability to function as well as it could without this loss.

**5. The process of reappointment for additional terms beyond the maximum must be open and transparent.**

**Commentary**

When there is a term limit, there must be a provision for further reappointment based on the circumstances of the Tribunal at a particular time. For example, if a tribunal is faced with a sudden increase in case load, the ability to maintain the most experienced adjudicators may outweigh the advantages of a cap on re-appointments.

**6. Appointment and reappointment terms should be clearly and publicly stated, ideally in legislation.**

**Commentary**

A clear and transparent statement of appointment and reappointment terms helps to establish confidence in the process and provides certainty for appointees.

**7. Appointment and reappointment terms should not be disrupted in the period before and after an election.**

**Commentary**

In a merit-based system of appointments and reappointments, there should be no change to OIC appointments and reappointments leading up to an election, or in the period after an election. To suspend appointments and reappointments prior to and after elections creates uncertainty and disruption in an institution's ability to continue to provide the same level of service to the public. It also creates the perception that appointments might not be based on merit. The public's access to administrative justice should not be hindered by elections.

## **8. Appointees should have defined employment-related rights, including severance**

### **Commentary**

The work performed by adjudicative tribunals requires dedicated professional appointees who should be entitled to the same basic employment rights enjoyed by other government employees.

A reasonable severance package should also be available for appointees at the end of their terms where there is no reappointment or because the member has reached the maximum length of service.

Conflict of interest policies at many institutions require appointees to also accept restrictions on their post-appointment professional activities. These circumstances require that a reasonable severance package be available for appointees.