



## SOAR Advocacy and Innovation Committee

### STUDY ON THE IMPACT OF THE GOVERNMENT DIRECTIVE ON TERM LIMITS FOR OIC APPOINTMENTS

#### I. Introduction

The Addendum to the Government Appointees Directive (the “Directive”) states that effective September 1, 2006, subject to the requirements of an agency’s enabling statute or any other law, the term of appointment of appointees to a given position on a regulatory or adjudicative agency is a maximum of 10 years. It also states that appointment to an additional term (beyond 10 years) may be made only in exceptional circumstances.

The purpose of this study is to assess the likely impact of the Directive on larger adjudicative Tribunals defined as those with a full-time Chair or Executive Chair and 20 or more Order in Council (OIC) appointees. Seventeen Tribunals were identified, the majority of which are in the three Clusters.

The study consisted of gathering data from the Public Appointment Secretariat (PAS) website that lists the OIC appointees for the tribunals and the date that the appointee started with the tribunal.

We then contacted the Chair or the Executive Chair for the 17 tribunals to obtain information about the impact of the Directive from the Chairs’ perspectives.

The study shows that the impact of the Directive will vary considerably among the 17 tribunals. For some, there will be a profound impact to the point that, if fully implemented, the Directive will mean that the tribunal will be unable to fulfill its statutory mandate. In some cases, the impact will be delayed beyond 2016. Some Chairs see advantages to the Directive. Others believe the advantages are outweighed by the anticipated sudden loss of their most experienced adjudicators.

It appears that there is considerable uncertainty in the system as a whole about certain aspects of the Directive. For example, there is uncertainty about factors that may “re-start the clock”, such as cross-appointments and changes in position (e.g. Associate Chair, Vice-Chair, member, part-time, full-time).

#### **The Directive**

The Directive states as follows:

*In the case of a person appointed as an Associate Chair, Vice-Chair or Member of a regulatory or adjudicative agency and, subject to the recommendation of the Executive Chair or Chair in exceptional circumstances:*

- *There will be an initial appointment for a period of two years.*

- *On the recommendation of the Executive Chair or Chair, the appointee is eligible for re-appointment for a term of three years.*
- *On the recommendation of the Executive Chair or Chair, the appointee is eligible for re-appointment for a further term of five years.*

*The ultimate decision to re-appoint rests with the appointing authority.*

*Re-appointment to a further additional term beyond the maximum of ten years in total may be made only in exceptional circumstances in the public interest.*

*Appointees will be notified of the expiry date of their appointment at least four months prior to the expiry of their term of appointment.*

## **II. The Data**

### **How the data was collected**

The data regarding the 17 tribunals was taken from the PAS website. We looked at the OIC complement for the years 2014 to 2021 on January 1<sup>st</sup> of each year. As a result, we show the direct effect of the directive in the year following the expiry of an OIC because of the Directive. For example, the Directive will mean that a large number of OICs will end during 2016. Our data shows the effect as of January 1, 2017.

We looked at the average experience of the OICs for the years studied. Our data assumes that a person not re-appointed because of the directive would be replaced by a person with no experience with the tribunal. We then considered the numbers of OICs who appear from the PAS data to be subject to the Directive, and then considered these numbers as a percentage of the OIC complement.

### **Limitation regarding the data**

The data was taken only from the PAS website. This information shows only the start date for the OIC appointees to each tribunal. It does not show how long the person has been in their current position. So, for example, a person who started as a part-time OIC in 2000 but became a full-time OIC at the same tribunal in 2010 would appear from the data to be subject to the 10 year rule as of 2016 when in fact, they may not be subject to the rule until 2020 because arguably the clock would have been reset to zero as of 2010 for this individual.

As a result of this, the data concerning the impact of the directive is not completely accurate. It is less accurate for tribunals where a change in OIC appointee status is a regular feature of the tribunal (e.g. change from part-time to full-time, member to Vice-Chair, Chair to Associate Chair). The data is relatively accurate for tribunals where change in status is not a regular occurrence. In general terms, it appears that the ELTO and SLASTO Cluster tribunals are in the former category. The larger Social Justice Tribunal of Ontario tribunals, the Workplace Safety and Insurance Appeals Tribunal and the Ontario Labour Relations Board are tribunals in the latter category.

## Assessment of the data

Over a long period of time, it would be expected that the effect of a ten-year limit on appointments would result in a turn-over of approximately 10% each year. The actual turn-over would likely be more as people might leave the tribunal for other reasons, such as retirement or other career options.

The Directive however, takes effect all at once and is not staggered over time. As a result, for some tribunals, there will be a sudden significant loss of experienced OICs.

For some tribunals, while the PAS data suggests a significant turn-over, the actual impact may not be as significant because of factors such as changes in appointee status (e.g. part-time to full-time, member to Vice-Chair), which may mean that the OIC will not in fact expire due to the Directive as soon as the PAS data suggests.

However, based on the PAS data and the follow-up interviews with the chairs, it is apparent that some tribunals stand to lose over 50% of their current OIC complement in a two-year period as a result of the Directive.

The tribunals that will be most directly and clearly affected are those that require a high degree of subject matter expertise and who have historically relied on a cadre of experienced, long-term appointees and where change of OIC status is not a regular feature of the tribunal.

### Tribunals most directly and clearly impacted

Of the 17 tribunals we looked at, the ones most clearly affected are noted in the chart below:

<b>Tribunal</b>	<b>Years most affected</b>	<b>Percentage of OICs lost</b>	<b>Numbers lost</b>	<b>Change in average years of experience</b>
Workplace Safety and Insurance Appeals Tribunal	2016-17	56	38	From 10. to 3.0
Ontario Labour Relations Board	2017-18	48	23	From 10.3 to 3.5
Landlord and Tenant Board	2017-18	60	30	From 8.0 to 3.2
Consent and Capacity	2017-18	53	66	From 9.0 to 3.5
Human Rights Tribunal of Ontario	2018-19	50	25	From 6.2 to 3.2
Social Benefits Tribunal	2016-17	47	18	From 6.7 to 3.3
Criminal Injuries Compensation Board	2017-17	52	12	From 7.4 to 4.8

The Chairs of these tribunals have confirmed that the loss of roughly half of their adjudicators in such a short period will have significant negative effects on the work of the tribunals.

Concerns were expressed about the ability to maintain the quantity and quality of decisions. Substantial human resources will be required to recruit and train new appointees. For tribunals that require adjudicators to have a particularly high degree of subject-matter expertise, the learning curve can be steep. As a result, it can take several years before a newly appointed member develops the skills and knowledge to handle the more complex cases. This problem will be compounded by the fact that as a result of the Directive, many of the tribunal's most experienced adjudicators, who would otherwise be used to help train new appointees and handle the more complex cases, will be gone.

### **III. The Public Interest and other factors**

As a result of the Directive, there is an obvious concern about the impending loss of the most experienced adjudicators in the administrative justice system. Some of these adjudicators have transferable skills that may qualify them for consideration for a new appointment with a different tribunal. However, since subject-matter expertise is an essential aspect of the merits-based appointment system, the degree to which people can move from tribunal to tribunal may be limited. It appears that movement between tribunals in clusters may be easier to facilitate, but even in that case, subject-matter training will be required with an associated learning curve.

There is also a public-interest concern regarding the relative experience of adjudicators who are left after the Directive takes effect. For the tribunals most directly affected, there will be a sharp decline in the average level of experience of the remaining adjudicators. For example, for the WSIAT and OLRB, the loss of half of their adjudicators means that the average level of experience will decline from approximately ten years to approximately three. This means that half of the adjudicators will have no experience with that tribunal.

#### **Resources**

Concern was expressed by all of the chairs about the time that it may take to replace appointees who are lost as a result of the Directive. Chairs reported that in the last few years, the appointment and re-appointment process has slowed considerably. In the absence of some change, the Directive is going to lead to a substantial and unprecedented increase in the numbers of new appointments that will be required. Concern was expressed that managing the effects of the Directive will be further complicated if there are significant delays in the process of getting new OICs appointed to replace those who have left.

This suggests that there will need to be significant increases in resources at the Public Appointments Secretariat and the host Ministries, particularly the Ministry of the Attorney General, to ensure that open positions are filled quickly and efficiently. Obviously large numbers of unfilled adjudicator positions will further compromise the ability of tribunals to function.

It was also noted that significant resources will be needed for the recruitment process at the tribunals most affected. To take just one example, at the Landlord and Tenant Board, there could be 28 vacancies to be filled in 2016-17. In the SJTO Cluster as a whole, there could be approximately 65 vacancies in the same period.

In many tribunals, the majority of OICs are members with a smaller number of OICs who are Vice-Chairs. In these tribunals, the Vice-Chairs have senior leadership roles. They are also typically the most experienced adjudicators who are relied upon to mentor and train, as well as take on the more complex cases. Some Chairs expressed particular concern about the potential loss of these people by operation of the Directive.

Some tribunals are required by statute to have professional members, such as physicians, on panels. It can be particularly difficult to recruit these people and the loss of these members as a result of the Directive will have a potentially debilitating effect on the ability of these tribunals to function. The Chair of one tribunal noted that the tribunal is statutorily required to have professional members and that many of the professional members have been with the tribunal for more than ten years. The tribunal relies on these experienced professional members who are not easily replaced. If the Directive applies to these members, the tribunal will be unable to fulfill its statutory mandate.

Some tribunals have regional centres or members. This results in efficiencies and savings for such things as travel and an ability to respond to local situations quickly. The effect of the Directive will be that some tribunals will lose regional members. For example, one tribunal has one member in Thunder Bay. That member has been with the Tribunal for more than ten years. The tribunal will have difficulty replacing that member and may not be able to have a regional member.

### **Tribunals less directly impacted**

Some Chairs believe that the impact of the Directive can be managed in positive way for their respective tribunals. The Directive is an external factor that can be used to foster renewal of the OIC complement. For those tribunals where change of status (e.g. between part-time, full-time, member and vice-chair) is a historical feature of the tribunal, it is assumed that the potential loss of the most experienced adjudicators can be managed through appointment of those adjudicators to a new position within the tribunal, or, in the case of a cluster, potentially to another tribunal within the cluster.

### **What factors re-start the clock?**

Some uncertainty was identified in regards to whether all changes in status re-start the ten-year cycle. The Directive is silent on this.

It seems to be generally understood that an appointment to a different status at the end of a term will start the clock again. So, for example, if a full-time member reaches the ten-year mark, the member could be re-appointed as a part-time member to the same tribunal, potentially for up to ten more years. This appears to be understood to also apply if a member were to go from part-time to full-time.

It is similarly understood that the ten-year clock would start again if a member was appointed as a Vice-Chair at the end of a ten year appointment.

The situation is less clear when there is a change in status during a term. For example, if at year four of a full-time member's final five-year appointment, the member is appointed as a part-time member, will the appointment be for a one year term, finishing the five-year term, or will the member be potentially eligible for up to ten years as a new part-time member?

#### **What are exceptional circumstances?**

The Directive provides that an additional term beyond the maximum of ten years in total may be made "only in exceptional circumstances in the public interest."

None of the Chairs had a clear understanding of what this means. Few have had occasion to seek re-appointment under this exemption.

Some concern was expressed about a potential lack of transparency about this provision. If the criteria for the exemption are not clear, there is a potential for the appearance that it is being applied on the basis of factors other than merit. One Chair reported that a member had been re-appointed under the exemption and that this had resulted in discontent and resentment among other members.

In the absence of a clear explanation for the application of the exemption, the public and the users of the tribunal may also not have confidence that the exemption is applied fairly. This, in turn, could lead to a lack of confidence in the independence of decision-makers.

Some Chairs of the tribunals most directly impacted by the Directive expressed the hope that the exemption will be applied broadly, recognizing not just the circumstances with respect to a particular adjudicator, but also the fact that for some tribunals, the sudden loss of significant numbers of the most experienced adjudicators will significantly impact the tribunal's ability to function. Some Chairs expressed hope that consideration will be given to exempting their tribunals altogether on the basis that the high degree of subject-matter expertise needed at those tribunals outweighs the potential benefits of the Directive.

#### **IV. Summary and recommendations**

The study that we have undertaken has looked at only 17 tribunals. For some of these tribunals, the Directive will achieve its stated goals of promoting renewal and diversity. For others, the Directive will substantially impair the tribunal's ability to function.

The Directive is going to impact all of the adjudicative and regulatory tribunals in the system. It is likely that the experience of those tribunals will mirror the tribunals that we have examined.

We offer the following recommendations:

1. The Chairs of the tribunals affected by the Directive should be immediately consulted by the PAS to determine whether implementation of the Directive will allow the tribunal to continue to operate effectively.
2. Clear guidelines should be developed as soon as possible to clarify the circumstances that “re-start the clock” to ensure transparency and consistent application across the system.
3. It should be recognized that “one size does not fit all”. What makes good sense for one tribunal may have a devastating effect on another tribunal. Consideration should be given to some alteration of the Directive for those tribunals that require its adjudicators to have a particularly high level of subject-matter expertise and adjudicative experience. This could include:
  - a. Exemption of some tribunals from the Directive altogether;
  - b. Partial exemption of some tribunals – for example that the tribunal may retain up to 50% of members who have reached ten years with a further five year appointment.
  - c. An extension of the start date or a process for staggering the start date so that the impact is not so sudden.
4. Clear guidelines should be developed as soon as possible to clarify how the “exceptional circumstances” exception will be implemented. We recommend a broad interpretation to allow Chairs to best manage change. Consideration should also be given to the fact that the Directive will impact tribunals in very different ways and to different degrees. As a result, exceptional circumstances should include recognition that particular tribunals may have circumstances that are exceptional when compared to other tribunals. Consideration should be given to allowing Chairs to make a business case regarding the particular circumstance of their tribunals.
5. Public Appointment Secretariat and host Ministry resources should be increased to handle the anticipated greatly increased workload associated with processing new appointments.

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