



## SOCIETY OF ONTARIO ADJUDICATORS AND REGULATORS

### STATEMENT OF PRINCIPLES FOR THE APPOINTMENT OF ADJUDICATIVE TRIBUNAL MEMBERS July 2018

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

This document sets out principles that apply to the appointment 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).<sup>1</sup>

These 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. The integrity of the tribunals' adjudication of rights and obligations requires an appointment process that ensures that the highest calibre adjudicators are appointed. It also requires a process that inspires public confidence that the individuals who are appointed will be able to make impartial decisions, even in cases in which the government may have a direct or indirect interest.

This document addresses the principles of appointment that should govern the selection and initial appointment of adjudicative tribunal members. Principles that should govern the reappointment of incumbent members of adjudicative tribunals are set out in SOAR's Statement of Principles for the Reappointment of Adjudicative Tribunal Members.

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<sup>1</sup> As prescribed in O Reg 126/10, Schedule 1.

## APPOINTMENT PRINCIPLES

### **1. Persons chosen for appointment to adjudicative tribunals must be competent and qualified to perform the work of the tribunal to which appointment is sought.**

#### Commentary

Section 14(1) ATAGAA requires that “the selection process for the appointment of members to an adjudicative tribunal shall be a competitive, merit-based process” and sets out the criteria to be applied in assessing candidates as follows:

1. Experience, knowledge or training in the subject matter and legal issues dealt with by the tribunal.
2. Aptitude for impartial adjudication.
3. Aptitude for applying alternative adjudicative practices and procedures that may be set out in the tribunal’s rules.

Section 14(2) underscores the importance of a merit-based appointment process by providing that “if a member of an adjudicative tribunal is required by or under any other Act to possess specific qualifications, a person shall not be appointed to the tribunal unless he or she possesses those qualifications.”

Further, the Society of Ontario Adjudicators and Regulators’ (SOAR’s) *Principles of Administrative Justice, a Proposal*, states that “[t]he selection process...should foster appointments of high quality that recognize the importance of appropriate experience and expertise.”<sup>2</sup>

In the context of the requirements for merit-based appointments to adjudicative tribunals, as set out in ATAGAA, a person is initially qualified if at least a basic understanding of the tribunal’s governing legislation and principles of administrative law is demonstrated, along with an aptitude for, and preferably experience in, adjudicative decision-making. Ongoing competence is demonstrated through a system of performance evaluation.

It is recommended that performance standards be applied to make agencies more accountable for public funds and the provision of efficient, high quality service to the public. Also, as part of

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<sup>2</sup> June 1995 at 20.

the performance management system, a code of conduct for appointees, a complaints process and a clear disciplinary policy are recommended.

**2. The appointment process for adjudicative tribunals should be fair, transparent and merit-based. It should be coordinated centrally and implemented in a consistent way across the tribunal sector.**

Commentary:

The importance of a transparent, fair and merit-based appointment process is recognized, and codified, in section 14(3) ATAGAA which provides that “the responsible minister of an adjudicative tribunal shall make public the recruitment process to select one or more persons to be appointed to the tribunal” and in order to do so shall specify “(a) the steps intended to be taken in the recruitment process; and (b) the skills, knowledge, experience, other attributes and specific qualifications required of a person to be appointed.”

In order to achieve transparency in the appointment process for adjudicators, wide public notice should be given of the availability of an appointment (along with a job description), the criteria to be used in selecting a qualified member, and the selection process.

**3. The tribunal chair should participate in the selection process and his or her recommendations should govern, barring exceptional circumstances. When a recommendation is not accepted by the government, written reasons for declining the appointment should be provided to the tribunal chair and the intended appointee.**

Commentary:

Section 14(4), ATAGAA, precludes the appointment of a person to an adjudicative tribunal in the absence of consultation with, and recommendation by, the chair of the particular tribunal. Specifically, the provision states that “No person shall be appointed or reappointed to an adjudicative tribunal unless the chair of the tribunal, after being consulted as to his or her assessment of the person’s qualifications under subsections (1) and (2) and, in the case of a reappointment, of the member’s performance of his or her duties on the tribunal, recommends that the person be appointed or reappointed.”

A tribunal is an institution whose members should have a consistent approach to decision-making. The chair is responsible for the efficient and effective operation of the tribunal. In order to manage and lead the organization, the chair should be the primary decision-maker in the selection process.

Further, a merit-based appointment process presumes that the chair is best situated to make recommendations based on a person's competence and qualifications. Therefore, OIC appointment recommendations of the chair should prevail, other than in exceptional circumstances.

**4. An adequate budget for training of new and continuing members is a central requirement for excellence within the tribunal sector.**

Commentary:

To ensure necessary competence, tribunal members should be entitled to adequate initial training and continuing learning opportunities related to their adjudicative function. Even where appointees have excellent qualifications and experience, these should be augmented by focused training for the adjudicative role.

**5. In order to ensure independence and impartiality, both in fact and in appearance, an appointment should be for a fixed term during good behaviour.**

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."<sup>3</sup>

In *2727-3174 Quebec Inc v Quebec (Regie des permis d'alcool)* the Supreme Court of Canada said:

The minimum requirements for independence do not require that all administrative adjudicators, like judges of courts of law, hold office for life. Fixed term appointments, which are common, are acceptable. However the removal of adjudicators must not simply be at the pleasure of the executive.

**6. The duration of appointments, and the basis for compensation, should be specified in the legislation.**

Commentary:

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<sup>3</sup> Supra, note 2, at 21.

Although the issue of length of terms for members of various and diverse tribunals is a complex one, consistency in approach should be a goal for the administrative justice system. Longer terms than presently exist in Ontario would reduce recruitment, selection, and training costs. Five year terms, set by statute, with a stated “reasonable expectation of reappointment” would reduce uncertainty. From an institutional viewpoint, this approach would promote the efficient use of resources, ensure consistency, continuity and legacies of expertise.

Compensation that is adequate to recruit and maintain qualified candidates is necessary.

Guidance on compensation issues could be provided, at regular intervals, by a committee established for that purpose or could be pegged to pay scales for senior management in the public service or proportionally to the judiciary.