



August 21, 2017

Hon Liz Sandals, MPP
Treasury Board Secretariat

SENT ELECTRONICALLY

Submissions on the Framework for Compensation of Adjudicators and Regulators

Introduction

The administrative justice system and the regulatory system are complex, and decisions about changing the compensation framework for adjudicators and regulators in these systems require a serious, broad-based examination aimed at safeguarding their stability and independence, and to establish compensation that will ensure the recruitment and retention of highly skilled candidates.

Setting and reviewing the compensation of Order-in-Council (OIC) appointees to tribunals, boards, and agencies should be transparent, predictable and respectful of the autonomy adjudicators and regulators require to perform at the level of their skills. Until the latest Agencies and Appointments Directive was issued, compensation rates were arbitrarily determined and sometimes not reviewed in any coherent way; indeed, sometimes they were not reviewed at all for a very long time. While the Directive sought to establish fixed payment grids, this has been undone in the past year. SOAR therefore welcomes the Compensation Framework Project currently underway by Treasury Board. We offer the following comments and suggestions to ensure that the new framework recognizes the nature of the work done by adjudicators and regulators and the need for a review process that is transparent and that respects independence.

The need for transparency

We believe that any new remuneration framework must be transparent so that it is clear how the new remuneration rates are established. We recommend that there should be a preliminary draft report that explains the process and sets out the rationale for any new classifications or payment models that are developed. This should be followed by a time for consultation so that all relevant information is taken into account before a final decision is made.

Consideration of the function of appointees to adjudicative tribunals

In Ontario, specialized tribunals adjudicate a large array of rights and obligations. The Courts would otherwise do this adjudication. In other jurisdictions people performing these functions are recognized explicitly as “administrative law judges” or members of the judiciary and are expressly part of the judiciary. Adjudicators appointed to these tribunals and regulatory bodies perform work that is equivalent to that done by members of the judiciary. The judicial nature of this work should be recognized in the new framework.

The importance of independence

In Canada compensation for the judiciary is established by independent commissions who are tasked with determining or recommending increases in a process that is removed from the political realm.

The reason that this is important is that in many cases, the government itself is a party or has an interest in the outcome of proceedings before the courts. An independent process for setting remuneration helps to ensure public confidence in the independence of the judiciary. These same considerations apply to adjudicative tribunals.

This system of setting compensation for the judiciary is constitutionally mandated and a similar approach should be considered for adjudicators performing judicial functions. Alternatively, future compensation could be indexed proportionally to increases that are established for the judiciary.

Public service within the adjudicative function

The Management Board “Agencies and Appointments Directive” (May 2017) states at clause 2.4.2 that “an element of public service is implied by any appointment by the Government of Ontario”, and suggests that remuneration of appointees may be discounted as a result.

Adjudicators and regulators appointed to tribunals and boards are performing important work that should not be devalued on the basis that the work is done in the public interest. The court system routinely adjudicates matters involving government and the public interest; there is no concomitant reduction in their compensation for their public service efforts. Adjudicators and regulators should not be treated the same as appointees to the many organizations that are community-based or that provide policy or other advice to the government.

Issues specific to part-time appointees

The majority of OIC appointments are on a part-time or *per diem* basis. Many adjudicative and regulatory tribunals are comprised entirely of part-time appointees. For some part-time

appointees, their work as an OIC appointee is very limited but other part-time or *per diem* appointees derive most or all of their income from their appointment.

Under the current system, part-timers remain at the bottom of the remuneration range, regardless of tenure. This is unfair and their *per diem* should be based on a *pro rata* amount which takes into account any increases full-timers receive as a result of progressing through the grid.

In the past few years, part-time or *per diem* OIC appointees have been deemed to be employees rather than independent contractors. As a consequence, they were no longer able to make contributions to the Canada Pension Plan (CPP) as self-employed individuals. At the same time, the Province requested the federal government to exempt these people from the CPP as employees. This has potentially very significant consequences (see SOAR Report on the Exclusion of Part-Time and per-diem Order-in-Council Appointees from the Canada Pension Plan).

The remuneration framework project should rectify this omission, which is incompatible with the government's general policy of ensuring adequate retirement income for workers.

The framework project should also ensure that part-time or *per diem* OICs are not excluded from the Employment Insurance plan.

In our view, there is no principled reason for the exclusion by the government of its own employees from basic employment rights that are legally mandated for every other employer.

Ten-year rule and severance

Finally, the framework should acknowledge the effects of the ten-year rule on OIC adjudicators and regulators, and give consideration to some sort of severance payment at the end of an appointment, particularly in light of the facts that the government's conflict of interest rules often prevent working in the area of one's expertise (or appearing before one's former tribunal or regulator) for a period of time post-appointment. Conflict of interest rules may also prevent members from seeking certain employment while still doing their tribunal or agency work.

Conclusion

SOAR remains committed to the enhancement and education of the members of our administrative justice and regulatory systems. We continue to offer broad and comprehensive programming—as the Public Appointments Secretariat itself has recognized. We resolutely promote the interests and concerns of the OIC group in the public interest, and trust that the present submission will be given due consideration as you work through the remuneration issue.

Approved by the SOAR Board of Directors

An earlier version of this submission (August 4) was sent to Treasury Board. A misstatement was subsequently corrected.