



Systems of evaluation of Tribunal members in Quebec

This paper was commissioned by the SOAR Board of Directors to facilitate a continuing dialogue about methods of evaluation of adjudicative tribunal members. The research was conducted in early 2017 by Zina Rita, a third-year law student at Osgoode Hall Law School.

I. Scope of Research

This paper looks at the formal practices for the evaluation of members of adjudicative tribunals in Québec. This research is the second part of a series of research projects surveying the adjudicative and regulatory landscape in Québec and aims to provide some background on methods of member evaluations. The research focuses on the unique process of evaluation of members of the Administrative Tribunal of Québec (“TAQ”) whose members are appointed for life. It also briefly looks at evaluation practices of other decision-making tribunals and adjudicative bodies.

Overall, there are some lessons that the Québec model can offer Ontario. The TAQ approach of anonymous surveys is especially instructive. Though the TAQ survey results are only used for the purpose of furthering a member’s education, the list of questions is a helpful starting point when assessing the baseline criteria for compiling evaluation principles for adjudicators and regulators in Ontario. Further, a fair approach to evaluation requires that an independent and impartial body be set up to oversee the evaluation process. A combination of different mechanisms in Québec could serve as a starting point in both these reforms.

II. Methodology and Limitations

The research in this paper was compiled by gathering information from legislation, TAQ evaluation questionnaires, phone interviews with TAQ members and secondary sources. While the research is an accurate reflection of the formal process of evaluation of tribunal members, the practical manifestation of such evaluation processes varies widely from tribunal to tribunal. A better methodological approach to this research would require interviews with members of various tribunals who could shed light on the process of annual evaluation on the ground.

Most of the background material and some of the questionnaires consulted in this research were only available in French. In addition to the general translation challenges, the technicality of the questionnaires and the differences in adjudicative processes in Québec and Ontario, added an extra layer of difficulty to this project. The translation is often an approximation of the process as understood by the author. Any translation issues are the fault of the author alone. For the purposes of this research, “conciliation” is understood to be a process of mediation undertaken by parties to a dispute before a Québec administrative judge. This process is similar to mediation

in Ontario tribunals. Finally, SOAR would particularly like to thank Marie Charest for her invaluable input and time spent in providing background, suggestions and reading earlier versions of this paper.

III. TAQ Evaluations

A. Historical Account of TAQ Member Re-Appointment

It has not always been the case that TAQ members held office during good behaviour. TAQ was created in 1996 by the *Act Respecting Administrative Justice*¹ (“the Act”) and started operating in 1998. At first, TAQ members were appointed for fixed five year terms. The recruitment and selection process of TAQ members is outlined in the *Regulations* and remains unchanged.² A discussion about recruitment is beyond the scope of this paper. A brief synopsis of recruitment practices would outline that potential members undergo a written examination and in-person interview. Those who are successful are then put on a list from which appointments are eventually drawn. This process is quite rigorous.

Before the 2002 and 2005 amendments to the *Act*, the renewal of members’ terms was considered by a committee which was composed of, among others, the TAQ President and staff of the Québec Ministry of Justice.³ The Constitutionality of this re-appointment process was challenged in 2001 in *Québec v Barreau de Montréal*.⁴ The Québec Court of Appeal (“QCA”) held that, for TAQ to satisfy the requirements of the *Québec Charter of Human Rights and Freedoms* it needed to ensure that the tribunal was seen as independent and impartial. The tribunal members had to undergo a fair, objective and independent re-appointment process. The presence of the TAQ President and Ministry staff on the renewal committee and the inability of TAQ members to have any input in the process were seen as incompatible with a fair, objective and independent re-appointment process by the QCA.⁵ In response, the Québec National Assembly amended the *Act* and *Regulations* in 2002. It further amended the *Act* in 2005 to appoint members during good behaviour.

The member evaluation criteria, in use prior to the above mentioned amendments, are outlined below. These criteria are no longer in use since Québec decided to go in the direction of good behaviour appointments to fix the requirement of impartiality. However, these criteria may be

¹*Act Respecting Administrative Justice*, RSQ, c J-3.

² *Regulation respecting the procedure for the recruitment and selection of persons apt for appointment as members of the Administrative Tribunal of Québec*, RQ, c J-3, r. 2.

³ Ron Ellis, *Unjust by Design: Canada's Administrative Justice System* (Vancouver: UBC Press, 2013), at 91.

⁴ *Québec v Barreau de Montréal*, [2001] RJQ 2058 (C.A.).

⁵ *Ibid.*

instructive for SOAR discussion purposes as they outline areas of inquiry that can be seen as objective. The criteria themselves were not part of the challenge to the Constitutionality of the renewal process.

The performance evaluation was performed according to the following criteria:

- A. Qualitative evaluation criteria: these criteria include factors and standards that aim to assess the knowledge, skills, attitudes, and behaviour of the member within the framework performance of his/her office, particularly regarding:
 - 1. the knowledge and use of laws, regulations, rules of evidence and procedure and jurisprudence at his/her disposal and ability to apply them;
 - 2. the quality of the drafting of decisions, in particular, clarity, precision and conciseness;
 - 3. behaviour towards the parties appearing before them, their witnesses and their representatives, particularly at the hearing;
 - 4. compliance with the code of ethics applicable to members of the Tribunal;
 - 5. availability and interest in their work;
 - 6. communications and relations with Tribunal management and staff;
 - 7. participation in committees and activities related to the Tribunal member functions.

- B. Quantitative job criteria are intended to assess the quantitative contribution of a member to the processing of files, particularly with regard to:
 - 1. the number of cases settled following conciliation, withdrawal or an amicable settlement;
 - 2. the number of cases handled following inquiries and hearings of the parties, heard and reserved to assess testimony, argument and documentary evidence ;
 - 3. the number of decisions rendered.

The annual performance evaluation is performed according to the following ratings:

- A: performance that far exceeds the standards required
- B: performance that exceeds required standards
- C: performance that meets required standards
- D: performance that is below required standards
- E: performance that is far below required standards.⁶

⁶ *Règlement sur la rémunération et les autres conditions de travail des membres du Tribunal administratif du Québec under Loi sur la justice administrative, RLRQ, c J-3.*

A brief critique of this evaluation has been offered by Pierre Noreau et al. in their 2014 administrative justice study.⁷ The authors argue that when assessing the competence of members there are three different categories of knowledge that should be taken into account: technical knowledge, practical knowledge and aptitude and values. An inquiry into technical knowledge should outline what skills are essential to the performance of the job at hand.⁸ On the second point the study has argued that those appointed should be able to demonstrate sufficient abilities in communication, listening, knowledge of social realities, historical perspectives and practical skills. And finally they should all be committed to values of impartiality, independence and integrity.

B. Current TAQ Evaluation Questionnaires

Post 2005 amendments, TAQ established a pilot project of evaluation of its members in 2006. The School for Public Administration of Québec (ENAP) administers this evaluation process. Numbers are assigned to each member being evaluated. Only the tribunal chair has the key to how the numbers correspond to the identity of each member. Since TAQ members are appointed for life, their evaluation is made for continuing education purposes only and plays no role in salary determination or re-appointment. For each member, ENAP sends a questionnaire to the parties appearing before the member, parties' counsel and to TAQ member's colleagues.

The questionnaires ask the parties to rate their agreement with a set of statements. Parties can rate their answers between: agree fully, agree somewhat, disagree somewhat, disagree totally, no opinion and does not apply. The questionnaires are then scored by ENAP. The ENAP questionnaires are reproduced below in English.

Evaluation Questionnaire for Petitioners – Conciliation

Indicate the extent to which you agree or disagree with the following statements, by filling the box that best represents their point of view for each statement. The options are:

At the beginning of the conciliation:

1. The member informed the parties of the way the conciliation would be conducted.
2. The member clearly explained the objectives of conciliation.

During the conciliation:

3. The member was courteous and respectful.

⁷ 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).

⁸ *Ibid* at 330.

4. The member was impartial.
5. The member encouraged parties to share their opinions.
6. The member promoted discussion and dialogue between the parties.
7. The member made sure that discussions were conducted in a peaceful environment.

At the end of the conciliation:

8. The member successfully summarized the outcome of the conciliation.
9. I am glad I took part in the conciliation process.

Evaluation Questionnaire for Lawyers and Representatives - Hearings

During the hearing the members:

1. Provided clear information about how the hearing would proceed.
2. Provided a framework for discussion by outlining the issues to be examined during the hearing.
3. Encouraged a conciliation (e.g. mediation) process where appropriate.
4. Properly disposed of questions in relation to the admissibility of evidence.
5. Allowed each party to fully present their point of view.
6. Provided equitable and impartial recourse to each party.
7. Listened attentively to the different points of view expressed.
8. Asked pertinent questions to lead the debate forward.
9. Were courteous.
10. Maintained order.
11. Made efficient use of the time allocated to the hearing.
12. Demonstrated impartiality.
13. Made sure they possessed all pertinent evidence to make a decision.

Evaluation Questionnaire for Petitioners - Hearing

During the hearing the members:

1. Provided clear information about how the hearing would proceed.
2. Listened attentively.
3. Were courteous.
4. Maintained order.
5. Were impartial.
6. Allowed me to express my point of view.

Evaluation Questionnaire for Colleagues - Conciliation

During the preparation of the conciliation:

1. Before the conciliation, the members applied themselves in thorough study of the file.
2. They ensured that we were on the same page before the conciliation.

During the conciliation the members:

1. Respected agreements on the roles of each colleague.
2. Were on time.
3. Were courteous and respectful.
4. Demonstrated impartiality.
5. Encouraged the expression of all parties' points of view.
6. Facilitated and encouraged dialogue between the parties.
7. Ensured that the dialogue took place in a harmonious environment.
8. Their interventions allowed for the continuation of the dialogue.

After the conciliation:

1. They correctly summarized/outlined the results of the conciliation.

Evaluation Questionnaire for Colleagues - Hearing

During preparation for the hearing the member:

1. Made efforts to study the file and outline preliminary issues.
2. Ensured that we were on the same page during the hearing.

During the hearing the member:

1. Arrived on time and made efficient use of the time allocated to the hearing.

In respect to relations between colleagues the member:

1. Was respectful.
2. Took my opinion into consideration.
3. Was available for questions during the course of deliberations.

On the decision the member:

1. Was capable of summarizing the pertinent evidence.
2. Applied the pertinent principles of law appropriately.

3. Explained the reasons for the decision logically, in relation to the facts and the law.
4. Drafted the decision in plain and understandable language.
5. Drafted the decision within a reasonable time.

C. TAQ Code of Ethics

Section 179.1 of the *Act*, states that “members of the Tribunal must perform their duties purposefully, maintain their competence and act diligently. They must avoid placing themselves in a position that undermines such performance of their duties and must conduct themselves in a manner fully compatible with the honour, dignity and integrity required by adjudicative functions.”

There is also a TAQ Code of Ethics that outlines rules of conduct for TAQ members.⁹ Though not considered evaluation criteria, the rules of conduct are instructive in outlining the behaviour expected of members. The rules of conduct are as follows:

Division 1

1. The purpose of this Code is to set out the rules of conduct and the duties of the members of the Administrative Tribunal of Québec with a view to sustaining the public trust in the impartial and independent execution of their functions.
2. The members shall administer justice within the framework of the law.

Division 2

Rules of Conduct and Duties

1. The member shall perform his/her office with honour, dignity and integrity; he/she shall avoid any conduct likely to bring it discredit.
2. The member shall perform his/her functions in full independence, without any interference.
3. The member shall be, and be seen to be, impartial and objective.
4. The member shall act in a respectful and courteous manner towards persons appearing before him/her, while exercising the authority required for the good conduct of the hearing.
5. The member shall perform his/her functions without discrimination.
6. The member shall act with reservedness in public.
7. The member shall uphold the integrity of his/her office and shall defend the independence thereof in the best interest of justice.

⁹ *Code of Ethics Applicable to the Members of the Administrative Tribunal of Québec*, OC 174-2006, 2006 GO 2, 1179.

8. The member shall take the measures required to maintain his/her professional competence.
9. The member shall respect the secrecy of deliberation.
10. The member is bound to confidentiality regarding any matter brought to his/her knowledge in the performance of his/her functions; he/she shall avoid disclosing any confidential information.

Division 3

Incompatible Situations and Activities

1. The member shall refrain from engaging in any activity or placing himself/herself in any situation which could affect the dignity of his/her office or discredit the Tribunal.
2. The member shall refrain from engaging in any activity or placing himself/herself in any situation which could compromise the effective performance of his functions or could be a recurrent reason for recusal.
3. The member shall refrain from becoming involved in any cause or participating in any lobby whose objectives or activities are related to matters which come within the jurisdiction of the Tribunal.
4. The member shall not collect any donations, except in the case of restricted activities of a community, school, religious or family nature and shall refrain from associating his/her status with fund-raising activities.
5. The member shall not engage in any activity or partisan political participation at the federal, provincial, municipal or school level.
6. The part-time member may not act on behalf of a party before the Tribunal or before a body whose decisions may be contested before the Tribunal.

Division 4

Duties Performed Gratuitously

The full-time member may gratuitously perform duties within a non-profit organization insofar as he/she do not compromise his/her impartiality.

It is also interesting to note TAQ members, along with members of the Labour Administrative Tribunal and the Québec Housing Board, may be the subject of an inquiry by the Administrative Justice Council. The Administrative Justice Council is a body similar to the Canadian Judicial

Council or the provincial judicial councils. Such an inquiry may follow a complaint submitted to the Council against a member of the tribunals for breach of the Code of Ethics, of a duty under the *Act* or of the prescriptions governing conflicts of interest and incompatible functions.

IV. Other Tribunals

In her 2009 article on administrative justice in Québec, France Houle outlines that interviews conducted with members of administrative tribunals point to an absence of rules concerning the reappointment of adjudicators. The fact that the reappointment process is conducted by the Secrétariat aux Emplois Supérieurs (SES), a unit placed directly under the Executive Council, is incompatible with the notions of transparency and legitimacy associated with the office of independent administrative adjudicators.¹⁰ The Chair of the tribunal is required to provide an annual assessment of the performance of every adjudicator in the agency. However, the same study found that such assessments carry little weight in the making of the reappointment decision.¹¹

The SES manages the hiring, appointment, renewal of the term of office of Québec adjudicators and senior public servants. When a term is to be renewed, an examination committee is formed with the mandate of offering advice on the renewal of terms of adjudicators. The examination committee spends between 30 to 60 minutes with the adjudicator whose term is up for renewal. The adjudicator responds to questions that have been pre-established by the SES. France Houle argues that the questions during these interviews have little practical value to the job of being an adjudicator.¹² Houle suggests that the process of term renewal should be based on the annual evaluation of adjudicators. In addition to annual evaluations, the Chair of the Tribunal should also be able to recommend the members whose terms should be renewed. This information should then be forwarded to an independent committee that makes a recommendation on term renewals to the Ministry responsible.¹³

According to Houle, an annual evaluation should concentrate on two aspects: 1) the knowledge, abilities, attitude and behaviour of the member; and 2) the quantitative contributions of the member on his or her files.¹⁴ However, there is no need to give too much weight on the quantitative criteria as caseloads and difficulty of cases may vary across tribunals.

Houle also suggests that a Code of Professional Ethics, the core principles of which should be the same across tribunals, should be established. However, each tribunal and administrative body

¹⁰ 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, page 228.

¹¹ *Ibid.*

¹² Norreau et al. *supra* note 4, 341.

¹³ *Ibid* 342.

¹⁴ Les règles concernant la rémunération et les autres conditions de travail des titulaires d'un emploi supérieur à temps plein under *Loi sur la justice administrative*, RLRQ, c J-3.

should be able expand on the core principles in consultation between the Chair and the members.¹⁵

V. Conclusions

The research reveals that there is no uniform way and set of principles used for the evaluation and re-appointment process of Québec adjudicators. System reformers have argued that a set of core principles would help the process of evaluation. These principles should be based on objective criteria. The current partial reliance on quantitative criteria in TAQ evaluations does not seem to have wide support. The lack of support is due to the fact that different members have different case load difficulties and some cases take a long time to reach a resolution.

The adoption in Ontario of a system of evaluation akin to that of the anonymous questionnaires adopted by TAQ might be a way to capture fair and consistent evaluation indicia. For the process to be effective, the questionnaires would have to be administered by an independent body similar to ENAP. Further, an evaluation process would also have to take into account the Tribunal Chair's assessment of the particular candidate being evaluated.

Before its transformation to the Labour Administrative Tribunal, the Québec Commission on Occupational Injuries, initiated its member term renewal process 12 months before the end of term. A committee of evaluation was formed and made up of: a representative of the legal community, a retired person having exercised an adjudicative function and a university representative who is a member of a professional order.¹⁶ The committee decided on majority and then forwarded its recommendation to the Minister of Labour. This is another avenue of potential exploration in the process of term renewal.

¹⁵ *Ibid* 347.

¹⁶ *Regulation Respecting the Procedure for the Recruiting and Selection of Persons Qualified for Appointment as Commissioners of the Commission des lésions professionnelles and or the Renewal of Their Term of Office*, 1998 GO 2, 2391.