

# A BRIEF HISTORICAL ACCOUNT OF THE REFORMS TO THE ADMINISTRATIVE JUSTICE SYSTEM IN THE PROVINCE OF QUEBEC

[Draft – please do not quote without the author’s permission]

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## Introduction

Few reforms aimed at reorganising governmental structures, institutions and processes –such as those entailed by the reform of administrative justice systems – are successful. Presumably, these types of reforms are not very attractive to politicians: they are too low profile and they usually create tremendous resistance within the public service.

It took at least 25 years before the reform to the administrative justice system came to terms in Québec by the adoption of the *Act Respecting Administrative Justice*<sup>1</sup> in 1996. Underlying this successful reform lie a mix of several factors. At least one is contingent on historical momentum. In 1996, the government of Québec had no choice but to address its disastrous financial situation. Rationalizing government spending became the *mot d’ordre* and the Parizeau government (September 26, 1994 to January 29, 1996) imposed severe spending restrictions on the public administration<sup>2</sup>. It was also the determination of the Bouchard government (January 29, 1996 to March 8, 2001) by the adoption of the *Act Respecting the Elimination of the Deficit and a Balanced Budget*<sup>3</sup>. Each department was asked to provide a plan to cut their spending. From a low priority, the reform to the administrative justice system – and particularly the creation of the Quebec Administrative Tribunal - became a high priority for the public administration.

A reform, however, does not entirely rest on contingency. Rational thinking is also a necessary ingredient. In Québec, three main working groups - presided by Professor Dussault (1971), Professor Ouellette (1987) and Professor Garant (1994)<sup>4</sup>- wrote the reports that supported the reforms. These working groups were asked to provide analysis and make recommendations on the creation of an appeal procedure, the harmonization of the status of members of administrative tribunals and the procedural safeguards to which citizens would be entitled during administrative decision-making.

Dussault, Ouellette and Garant constantly stressed in their reports upon safeguarding the specific character of administrative justice, and to ensure the quality and promptness of administrative justice and its accessibility to citizens. These safeguards and goals were entrenched in section 1

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<sup>1</sup> *Act Respecting Administrative Justice*, R.S.Q., c. J-3 [Q.S. 1996, c. 54].

<sup>2</sup> <http://www.observatoire.enap.ca/observatoire/docs/Presse/Soleil03-04/Soleil-6-10-03.pdf>

<sup>3</sup> *Act Respecting the Elimination of the Deficit and a Balanced Budget*, Q.S. 1996, c. 55.

<sup>4</sup> Québec, Ministère de la justice, Groupe de travail sur les tribunaux administratifs, *Les tribunaux administratifs au Québec*, Québec, Publications officielles, 1971, 300 p. [hereinafter ‘Dussault Report’]; Québec, Ministère de la justice, , GROUPE DE TRAVAIL SUR LES TRIBUNAUX ADMINISTRATIFS, *L’heure est aux décisions*, Québec, Publications officielles, 1987, 385 p. [hereinafter ‘Ouellette Report’]; Québec, Ministère de la justice, Groupe de travail sur certaines questions relatives à la réforme de la justice administrative, *Une justice administrative pour le citoyen*, 1994, Québec, Publications officielles, 1994, 158 p. [hereinafter ‘Garant Report’].

par. 1 of the new *Act Respecting Administrative Justice*<sup>5</sup>. It establishes the general rules of procedure applicable to individual decisions made in respect of a citizen (Title 1, sections 2-13) and it institutes the Administrative Tribunal of Québec (Title 2, sections 14-164) and the Conseil de la justice administrative (Title 3, sections 165-198, which will not be the subject of analysis here).

This text is divided in two parts. In the first part, I will describe the general rules of procedures; the second, the structure of the Administrative Tribunal of Québec (TAQ). In addition to reviewing the content of the *Act* and its modifications since 1996, I will summarize the content of the report of the Justice Minister on the implementation of the *Act* tabled in 2003, as required by s. 200 of the *Act*<sup>6</sup>, as well as the results of a performance review of the TAQ members and a users' survey on the functioning of the tribunal. Both were conducted in 2006-2007.

### **Part I – Laying the Basic Foundations for First-line *Quality* Decision-making**

Harmonization of the procedures in departments, tribunals, boards and agencies of the Quebec public administration was one of three recurrent questions asked to the three working groups. Indeed, one point that Dussault, Ouellette and Garant stressed in their reports was that providing an appeal to citizens would do little to improve the administrative justice system if basic foundations for first-line *quality* decision-making were not laid. The authors agreed that clarifying the rules of procedure applicable to decision-making processes would greatly help in this regard. The question was what type of decision-making processes should be targeted. On this issue a major shift in thinking occurred between the Ouellette report and the Garant report.

Dussault proposed an in-depth reform of the procedure, but that would only be applicable to 'administrative tribunals', strictly defined as those having exclusive jurisdictional or quasi-judicial functions<sup>7</sup>. Ouellette expanded on this general recommendation. He proposed to reunite in a legal text a few guiding principles on procedure and evidence that would also apply to 'administrative tribunals' as defined by Dussault and foremost to the four administrative tribunals that Ouellette recommended to create in his report. These guiding principles would then inspire administrative tribunals to elaborate their own rules of procedure<sup>8</sup>. Inspired by the development of the duty to act fairly in common law<sup>9</sup>, Garant proposed two sets of guiding principles. One set

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<sup>5</sup> *Supra* note 1, s. 1 (1): The purpose of this Act is to affirm the specific character of administrative justice, to ensure its quality, promptness and accessibility and to safeguard the fundamental rights of citizens.

<sup>6</sup> Québec, Ministère de la justice, *Rapport sur la mise en œuvre de la Loi sur la justice administrative*, Québec, Publications officielles, 2003 at p. 13-15. The methodology used to conduct the research was to send a questionnaire in 2002 to all departments and agencies constitutive of the Administration within the meaning of s. 3 of the *Act*. 77 departments and agencies declared not making any decisions in application of s. 2 of the *Act*. The remaining 43 departments and agencies answered to a first questionnaire containing questions related to conformity with the law and the measures they took to implement the statute. Among these 43 organisms, 20 were chosen to answer additional questions on the measures they took to meet the objectives stated by the *Act*. The choice of these 20 organisms was based on the following characteristics: visibility, clientele, importance of their decisions with respect to the public interest and their representation of the diversity of the activities of the Administration.

<sup>7</sup> Dussault Report, *supra* note 4 at p. 118.

<sup>8</sup> Ouellette Report, *supra* note 4 at p. 259.

<sup>9</sup> Garant Report, *supra* note 4 at p. 16, footnote 14. He cites *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Martineau v. Matsqui Institution Disciplinary Board (No. 2)*, [1980] 1 S.C.R. 602. However, he does not refer to *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 and *Syndicat des*

was to be applied by “Administrative Tribunal of Québec or by another body of the administrative branch” charged inter alia to settle disputes<sup>10</sup>; the other set was to be applied by all the other decision-makers of the Québec public administration<sup>11</sup>.

Garant’s recommendations were adopted by the National Assembly. The *Act Respecting Administrative Justice* established the basic legal framework for procedure in Title 1, which is divided in two chapters. Chapter 1, ss. 2 to 8, enacts the guiding principles applicable to decisions made in the exercise of an administrative function. Chapter 2, ss. 9 to 13, prescribes the principles for decisions made in the exercise of an adjudicative function.

### A. A Description of the two sets of Guiding Principles

The definition of an administrative function is not explicitly defined by the *Act*. Rather, the National Assembly chose to identify the entity which makes decisions in the exercise of an administrative function. Indeed, pertaining to s. 2, all decisions made by the “Administration” [defined in s. 3] are aimed at chapter 1 of the statute and s. 3 further explains that “Administration” means decisions made by departmental civil servants and ministers, but also by “bodies whose members are in the majority appointed by the Government”. This last category encompasses decisions made by decentralized boards which are not in charge of settling disputes. The function of “settling disputes between a citizen and an administrative authority or a decentralized authority” is the criterion used in s. 9 of the *Act* to characterize an adjudicative function and, thus, is used to determine which administrative body is required to follow the set of guiding principles prescribed by sections 9 to 13 of the *Act* and largely based on the recommendation made in the Ouellette Report<sup>12</sup>.

#### a) Sections 2 to 8

Decisions made in the exercise of an administrative function have to be conducted in keeping with the duty to act fairly [s. 2]. General procedural guidelines are prescribed in ss. 4, 7 and 8. Sections 5 and 6 enact special principles to be applied to specific decisions: those regarding permits or licences (s. 5) and those regarding indemnity and benefit (s. 6).

The general regime established in s. 4 prescribes that procedures must be accessible, ethical, fair, expedient, and carried on in good faith<sup>13</sup>. In addition, the decision-making process has to be

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*employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at pp. 895-96, per Sopinka J. for the majority).

<sup>10</sup> Garant Report, *supra* note 4 at p. 149-154, in particular recommendations #6.

<sup>11</sup> *Id.* in particular, recommendation #2 to #5.

<sup>12</sup> Ouellette Report, *supra* note 4 at p. 260 and ff. The guiding principles proposed by Ouellette were the recognition of: 1. The autonomy of administrative procedure in relation to judicial procedure; 2. The public character of administrative process; 3. The principle of impartiality; 4. The constitutive elements of a hearing (reasonable notice, prove facts and present arguments, contradict prejudicial evidence); 5. The principle of openness; 6. The duty to base a decision on evidence; 7. The duty to give reasons for decisions; 8. The immunity of witnesses; 9. The power to review decisions.

<sup>13</sup> *Act Respecting Administrative Justice*, *supra* note 1, s. 4: “The Administration shall take appropriate measures to ensure: 1) that procedures are conducted in accordance with legislative and administrative norms or standards and with other applicable rules of law, according to simple and flexible rules devoid of formalism, with respect, prudence and promptness, in accordance with the norms and standards of ethics and discipline governing its agents and with the requirements of good faith; 2) that the citizen is given the opportunity to provide any information useful for the making of the decision and, where necessary, to

transparent in that the “directives governing agents charged with making a decision are in keeping with the principles and obligations under this chapter and are available for consultation by the citizen.” [s. 4 (4)] Section 8 gives a right to citizens to obtain “reasons to any unfavourable decisions”. In those reasons, the administrative authority must also indicate the “non-judicial proceeding available under the law and the time limits to file an application”. In communicating the decision, the administrative authority must also “inform the citizen that he has the right to apply, within the time indicated, to have the decision reviewed by the administrative authority”. When decisions are re-examined or reviewed by the administrative authority, the citizen must be given “the opportunity to present observations and to produce documents” [s. 7].

The specific regime of s. 5 applies to orders “to do or not do something” or when the Administration is about to make “an unfavourable decision concerning a permit or licence or other authorization of like nature”. In these two cases, the Administration must then inform the citizen of “its intention and the reasons therefore” and “of the substance of any complaints or objections that concern him”. Finally, a citizen must be given the opportunity “to present observations and, where necessary, to produce documents to complete his file”<sup>14</sup>.

Section 6 applies when the Administration is about to make a decision in relation to an “indemnity or a benefit which is unfavourable to a citizen”. The Administration must then ensure that the citizen “has received the information enabling him to communicate with” the authority making the decision and that the citizen’s “file contains all information useful for the making of the decision”. If the authority “ascertains that such is not the case or that the file is incomplete, it shall postpone its decision for as long as is required to communicate with the citizen” and to give the citizen “the opportunity to provide the pertinent information or documents to complete his file”.

b) *Sections 9 to 13*

Section 9 prescribes that any authority in charge of settling disputes must ensure a fair process and that the procedures be conducted “in keeping with the duty to act impartially”<sup>15</sup>. Sections 10, 11, 12 and 13 specify the minimum content of procedural safeguards for “adjudicative decisions”.

A citizen has a right to be heard in a public setting, unless the decision-maker orders a hearing to be held *in camera* [s. 10]. Section 11 restates the common law principle that a decision-maker has “full authority over the conduct of the hearing”, but he shall remain “flexible and ensure that the substantive law is rendered effective and is carried out”. Therefore, it is the decision-maker

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complete his file; 3) that decisions are made with diligence, are communicated to the person concerned in clear and concise terms and contain the information required to enable the person to communicate with the Administration”.

<sup>14</sup> *Act Respecting Administrative Justice, supra* note 1, s. 5 also states that “An exception shall be made to such prior obligations if the order or the decision is issued or made in urgent circumstances or to prevent irreparable harm to persons, their property or the environment and the authority is authorized by law to re-examine the situation or review the decision.”

<sup>15</sup> *Id. at ss. 4 and 9* codified the two tests of impartiality of *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 [at p. 15 PDF version on line: “Once the order directing the holding of the hearing was given the Utility was entitled to procedural fairness. At that stage something more could and should be expected of the conduct of board members. At the investigative stage, the “closed mind” test was applicable. Once matters proceeded to a hearing, a higher standard had to be applied. Procedural fairness then required the board members to conduct themselves so that there could be no reasonable apprehension of bias.”

who rules on the admissibility of evidence and means of proof and “may, for that purpose, follow the ordinary rules of evidence applicable in civil matters”. This section also explicitly entitles decision-makers to reject any evidence obtained “under such circumstances that fundamental rights and freedoms are breached and the use of which could bring the administration of justice into disrepute”. For that purpose, the use of evidence obtained in violation of the right to professional secrecy “is deemed to bring the administration of justice into disrepute”.

Section 12 prescribes that the decision-maker is required to “take measures to circumscribe the issue and, where expedient, to promote reconciliation between the parties”, to give the parties the opportunity to “prove the facts in support of their allegations and to present arguments” and allow each party “to be assisted or represented by persons empowered by law to do so”. The decision-maker is also entitled to provide, if necessary, “fair and impartial assistance to each party during the hearing”. Finally, section 13 prescribes the manner in which a decision should be delivered. Although a decision-maker can communicate her decision orally to the parties, every decision terminating a matter (favourable as well as unfavourable) “must be in writing together with the reasons on which it is based”.

## **B. Report on the Implementation of the Act**

Contrary to the common law pragmatic view on administrative procedure which commands the evaluation of several factors to determine the adequate level of procedural protection due to a citizen in a given the context<sup>16</sup>, the National Assembly adopted the strict functionalist view proposed by Garant on public administration decision-making processes. The distinction between decisions made in the exercise of an administrative or adjudicative function was, however, well accepted by the Chamber of Notaries<sup>17</sup> and the Quebec Bar<sup>18</sup> although the latter raised three concerns about: 1. Their precise field of application; 2. Their content (whether they were adequate and sufficient); 3. Their coexistence with other procedural principles especially those coming from the common law<sup>19</sup>. Although these concerns were founded, the distinction is simple to make and in view of the wide-scale changes that these new administrative procedural guidelines were about to require throughout the public administration, it was likely the most workable solution to implement.

The legal duty to follow either one or the other sets of guiding principles forced each department and decentralized organisations to analyse and revise, whenever needed, the manner in which they were making individual decisions. By the *Act Respecting the Implementation of the Act Respecting Administrative Justice*<sup>20</sup>, introduced a few days after the *Act Respecting Administrative Justice* was assented (December 1996) and adopted six months later (June 1997), the National Assembly prescribed a tight schedule on the Administration to implement the principles established by the *Act respecting administrative justice*. In total, 135 statutes were modified as a result of the passing of the *Act respecting administrative justice*.

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<sup>16</sup> The factors affecting the content of the duty of fairness are listed in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras 21-28; see also *Knight*, *supra* note 10 at p. 682.

<sup>17</sup> *Chambre des Notaires, Projet de loi 130 – Loi sur la justice administrative, Mémoire présenté par la Chambre des notaires du Québec à la Commission des institutions*, Montréal, Chambre des notaires, janvier 1996, p. 8.

<sup>18</sup> *Barreau du Québec, Mémoire du Barreau du Québec sur la justice administrative*, Montréal, Barreau du Québec, mars 1995 at p. 3-4.

<sup>19</sup> *Barreau du Québec, Mémoire du Barreau du Québec sur le Projet de loi 130 intitulé Loi sur la justice administrative*, Montréal, Barreau du Québec, février 1996 at p. 19.

<sup>20</sup> *Act Respecting the Implementation of the Act Respecting Administrative Justice*, S.Q. 1997, ch. 43.

Even though this change was well received by the legal community, the real question was whether these guiding principles would, in practice, positively impact the Administration in its relations with citizens. In this section, I will review the content of the report on the implementation of the *Act Respecting Administrative Justice* that was filed in 2003 by the Minister of Justice and tabled to the National Assembly, according to s. 200 of the Act. My summary of this report will focus only on the implementation of sections 2 to 8 because they are the provisions which had the greatest impact on the millions of decisions made by Administration in the exercise of an administrative function on a yearly basis<sup>21</sup>. Two themes will be tackled: a) increase in bureaucratic measures to control the quality of the decision-making process, assessment of its effectiveness and legal audit; b) re-examination of decisions and qualifications of primary adjudicators.

a) *Increase in bureaucratic measures and legal audit*

In his concluding remarks, the Minister of Justice noted that the guiding principles prescribed in sections 2 to 8 are applied and well accepted within the Administration. The latter took several measures to control the respect for the law and to assess the efficiency of these measures to address the needs and expectations of citizens.

Measures of control ranged from:

- Greater use of legal experts to check the conformity of procedures with the *Act*. Some departments and agencies took the opportunity of the reform to review their normative framework and tools to ensure a greater coherence and better access to all norms governing their activities and operations.
- Better communications with the employees of departments and agencies regarding rules, guidelines and policies to their employees through meetings, training sessions and with guides, instructions and practice manuals;
- Reducing formalism in their processes: increasing verbal communications and humanizing relations with citizens.
- Making public the time it takes for the treatment of a file (notably in the Declaration of services to citizens – the general rule is 30 days). Some departments and agencies conclude agreements with their clients mentioning for each step of the process, the time it take to conclude each step, etc. Some have implemented mechanisms to regularly measure delays, to establish priorities and procedures for treating urgent matters.
- Improving the quality of the general information on the services offered by the department or the agency (information services, leaflets, etc.);

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<sup>21</sup> As to the implementation of sections 9 to 13, only four boards reported on it at the time the inquiry was conducted by the Minister of Justice: Commission des lésions professionnelles, Commissaire de l'industrie de la construction, Commission d'accès à l'information Commission municipale du Québec. All these boards were instituted by statute prescribing rules of procedures and which conferred them the power to adopt rules of practice and procedure. Therefore, sections 9 to 13 had little direct impact on these boards, although the adoption of the *Act* stimulated some reflections on their functioning and triggered the implementation of several measures to improve their adjudication systems. The chapter of the report analysis the impact of sections 9 to 13 concludes that none of these four boards declared having received a 'meaningful' complaint on their way of functioning : *Rapport sur la mise en œuvre de la Loi sur la justice administrative, supra* note 6 at pp. 42 and ff. and 68.

- Increasing points of service (regional and local), easy access for citizens to their files, to forms (offer the possibility to use electronic forms) and to civil servants through toll free lines;
- Generalizing the practice of sending acknowledgment receipts and of identifying the name of the civil servant in charge of a file;
- Transmitting to citizens reliable and relevant information. Departments and agencies revised their forms to ensure that they are easy to complete, that all their correspondence with citizens is clear and precise by adopting a process of linguistic review, using their experts in the communication division, or consultants, etc.
- Improving the clarity, conciseness, usefulness, completeness and accuracy and reasons for decisions. Special attention was brought to diminish legal and technical jargon. Retrospective analysis of decisions is another mechanism that is used to improve decision-writing. Most departments and agencies also offer the possibility to a citizen to have the decision be explaining to them verbally. With respect to consistent decision-making they also implemented control and verification mechanisms to check consistency within departments and agencies, but also with administrative tribunals and courts' decisions and adjust their practices in consequence
- Instituting mechanisms to systematically check if each file is complete and to send reminders to citizens.

Methods to assess impact ranged from:

- Analysing each step of the decision-making process in order to refine the knowledge on the needs and expectations of the clients they serve, their satisfaction rate and the time it takes to reach a decision. Some departments and agencies are using tools such as discussions groups, surveys, and appreciation cards;
- Using different tools to treat, follow and analyse claims or complaints.

Although much work was done to meet the new standards, the Minister of Justice also noted that the Administration's practices were not always optimal in relation to the exigencies of the statute. In particular, he noted that some departments and agencies' understanding of the scope and limit of the *Act* was not always as clear as it should have. However, helping these departments and agencies to improve the quality of their decision-making process would need further analysis focusing on each particular organisation. Therefore, measuring and assessing fidelity to law in government departments and agencies might be more efficiently achieved through some form of legal audit (checking records, often by random sample, and interviewing staff)<sup>22</sup>.

*b) Re-examination of decisions and qualifications of primary adjudicators*

It is only in the Garant Report that the issue of re-examination of decisions was discussed, but only a few pages were dedicated to this question and their purpose was to state the law. There was no discussion on the justification of allowing this procedure in a system when a right to an administrative appeal on questions of law and facts is provided to citizens. Given the fact that two senior civil servants composed the Garant working group (Executive (Privy) Council and Justice), it is very likely that this issue was of particular importance for the Public administration.

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<sup>22</sup> On the suggestion of a legal auditor, see the report written by Pr. Terence George Ison: Canada, Law Reform Commission, *The Administrative Appeals Tribunal of Australia*, Administrative Law Series, Study Paper, Ottawa, Law Reform Commission, 1989 at p. 55.

However, one may question if this procedure truly serves the interests of citizens. Indeed, even when re-examination leads to the reversal of the initial decision, the issue becomes whether the same result could have not been achieved by a direct access to the TAQ. When re-examination does not lead to the reversal of the initial decision, then re-examination simply increases the incidence of delay in reaching a final decision. It may also discourage citizens to pursue the battle, and as consequence, deflect applicants from the TAQ and, thus, serves as an access barrier to the tribunal. As Pr. Ison wrote in his study paper:

Where a primary decision has been affirmed on reconsideration and the applicant does not appeal further, it is commonly assumed that the applicant must have been satisfied with the explanation that resulted from the reconsideration. The truth could be that the applicant has been so disheartened by the process that he has given up in despair. The structural requirement of reconsideration prior to any appeal puts a premium on persistence and tends to penalize those, perhaps people of more modest disposition, who give up after a negative decision is seen to have been officially confirmed.<sup>23</sup>

He also pointed out that the practice of re-examination raises concerns when a citizen has a relationship on ongoing dependency with the department. “If the complaint concerns the level of benefit, for example, the applicant may be apprehensive that if a complaint has been made and the primary decision has been officially upon reconsideration, persistence with an appeal at that stage might be seen as a hostile gesture inviting retaliation.”<sup>24</sup> Pr. Ison raised other serious objections to the practice of reconsideration in his study paper. For example, it would tend to weaken rather than strengthen the quality of primary adjudication and that re-examination would promote the practice of rejecting doubtful claims to see if the applicant complains, rather than investigating them to determine their validity<sup>25</sup>. He was of the opinion that reconsideration should be abolished.

In sum, little is known on the effect of the procedure of re-examination on the decision-making process as a whole and, in his report, the Minister does not provide complete, accurate and thus meaningful statistics on re-examination procedures. For example, it is not possible to know how many decisions, of all requests for re-examination by citizens, were reconsidered and modified in favour of citizens<sup>26</sup>.

Pr. Ison’s strong opinion against reconsideration should be given the attention it deserves and research should be conducted within departments and agencies routinely re-examining their decisions to find out what are the negative impacts, if any, on citizens. This research would also be useful to better understand why the primary adjudicator did not reach the correct or reasonable decision in the first place. Indeed, one element that was briefly mentioned in the report of Minister of Justice on the implementation of the Act was that he seemed to acknowledge that not all primary adjudicators have the proper qualifications to make decisions.

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<sup>23</sup> *Id.* at p. 34.

<sup>24</sup> *Id.*

<sup>25</sup> *The Administrative Appeals Tribunal of Australia*, *supra* note 22 at p. 32-33.

<sup>26</sup> *Rapport sur la mise en œuvre de la Loi sur la justice administrative*, *supra* note 6 at p. 34. The Minister sometimes gives numbers as to the cases reconsidered or the requests by citizens for a reconsideration. Here are the numbers as stated in the report: Société d’assurance automobile du Québec: 300,000 decisions in 2001; 6,897 reconsidered, 2,147 appealed to the TAQ; Commission de la santé et de la sécurité du travail: more than one million decisions in 2001, 38,929 reconsidered; Régie des rentes: 175,000 decisions, 4497 request for reconsideration, 817 appealed to the TAQ. Ministère Emploi et Solidarité sociale: more than 9 millions of decisions in social security benefits: reconsidered 17,883, 3,160 appealed to the TAQ.



“La compétence du personnel joue également un rôle dans le respect des normes, des directives et des politiques et, à cet égard, il ne faut pas négliger l’importance de la formation et de l’établissement du profil de compétence et d’un programme de perfectionnement à l’intention du personnel.”<sup>27</sup>

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The report of the Minister shows that several improvements were made to improve the quality of decision-making by primary adjudicators. If the number of requests for re-examination is an indicator of the satisfaction of the citizens with their Public Administration, then the low number of requests may at least indicate a good level of satisfaction. However, the method of inquiry (focusing only on the filling-in of questionnaires by departments and agencies, *cf* footnote 6) is incomplete. It does not include any form of independent research using either quantitative methods to survey the views of citizens affected by decisions made by departments and agencies in the exercise of an administrative function or qualitative methods. For this reason, it could be worth pursuing the idea of establishing some sort of legal audits to check the quality of decision-making processes followed by primary adjudicators and on the procedure of reconsideration. Indeed, all efforts should be made to ensure the correctness and reasonableness of first-line decisions. It is truly then that an appeal procedure makes sense: to correct wrong or horribly wrong decisions, not to give a second chance to get the desired outcome.

## **Part II - The Québec Administrative Tribunal**

In operation since April 1, 1998, the Québec Administrative Tribunal (TAQ) holds a distinct and separate place in the state organisation. The National Assembly entrusted the Minister of Justice for the carrying out of this Act [s. 199]. This transfer of responsibility for the new tribunal to the Minister of Justice was favourably noticed, notably by the Québec Bar, as a sign of an important “cultural” evolution regarding administrative justice in Québec<sup>28</sup>.

In Québec, the Minister of Justice is responsible of the generalist courts and of three additional institutions: the Quebec Human Rights Tribunal (QHRT), the Professionals Tribunal and the TAQ. Their common characteristic is that their sole function is to dispense justice by settling disputes between parties. However, they are not part of civil or criminal justice systems and they are not considered ‘courts’ for reasons specific to each tribunal.

The QHRT is a highly specialized tribunal having sole jurisdiction over quasi-constitutional matters referred to by the Quebec Human Rights. Although only judges can sign QHRT decisions, the tribunal sits in formation of three members, composed of one judge and two assessors. The Professions Tribunal is composed of Court of Quebec judges, but it is also a specialized tribunal whose jurisdiction extends to hearing appeals from discipline committees established by professions orders of Quebec. As for the TAQ, it hears appeals filed by the State or citizens who are not satisfied with a decisions handed down by the Administration

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<sup>27</sup> *Rapport sur la mise en œuvre de la Loi sur la justice administrative*, *supra* note 6 at p. 29. Also and as pointed out by Pr. Ison, primary adjudication is often carried out by “clerical-grade personnel who work under pressure in physical conditions that are not conducive to penetrating thought” : *The Administrative Appeals Tribunal of Australia*, *supra* note 22 at p. 30.

<sup>28</sup> *Mémoire du Barreau du Québec sur le Projet de loi 130 intitulé Loi sur la justice administrative*, *supra* note 19 at p. 59.

(departments and decentralized boards). Not all Administration's decisions are subjected to an appeal to the TAQ, but the tribunal hears recourses based on very large number of statutes ( $\pm 100$ ) and on several subject-matters<sup>29</sup>. In this sense, it is a generalist tribunal as opposed to a specialized tribunal. In addition, although the Code of civil procedure does not apply to the TAQ, its procedures are highly judicialized compared to other administrative tribunals. The Act provides for very detailed rules of procedures [ss. 99 to 164], which are supplemented by rules of practice and procedure authorized by s. 109<sup>30</sup>. Finally, Board members hold office during good behaviour [s. 38] since 2005.

The creation of an administrative appeal tribunal was the centre of controversies and discussions for over 25 years in Quebec before the National Assembly finally decided to go ahead with the institution of the TAQ. Although the creation of the TAQ was welcomed with great enthusiasms by the Quebec Bar and the Chamber of Notaries<sup>31</sup>, the Bar challenged its constitutionality as soon as it started to operate in 1998. The status of members was the target. In addition, as soon as the Charest government was elected, another round of discussions was launched on 'government reengineering'. As a result, multiple bills were proposed since 2003 to modify the structure, functioning and status of members of the TAQ.

Next, I will describe these important historical moments in the life of the TAQ. This section will be followed by a discussion which aims at focusing on other issues less often discussed and surrounding the creation of an administrative appeals tribunal such as the TAQ.

## **A. Before and After the TAQ : Controversies and Discussions**

### *a) The organisation of the TAQ*

#### *—Instituting a generalist appeal tribunal*

The idea of granting an appeal from decisions taken by the Administration likely started to germinate in Quebec in 1965. In an address to the Quebec Bar, Jean Beetz<sup>32</sup> proposed the creation of an administrative appeal *court*. In 1971, the Minister of Justice constituted the first working group on administrative tribunals and mandated Pr. Dussault to examine the legality and opportunity of creating such a court<sup>33</sup>. At that time, Pr. Dussault expressed some concerns regarding the constitutionality of an administrative appeal court and recommended the government to proceed with a modification to the constitution before establishing the court<sup>34</sup>. The hypothesis that Pr. Dussault examined was that of a creation of an appeal to *all* decisions taken by the Administration with the abolition of Superior Court's power to review administrative action. Because this route seemed too complex, the idea was abandoned initially. However, when Pr. Ouellette published his report in 1987, the proposal was to transfer the jurisdiction of existing administrative appeals tribunals to the Québec Court (Provincial Court).

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<sup>29</sup> *Act Respecting Administrative Justice*, *supra* note 1 annex 1.

<sup>30</sup> *Rules of procedure of the Administrative Tribunal of Québec*, c. J-3, r.1.1.

<sup>31</sup> *Supra* notes 17 and 19.

<sup>32</sup> J. Beetz was then professor at the faculty of law at the University of Montreal when he addressed a committee constituted by the Quebec Bar –Comité du Barreau sur la surveillance de la législation–. His address was published in (1965) 25 R. du B. 244, 246.

<sup>33</sup> Dussault Report, *supra* note 4 at p. 274 and ff.

<sup>34</sup> *Id.* at p. 265 and ff.

Pr. Ouellette rejected the idea on the ground that it would have negative impacts on the accessibility of appeals to citizens, who often have limited financial means. It would also deprive them of the important advantages deriving from the existence of administrative tribunals: expertise, flexibility, procedural simplicity modeled to fit each category of cases<sup>35</sup>. He also pointed out that the experience revealed that the exercise by a generalist court of an appeal jurisdiction over specialized and narrow issues was conducting courts to adopt a very high degree of deference. This raised the question whether appeals to courts were not transformed by the passage of time to *de facto* judicial review<sup>36</sup>. It appears that Pr. Ouellette's concern was justified as shown by the evolving Supreme Court case law on the issue of standard of review<sup>37</sup>.

Pr. Ouellette also examined the possibility of creating *one* administrative appeal tribunal (non judicial) regrouping *all* tribunals and boards in charge of reviewing *all* primary decisions to which a statute was conferring a right to an appeal. It appears that the proposal examined by Pr. Ouellette here was the establishment of a tribunal similar to the Administrative Appeal Tribunal of Australia (in charge of reviewing decisions of the Commonwealth Government and presided by a judge of the Federal Court of Australia<sup>38</sup>). Pr. Ouellette underlined the constitutional difficulties that were raised by Pr. Dussault concerning the creation of a truly generalist appeals tribunal for such a statute could be interpreted as conferring jurisdiction to an institution akin to a superior court<sup>39</sup>. Such an institution would need, at the very least, to be presided by a judge appointed by the Federal Government in virtue of s. 96 of the *Constitution Act*. Needless to say, this option was out of question.

He added that the stakeholders who were consulted by the working group were in total disagreement with the creation of a super tribunal. They were of the view that such a gigantic regrouping of tribunals ran the risk of being artificial. They also voiced their concern that such tribunal would be under the authority of a super president and that would lead to excessive centralization, destroy the specificity of administrative tribunals and estrange all (parties, experts, etc.) who identify themselves or are used to deal with a given tribunal<sup>40</sup>.

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<sup>35</sup> *Id.* at p. 274 and *ff*; Ouellette Report, *supra* note 4 at p. 71.

<sup>36</sup> *Id.*

<sup>37</sup> *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226. As a result of these Supreme Court's decisions the Québec Court acting on appeal of some decisions of the TAQ applies the pragmatic and functional approach to determine the norm of control applicable to these decisions.

<sup>38</sup> *Administrative Appeals Tribunal Act 1975*, Act No. 91 of 1975 as amended, on line : [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/438389441C980FB3CA257301002235FE/\\$file/AdminAppealsTribunal75.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/438389441C980FB3CA257301002235FE/$file/AdminAppealsTribunal75.pdf). On the web site of the AAT [<http://www.aat.gov.au/AboutTheAAT/IntroductionToTheAAT.htm>] one can read the following general information about the AAT: "The Tribunal does not have a general power to review decisions made under Commonwealth legislation. The Tribunal can only review a decision if an Act, regulation or other legislative instrument provides specifically that the decision is subject to review by the Tribunal. Jurisdiction is generally conferred by the enactment under which the reviewable decision was made. The Tribunal has jurisdiction to review decisions made under approximately 400 separate Acts and legislative instruments. Decisions in the areas of social security, taxation, veterans' affairs and workers' compensation constitute the bulk of the Tribunal's workload. The Tribunal also reviews decisions in areas such as bankruptcy, civil aviation, corporations law, customs, freedom of information, immigration and citizenship, industry assistance and security assessments undertaken by the Australian Security Intelligence Organisation." For a general overview on the AAT, Dennis PEARCE, *Administrative Appeals Tribunal*, Australia, Lexis/Nexis Butterworths, 2003, 308 p.

<sup>39</sup> Ouellette Report, *supra* note 4 at p. 72.

<sup>40</sup> *Id.* at p. 73.

Pr. Ouellette also rejected the status quo because it had become difficult for citizens to know to which category of institution they were in front of. They were going before a mix of courts of justice and administrative institutions. But more fundamentally, Pr. Ouellette was of the view that the “sprinkling of similar jurisdictions or sharing manifest functional kinship between distinct boards, or between the provincial court and a diversity of boards, ran counter to common sense and added unnecessary confusion and complexity to the system<sup>41</sup>.

Therefore, Pr. Ouellette’s recommendation was that the National Assembly adopted an *Act Respecting Administrative Tribunals*. This act would have instituted four distinct administrative tribunals: Tribunal des affaires sociales, Tribunal des affaires immobilières, Tribunal des recours administratifs and Tribunal du logement<sup>42</sup>. [Bill 105 was introduced in the National Assembly in 1993<sup>43</sup> (to be completed).]

—*One tribunal, four divisions*

In 1994, the financial situation of Québec was such that it called for more drastic measures in government spending. Pr. Garant and two senior civil servants, from Justice and Executive Council Departments, formed the last working group whose recommendations would finally lead to the adoption of the new *Act Respecting Administrative Justice*. Instead of creating four tribunals, Pr. Garant proposed the institution of one tribunal with four divisions. This recommendation was accepted by the National Assembly. The TAQ is divided into four divisions [s. 17]:

- The Social Affairs Division (similar jurisdiction compared to the Tribunal des affaires sociales in Pr. Ouellette’s report)
- The Immovable Property Division (similar jurisdiction compared to the Tribunal des affaires immobilières in Pr. Ouellette’s report)
- The Territory and Environment Division (new in relation to the recommendations made by Pr. Ouellette)
- The Economic Affairs Division (correspond to the Tribunal des recours administratifs in Pr. Ouellette’s report)<sup>44</sup>.

At the time of its creation, the TAQ amalgamated five existing administrative tribunals (disseminated in different departments) which had jurisdiction to hear appeals from aggrieved citizens by a decision made by the Administration. The former Commission des affaires sociales, Commission d’examen des troubles mentaux and Bureau de révision en immigration were replaced by the TAQ and were regrouped in the Social Affairs Division. The former Bureau de

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<sup>41</sup> *Id.* at p. 74.

<sup>42</sup> *Id.* at p. 303.

<sup>43</sup> Bill 105 *An Act respecting administrative justice*, 2<sup>nd</sup> session, X legislature, 1993. On this Bill, Denis Lemieux, *Justice administrative - Loi annotée*, Publications CCH Ltée, 1997, 238 pages. [to be completed].

<sup>44</sup> In *Bill 35 An Act to amend the Act respecting administrative justice*, 1<sup>st</sup> session, 37<sup>th</sup> legislature, 2003, the Minister of Justice proposed to change the organisation of the divisions of the TAQ and add a new one (worker compensation division) [ss. 6-16]. This proposal was severely criticized notably because the Minister wanted to integrate the Commission des lésions professionnelles into the TAQ, which would have resulted in a drastic change of the nature of this tribunal. Indeed, the CLP is a tribunal ‘paritaire’ which means that the panel is composed of a representative of the State, the employer and the employee (Union). Therefore, employers and unions have some control over the tribunal. If integrated to the TAQ, the CLP would have been then controlled by the government. This Bill was withdrawn after the resignation of Minister of Justice Marc Bellemare on April 27, 2004.

révision de l'évaluation foncière was replaced by the Immovable Property Division and the former Tribunal d'appel en matière de protection du territoire agricole was replaced by the Territory and Environment Division. Some powers that formerly fell under the jurisdiction of the Court of Québec were transferred to the TAQ and new powers were created. These power were principally, but not exclusively, conferred to the new Economic Affairs Division of the TAQ.

Such a unified structure was viewed as a positive feature of the new tribunal for it would augment the prestige and credibility of administrative justice. From a financial perspective, merging tribunals was viewed as a good solution to maintain and improve services, while reducing their expenses. Sharing administrative functions such as office space, hearing rooms and clerk's office, secretariat and computer services, legal services, documentation centres and library would allow important cost savings but also optimal use of these material resources and services<sup>45</sup>.

The annual budget of the TAQ is ±30 million\$ and the TAQ makes around 10,000 decisions on an annual basis. In the 2006-2007 annual report of the TAQ, there is no indication as to the average operating cost per case<sup>46</sup>. One thing we know is that there is usually no charge to file an appeal to the Tribunal. There are some exceptions, namely, in matters of municipal taxation, expropriation and economic matters<sup>47</sup>.

In order to avoid the criticism regarding the creation of too big a structure headed by a super president, which lead Pr. Ouellette to reject the idea of creating one tribunal, the four divisions of the TAQ are each headed by a vice-president. Also, the divisions are relatively impermeable to one another in that the "division to which a member is assigned shall be determined in the instrument of appointment" [s. 39]. They do not sit, as a general rule, in another division's panel. In addition to the specialization of each division, the National Assembly wanted to ensure that the TAQ members would be expert in several disciplines. Members often sit in panels of two or three members, each with different qualifications. Section 41 states the general rule for the appointment of any member in that "only a person who has the qualifications required by law and at least ten years' experience pertinent to the exercise of the functions of the Tribunal may be a member of the Tribunal". The expertise of the Social affairs division is protected by section 40 for it prescribes that in this division "at least 10 members shall be physicians, including at least four psychiatrists, at least two members shall be social workers and at least two other members shall be psychologists." To sit on a panel, members often have to demonstrate special expertise in a field relevant to the decisions made in a particular division. He or she either has to be a lawyer or a notary, a chartered appraiser, a physician, a psychiatrist, a psychologist or a social worker [see for example ss. 21, 22.1, 33].

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<sup>45</sup> Many provinces in Canada chose to merge tribunals in order to save costs: Heather M. MacNaughton, Chair, British Columbia Human Rights Tribunal, *Future Directions for Administrative Tribunals: Canadian Administrative Justice – Where do we go from here?*, to be published in 2008 by the Federation Press.

<sup>46</sup> Québec, Tribunal administrative du Québec, *Rapport annuel de gestion, 2006-2007*, on line [[http://www.ta.qouv.qc.ca/pdf/RAG%202006-2007%20version%20Internet%20\(avec%20liens\).pdf](http://www.ta.qouv.qc.ca/pdf/RAG%202006-2007%20version%20Internet%20(avec%20liens).pdf)]. As Pr. Ison observed in relation to the Australian Administrative Tribunal, any cost-benefit analysis would probably "leave a negative impression if the benefits were to be measured only by the results to individual applicants» [...] it is important to consider the spill-over influence of the AAT, particularly on the departments and agencies from which appeals are brought." *The Administrative Appeals Tribunal of Australia*, *supra* note 22 at p. 25.

<sup>47</sup> The fees charged by the TAQ can be found on line: <http://www.ta.qouv.qc.ca/english/recours-taq/requete/frais.jsp>

—*Preserving specialization and expertise*

Preserving the specialization and multidisciplinary character of the TAQ was viewed as crucial to the future development of the tribunal, especially in terms of the building its legitimacy in the community. Two clear messages needed to be sent: 1) the TAQ is not a court, but an administrative tribunal; 2) judges should show great deference to the tribunal's decisions. Although the decisions of the TAQ are final and protected by a full privative clause [s. 158], it was feared that the Quebec Superior Court's judges would impose a lower standard of review than the patent unreasonableness standard if they were to be of the view that the TAQ was more of a generalist than of a specialized and expert tribunal.

Since the Charest government has been in power in Québec, there have been several attempts to dismantle bidisciplinary and multidisciplinary panels. In Bill no 4 tabled in 2003, the Minister of Justice proposed that, as of a general rule, all the panels would be formed by one member<sup>48</sup>. Save for some exceptions, it was understood that this member would be a lawyer or a notary. This was the sole purpose of this Bill and the Minister was very much criticized for his haste in attempting to solve a problem that only he seemed to see. As a result, this Bill was subjected to strong filibuster conducted by the official opposition and the Minister of Justice finally decided to withdraw the bill<sup>49</sup>. However, he came back later the same year with a much more robust plan to reorganize the TAQ. With Bill no 35 the Minister proposed, among others, to again not only modify the composition of panels but also proposed the idea of the TAQ sitting in one-member panels (lawyer or notary) as of a general rule [s. 34]<sup>50</sup>. This Bill was withdrawn as a result of the resignation of the Minister of Justice.

Since then, there have been no more attempts to dismantle the legal requirement of bidisciplinary and multidisciplinary panels. However, there is a clear tendency toward the control of the tribunal by lawyers and notaries. In 2006-2007, 13 new members were appointed: 11 lawyers and notaries; 2 chartered appraisers<sup>51</sup>. The Annual report does not provide information on the qualifications of all its 87 full-time members. All we know is that only 10 are required by law to have other qualifications [s. 40]. If the tendency continues to replace 85% of the members who take their retirement by lawyers and notaries, it is only a question of time before the tribunal is controlled by the legal community, if it is not already the case.

*b) The status of members*

When the TAQ was created in 1996, all members were appointed for a five-year renewable term unless the member was notified otherwise at least three months before the expiry of his term by the Government [ss. 46, 48(1)]. Therefore, it was not with term-appointments that the National Assembly innovated at that time, but by its recruitment and selection procedure of new members

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<sup>48</sup> Bill 4 *An Act to amend the Act respecting administrative justice*, 1<sup>st</sup> session, 37<sup>th</sup> legislature, 2003, s. 17.1.

<sup>49</sup> I also filed a brief to the Commission des institutions on this Bill disagreeing vigorously with the Minister on the dismantlement of bidisciplinary and multidisciplinary panels of the TAQ. The official opposition used this brief to conduct its filibuster. France HOULE, *Projet de loi no 4 - Loi modifiant la Loi sur la justice administrative*, 1<sup>ère</sup> session, 37<sup>e</sup> législature, 2003, déposé à la Commission des institutions – Assemblée nationale, Québec - 26 août 2003, 17 p.

<sup>50</sup> Bill 35, *supra* note 44. I, again, filed a brief to the Commission des institutions on this Bill expressing my strong disagreement with a TAQ controlled by the legal community. France HOULE, *Projet de loi no 35 - Loi modifiant la Loi sur la justice administrative*, 1<sup>ère</sup> session, 37<sup>e</sup> législature, 2003, déposé à la Commission des institutions – Assemblée nationale, Québec – 20 janvier 2004 at p. 17-39.

<sup>51</sup> *Rapport annuel de gestion, 2006-2007*, *supra* note 46 at p. 15.

based on merits and by its procedure for renewal of terms of office<sup>52</sup>. These procedures were established by government regulations and will be briefly described in this section as well as performance review procedure, termination of appointment and remuneration.

—*Recruitment and Selection*

The recruitment and selection procedure remains unchanged as of today [s. 42]. The regulations determine the form and content of the publicity and the procedure by which a person may become a candidate. It also authorizes the establishment of selection committees as well as to fix the composition of the committees and mode of appointment of committee members, determines the selection criteria to be taken account by the committee to assess the aptitude of candidates and formulate an opinion concerning them. Finally, the regulations prescribe the information that a committee may require from a candidate and the consultations it may hold<sup>53</sup>.

—*Renewal of a term of office*

As for the procedure for renewal of a term of office [s. 49], the *Act*, as adopted in 1996, prescribed that the regulations would authorize the establishment of committees and fix their composition and mode of appointment of members. The regulation would also determine the criteria to be taken into account by the committees and determine the information a committee may require from the member and the consultations it may hold<sup>54</sup>.

The constitutionality of the procedure for renewal of terms was attacked on three grounds by the Quebec Bar under s. 23 of the *Quebec Charter of Rights and Freedoms* in 1998. Two of them succeeded: 1) the decision-maker who was not renewed had no means to be heard and, 2) the presence of the Chairperson of the TAQ was inappropriate as some weight was inevitably given during the renewal process to the annual performance appraisal made by the Chairperson<sup>55</sup>. He was also of the opinion that the presence of a representative of the Government on this committee created a situation of dependence, at least an appearance of dependence, because the TAQ hears appeals made by the State or appeals made against the State.

Finally, Dussault J.A. stated that the procedure should include the right for a decision-maker to be heard when the committee was about to make a recommendation not to review his or her term. In

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<sup>52</sup> The Garant Report, *supra* note 4 contained no recommendation on the recruitment and selection procedure. This silence in the report was strongly denounced by the Chambre des notaires during the consultations on the report: CHAMBRE DES NOTAIRES DU QUEBEC, *La justice administrative, mémoire présenté par la Chambre des notaires du Québec à la Commission des institutions*, Montréal, Chambre des notaires, 1995, p. 18.

<sup>53</sup> *Regulation respecting the procedure for the recruitment and selection of persons apt for appointment as members of the Administrative Tribunal of Québec and for the renewal of their term of office*, R.Q. c. J-3, r. 1.

<sup>54</sup> The Chambre des notaires disagreed strongly with the five-year terms of office for TAQ members and expressed strong views in favour of an appointment system during good behaviour. However, since the government indicated clearly that it would not move in this direction, both organizations told the government that they would agree with fix terms only if the Act were to include a adequate procedure for renewal of terms of office. See the brief of the Chambre des notaires, *Projet de loi 130 – Loi sur la justice administrative, mémoire présenté par la Chambre des notaires du Québec à la Commission des institutions*, *supra* note 17 at p. 18-20. Notaries made the same recommendations after being consulted on the Garant Report: *La justice administrative, mémoire présenté par la Chambre des notaires du Québec à la Commission des institutions*, *supra* note 52 at p. 2.

<sup>55</sup> *P.G. Québec c. Barreau de Montréal*, [2001] R.J.Q. 2058 (C.A.) at para 177.

practice, this meant that Cabinet could no longer use the renewal procedure to get rid of a decision-maker whose decision it did not agree with. As a result of this decision, the Act<sup>56</sup> and the Regulations<sup>57</sup> were modified in 2002. In 2005, the Act was again modified but this time to appoint members during good behaviour<sup>58</sup>. The main reason invoked to push for such a change was because the great majority of disputes settled by the TAQ were between the State and the citizens<sup>59</sup>.

#### —Performance Review Procedure

With this new status, however, a new ethical responsibility was added to the duty of Members, namely to perform “their duties purposefully, maintain their competence and act diligently.”<sup>60</sup> The President of the TAQ was also given a new duty to periodically evaluate “the knowledge and skills of the members in the performance of their duties and their contribution to the processing of the cases before the Tribunal and to the achievements of the objectives of this Act.”

Designing a performance evaluation program that can manage adjudicator performance without compromising independence is not easy. The TAQ established a pilot project performance review procedure and since February 2006, this project is on-going. TAQ members agreed to participate to this project and they formed a Committee which is in charge of the procedure. This Committee works with the ENAP (School for Public Administration in Québec).

The ENAP manages the project within the tribunal. The other important point is that this process is completely confidential – ÉNAP doesn’t know the names of the members who are evaluated. Numbers have been assigned to each file and it is only the Chair of the Tribunal who as the key to this codification (only the Chair can match the # with the name of the Board member).

For each member, ENAP sent a questionnaire to parties, lawyers and colleagues. The evaluation is done in the form of a survey, based on numbers which are statistically valid. The questionnaires are filled in and sent back to ENAP which analyses the results. This first round has been completed and ENAP has sent its preliminary report to the Committee and in March 2007 a summary report was made public<sup>61</sup>. The general conclusion is that the evaluation is very positive. The appreciation of the TAQ member’s work by the ‘TAQ community’, including citizens and attorneys, are by and large very favourable. In addition, a telephone survey was also

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<sup>56</sup> Bill 70, *An Act to amend the Act respecting administrative justice and other legislative provisions*, 2<sup>nd</sup> session, 36<sup>th</sup> legislature, 2002, amending s. 49.

<sup>57</sup> The *Regulation respecting the procedure for the recruitment and selection of persons apt for appointment as members of the Administrative Tribunal of Québec and for the renewal of their term of office*, *supra* note 53 were modified by O.C. 1179-2002, amending ss. 26-27.

<sup>58</sup> Bill 103, *An Act to amend the Act respecting administrative justice and other legislative provisions*, 1<sup>st</sup> session, 37<sup>th</sup> legislature, 2002, amending s. 38.

<sup>59</sup> Appointments during good behaviour was proposed in Bill 35 *supra* note 44, s. 18 replacing s. 38 and the President of the TAQ appeared in front on the Commission des institutions to support this change: Jacques Forgues, *Mémoire du Tribunal administratif du Québec, Commission des institutions, consultations particulières sur le projet de loi no 35, Loi modifiant la Loi sur la justice administrative et d’autres dispositions législatives*, January 20, 2004 at p. 9 on line : <http://www.taq.gouv.qc.ca/pdf/Memoire%20du%20TAQ%202004-01-20.pdf>

<sup>60</sup> Bill 103, *supra* note 58, by adding s. 179.1.

<sup>61</sup> ÉCOLE NATIONALE D’ADMINISTRATION PUBLIQUE, *Projet pilote d’évaluation formative des membres du Tribunal administratif du Québec, Rapport sommaire*, Direction des services aux organisations, mars 2007 on line : <http://www.taq.gouv.qc.ca/pdf/TAQsommaire-final20070323.pdf>



conducted among citizens who appeared in front of the TAQ without a legal counsel and, again, the evaluation is very positive<sup>62</sup>.

#### —Termination of appointment

The appointment of a member may be terminated only on the member's retirement or resignation, or on his being dismissed or otherwise removed from office [s. 51]. The two grounds of removal are loss of qualification required by law for holding the office of member and permanent disability [s. 54]. With respect to dismissal, the Government may do so only after the Conseil de la justice administrative “so recommends, after an inquiry conducted following the lodging of a complaint pursuant to section 182”[s. 53].

#### —Remuneration

As for the remuneration, the 1996 Act provided for the Government to make regulations the mode of remuneration of the members and the applicable standards and scales, the conditions of reimbursement of expenses as well as other conditions of office, including social benefits [s. 56]<sup>63</sup>. Ss. 57-58 prescribed that the government had to fix a member's remuneration and other conditions of office according with the regulations and that once the remuneration was fixed, it may not be reduced<sup>64</sup>. The constitutionality of s. 56 was also challenged by the Quebec Bar under s. 23 of the *Quebec Charter*. The main point of contention was that the annual performance review was used to determine the percentage of progression in the remuneration scale. Justice Dussault agreed with the Bar that annual performance review could not be used for such a purpose but only to determine the needs of a member in terms of training<sup>65</sup>. Justice Dussault also added that once appointed all members should be entitled to an annual increase of the same percentage for all<sup>66</sup>. As a result, s. 56 of the Act<sup>67</sup> as well as s. 9 of the Regulations were amended<sup>68</sup>.

### **B. Instituting an Administrative Appeals Tribunal : Other issues for Discussion**

There were not many discussions in the Dussault, Ouellette and Garant reports on the justifications underlying a right to an administrative appeal. The general view being that a right to appeal would serve to correct errors on a much broader basis than judicial review is capable of doing. However, TAQ numbers are not available to sustain this argument. At the very least, it is possible to say that the TAQ gives the possibility to a greater number of citizens to complain for injustices they believe they have suffered. In that sense, an appeal may very well play the role of a buffer through which the insatisfactions and frustrations of citizens can be channelled and, as a

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<sup>62</sup> LEGER MARKETING, *Tribunal administratif du Québec. Sondage téléphonique auprès des requérants non représentés par un avocat. Rapport d'analyse*, avril 2007 on line : [http://www.taq.gouv.qc.ca/pdf/Rapport\\_d\\_analyse\\_sondage\\_fevrier\\_2007.pdf](http://www.taq.gouv.qc.ca/pdf/Rapport_d_analyse_sondage_fevrier_2007.pdf)

<sup>63</sup> *Regulation respecting the remuneration and other conditions of office of members of the Administrative Tribunal of Québec*, c. J-3, r.2.

<sup>64</sup> Pension plan is prescribed by s. 59 : “The pension plan of full-time members shall be determined pursuant to the Act respecting the Government and Public Employees Retirement Plan (chapter R-10) or the Act respecting the Civil Service Superannuation Plan (chapter R-12), as the case may be.”

<sup>65</sup> *P.G. Québec c. Barreau de Montréal*, *supra* note 55 paras 205-206.

<sup>66</sup> *Id.* para 206.

<sup>67</sup> Bill 70, *supra* note 56.

<sup>68</sup> The *Regulation respecting the remuneration and other conditions of office of members of the Administrative Tribunal of Québec*, *supra* note 63 were amended by O.C. 1180-2002.

consequence, aiding in the preservation of social peace and the legitimacy of our institutions. If only for this reason, I believe that it is worth creating a tribunal such as the TAQ.

However, the TAQ functions pretty much as a court of justice. The legal profession appears to play an increasingly dominant role. This is cause for concern because there are good reasons to not leave the final say on the scope and limit of social and economical programs solely in the hands of the legal profession. Their scope of analysis is too narrow and they need the contribution of other disciplines to reach a more complete understanding of social and economical problems. In addition, and just as a court, the actions which can be undertaken by the TAQ are very limited: It can protect individual interests, but not public interests. As Pr. Ison writes:

Of course one would expect the legal profession to play a substantial role in any system of appellate adjudication, but if the system is to function in a manner significantly different from that of the ordinary courts, one would also expect more diversity of perspective. That surely requires more of the crucial positions to be occupied by people whose backgrounds are primarily in other disciplines.<sup>69</sup>

Before instituting an administrative appeals tribunal, this is an important consideration. In this respect, one could conduct research comparing the decision of the primary adjudication with the one made by the TAQ in the same file to have a better understanding of the work of the TAQ and the response of the department or agency to the decision: did it implement it? If yes, how? If not, why? What is the influence of the TAQ on the operations of Government? Did it induce a new respect for statute law in government departments and agencies? What is the perception of departments and other agencies over the decisions of the TAQ? Are they treating the TAQ decisions with the same respect as decisions of courts?

The other issue to consider is why maintaining judicial review if the tribunal functions like a court? Does contemporary Canadian administrative law still need to maintain judicial review as of a constitutional right? If it is acknowledge that the administrative justice system constitutes the fourth branch of government, should it be freed from sporadic judicial intervention? What social good does judicial review serve in this context? Here again research would provide a clearer answer on whether courts, acting on judicial review, add value to this administrative adjudicative system.

One final issue to take into consideration is the culture in which the tribunal is going to operate. Some legal scholars and judges in Québec who worked in administrative law in Québec and other provinces believe that the administrative law community functions within a more formal setting in Québec than elsewhere in Canada. This may explain, at least in part, why there was a low number of objections raised regarding the creation of the TAQ in the first instance.

### **Conclusion**

The overall judgment on the utility of establishing a generalist appeal tribunal depends upon the weighing of several factors<sup>70</sup>. For example, will it create more accountability on the bureaucrats? Will it contribute to the advancement for the rule of law? Will it be an improvement on judicial review? Are the costs too high? Does it impose unnecessary procedural steps, excessive formality and unequal justice?

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<sup>69</sup> *The Administrative Appeals Tribunal of Australia*, *supra* note 22 at p. 43.

<sup>70</sup> *Id.* at p. 45.

The Canadian Legal community has worked hard to understand the influence of courts over the functioning departments, agencies and administrative tribunals, but we still know very little on the influence of specialized or generalist appeal tribunals over departments and agencies or how the latter operates. As Pr. Ison points out “no official attempt should be made to identify the appeal structure most appropriate for any particular subject area except as and when the government is ready to undertake a more comprehensive study of that area.”<sup>71</sup> In other words, “any intelligent decision-making about new appeal structure must involve field-work.”<sup>72</sup>

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<sup>71</sup> *Id.* at p. 58.

<sup>72</sup> *Id.*