SESSION #3
Adjudicator Accreditation: Yeah or Nay!

Moderator: Judith McCormack, Faculty of Law, University of Toronto
Speakers: Ron Ellis, QC, Former Chair of WCAT
Paul David McCutcheon, Fraser Milner Casgrain LLP
Toby Vigod, Former Chair of the Environmental Review Tribunal

Ron Ellis – Yeah!

Mr. Ellis began by describing the process that is used in the United States for the accreditation and appointment of federal administrative law judges. In the U.S. system, candidates for accreditation need to have the following initial qualifications: they must be lawyers with a minimum of 7 years of administrative law or court hearings experience and they must submit 10 significant administrative law or litigation cases that they were involved in, as well as one memo or decision that they have written. Mr. Ellis noted that in Ontario, we would not want to impose the requirement that a candidate must be a lawyer, but he questioned whether there was any reason why we would not want to confine the accreditation and appointment process to candidates with serious experience. In the U.S., candidates who meet the minimum qualifications must then submit supplemental qualification statements describing their expertise in the areas of: rules of evidence and procedure, analytical ability, decision making ability, writing and oral communication. Candidates are graded on these statements, and if they pass, they enter the final rating process.

The final process of accreditation begins with the candidates participating in a 6 hour demonstration of their ability to write a decision. Following this, candidates are interviewed by a panel to assess their ability to deal with people, communicate orally, analyze and evaluate situations and make decisions. In the next step of the process, the accrediting body chooses 10-20 people who have knowledge of the candidate's judicial temperament and adjudicative qualifications. These people are chosen without the candidate's knowledge and are asked to choose from a list of behavioural descriptions, the ones that best describe the candidate. The candidates who make it this far are then rated and placed on a list of eligible candidates. A tribunal that is looking to fill a position must choose one of the top three ranked candidates, and the government will then appoint the tribunal's choice.

Mr. Ellis raised the question of whether this type of system would be a good idea for tribunal members in Ontario. The answer, he said, depends on whether the government, bureaucracy, and tribunals in Ontario are convinced of the need for qualified adjudicators. If so, then the answer to the question of accreditation is also yes. However, Mr. Ellis noted that it is important to distinguish between the exercise of administrative versus judicial functions. In his view, there should be no accreditation for appointments to regulatory agencies.

Mr. Ellis described the current climate in Ontario as one where politicians and Ministries don't believe in professional adjudicators. He pointed out that the importance of qualifications has been well recognized under the current government, but suggested that nevertheless, tribunal members are still seen as people whom the government is indulging with an opportunity for public service. This view is evidenced by three policies:

1. the government's formal commitment to non competitive compensation; 2. the existing discretion to decline the reappointment of members without reasons or notice, thereby rendering adjudicators in a precarious situation regarding job security; and 3. the arbitrary 10 year appointment limit. Mr. Ellis pointed out the dilemma that is created by the government retaining these policies, which are not consistent with a professional career, while at the same time requiring what amounts to professional qualifications for appointments. He suggested that if we remove these policies and the impediments they create from our current system, we would find that we essentially already have a system that is similar to accreditation. The only thing left to do would be to establish a council to actually undertake the accreditation process.

Mr. Ellis described the benefits that would flow from a commitment to professional qualifications and a rigorous accreditation process: the pool of candidates would be enlarged, we would optimize the competence of tribunals, eliminate patronage appointments, increase respect towards appointees, and provide motivation for broader participation from diverse communities.

Toby Vigod – Nay!

Ms. Vigod began by defining accreditation as the process by which certification of competency, authority and credibility is given by an accrediting body. She noted that judges in Canada are not accredited and she highlighted some of the differences between judges and adjudicators. For example, judges are appointed for life whereas adjudicators in Ontario are limited to a 10 year appointment cap. Also, all judges are lawyers whereas adjudicators are not.

Ms. Vigod discussed the potential motivations behind the desire for accreditation, including: increased respect and credibility with the courts and the public, quality control, fostering independence, and increased remuneration. The overall goal of accreditation is to create a climate of professional respect. While these are laudable goals, in her view, the context in Ontario is not amendable to accreditation. She doubted whether the logistics of Mr. Ellis' U.S. system, where the government appoints the candidate chosen by the tribunal, could work in Ontario, given the unlikelihood that Ontario politicians would readily give up the prerogative to make appointments.

Ms. Vigod questioned what would be accredited: adjudicative skills, alternative dispute resolution skills or writing skills? She also questioned when you would undertake accreditation: before an appointment or after the first 2 years of an appointment and before reappointment? She questioned who would do the accreditation, how it would be funded and what would be the consequences of not getting accredited?

Instead of accreditation, Ms. Vigod suggested that the desired goals could be achieved through a greater emphasis on more practical mechanisms, such as merit based appointments. In particular, she referred to section 14 of the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009* S.O. 2009 c.33, which establishes a formal requirement that the appointment of members to adjudicative tribunals must be a competitive, merit-based process, though this provision has yet to come into force. She also suggested a greater role for adjudicator training, for example through courses offered by the Society of Ontario Adjudicators and Regulators. She noted that the legal profession has Continued Legal Education requirements for lawyers, and suggested that similar, mandatory education requirements could be imposed upon

adjudicators. In addition, a robust performance review process that is linked to adjudicator training could help to achieve many of the desired goals. In conclusion, Ms. Vigod stated that she says yes to the goals of increased professionalism and respect, but no to accreditation.

David McCutcheon – somewhere in the middle

Mr. McCutcheon presented his views on the accreditation of adjudicators from the perspective of a person who uses tribunals. Without giving a resounding "yeah" or "nay," Mr. McCutcheon was of the view that some form of minimum accreditation was a good thing.

Mr. McCutcheon's views were informed by his experience with the ADR Institute, an organization which provides accreditation with respect to alternative dispute resolution. In explaining the basic scheme of accreditation through the Institute, he noted that the Institute is funded by the people who get accredited, and in return, accreditation gives that person a value in the marketplace. To become a chartered mediator through the ADR Institute requires 80 hours of training, 100 hours of study and training in ADR generally, completion of 10 paid mediations, 5 of which are in a sole/lead capacity, and the completion of a skills assessment. In addition, the accreditation must be renewed every 3 years.

Mr. McCutcheon then addressed the question of whether a similar scheme of accreditation would work in a tribunal context. He noted a fundamental difference that exists between a person seeking accreditation in ADR and a tribunal adjudicator, in that with tribunals, the marketplace comes to you. As a user of tribunals, Mr. McCutcheon has experienced practices that he believes would not happen if there were minimum training in place which provided standard knowledge to adjudicators (e.g., a tribunal member ruling on an issue without hearing from all parties) He noted the importance of having the opportunity to learn on the job and the benefits associated with gaining experience through practice. However, he suggested that this type of learning could be enhanced through minimum training which would allow the adjudicator to develop on the job without having to worry about the fundamental basics. He therefore took a position in the middle of the "yeahs" and "nays" that would require a minimum level of accreditation with further learning on the job.

Questions for the Panel

In response to Ms. Vigod's doubt about the reality of doing away with the arbitrary exercise of discretion by politicians in the appointment and reappointment process, Mr. Ellis referenced the decision of the Quebec Court of Appeal in *Barreau du Quebec c. Quebec (Procureur General)* [2010] R.J.Q. 1341. He noted that the Court of Appeal in this case decided that the existence of arbitrary discretion in the appointment and reappointment process is contrary to principles of procedural fairness at common law. He further suggested that if the appeal of *Saskatchewan Federation of Labour v. Saskatchewan Government and General Employee's Union*, 2010 SKQB 390 comes to fruition and we end up with a constitutional requirement for independence, then the continuation of the ability of politicians to choose not to reappoint with no notice would disappear. In terms of the logistics of accreditation, Mr. Ellis suggested that requiring

those seeking appointment to pass a 2 week course on adjudication held in the summer would go a long way towards improvement.

The panel was asked whether accreditation would limit applications from adjudicators with valuable subject matter expertise, but little adjudicative expertise and whether this would have a positive or negative effect on diversity. In Mr. Ellis' view it would indeed limit those with no adjudicative experience from applying for positions, and this would be a good thing. He suggested that accreditation would have a positive impact on diversity because currently an appointment to an administrative tribunal is not a particularly attractive career option due to precarious job security, the short term nature of appointments, and the relatively poor pay. Accreditation would provide competent and well trained members with an assured future that would attract a much wider audience. Mr. McCutcheon agreed that accreditation would only improve diversity because it would open up opportunities for people who can say that they have achieved a level of accreditation and it would take away one more barrier to appointments. Ms. Vigod stated that her experience has been to hire adjudicators based on four areas of expertise: subject matter, adjudication, administration, and alternative dispute resolution. She noted that it is rare to find someone who is an expert in all four areas. However, she noted that the importance of each area will vary from tribunal to tribunal and further, that it may be beneficial to have a range of experience across the members within a tribunal. She suggested that with a formal accreditation process, we may lose some of this flexibility in establishing the range of expertise that is best suited to the particular tribunal.

The panel was asked how, in an accreditation process, would the intangible qualities that are expected from adjudicators, for example judicial temperament, be assessed? Mr. Ellis pointed to the U.S. system of appointment to federal tribunals and the tactic of selecting people who have worked with the candidate to give their assessments. In this process, the Council solicits opinions confidentially without the candidate's knowledge. He stated that this technique gives a good idea of the character, qualifications and capabilities of the candidate, and it is much more effective at identifying candidates with judicial temperaments than relying on the more traditional process of questioning references selected by the candidate. Mr. McCutcheon suggested that while you can't accredit temperament, you can assess it through peer review. He also noted that some people grow into their judicial temperament on the job, and thus, it might not necessarily be something that should always be required up front. Ms. Vigod suggested that judicial temperament is an amorphous concept that doesn't lend itself to accreditation. She agreed with Mr. McCutcheon that it is something that can be learned on the job. She noted that considerations of temperament are different from a credibility or reference check and that you need to go beyond this in the hiring process.

The panel responded to a question from the audience asking where a generic accreditation process would fit in Ontario's diverse system of specialized tribunals. Would an accreditation process that fits all types of tribunals run the risk of having to set the standards so low that accreditation effectively doesn't mean anything? Ms. Vigod returned to her previous point regarding the benefits of establishing a range of experience within the members of a tribunal and the differences in expertise required across tribunals. She suggested that job description requirements can be used to ensure that this range of expertise is captured, rather than a U.S. style system forcing the tribunal to pick from a very small range of candidates who, though they may be accredited, do not have the type of expertise that is desired. She suggested that creating

a generic process of accreditation would lead to the problem of creating a lowest common denominator.

Mr. McCutcheon recognized that creating a lowest common denominator could lead to problems and emphasized the importance of deciding what the lowest common denominator is going to be. For example, he suggested that a two week course with 80 hours of training would give candidates a good grasp of the law, yet it would not be too cumbersome of a requirement as to become a barrier to participation. Mr. Ellis noted that the U.S. system is one extreme, and he suggested that an accreditation system would need to be designed to fit the realities of the Ontario system, for example by excluding regulatory agencies not exercising judicial functions from accreditation requirements. He suggested that levels of accreditation could be established, such that members of tribunals that do not require high level adjudicative skills could be accredited at a lower level. He suggested, however, that accreditation will not work if the current system, where you can't make a career out of adjudication, continues. He stated that this failure in our system, while deeply mistaken, is part of our culture and continues to influence the bureaucracy. In his view, accreditation can be used as a vehicle to shine light on the fact that we don't have the prerequisites for an accreditation program or a career situation.

The panel was asked what other regimes or professions we can draw on in developing a system of accreditation. Ms. Vigod noted that other professions which have accreditation programs are for different services. In these situations, there is somewhere that the accredited person can then go and use that accreditation. She notes, however, that the market for accredited adjudicators would be very small, as there are limited tribunal positions available in Ontario. Mr. McCutcheon suggested that there may also be a market for private adjudicators that would benefit from accreditation. Mr. Ellis described the performance evaluation process at the Landlord Tenant Board as a potential model to rely on. In this process, performance evaluations are conducted after two years and if the adjudicator does not pass, then the failure to reappoint is supported by reasons and not done without cause. He notes that this is a way of informally accrediting adjudicators at that particular tribunal.