

ADMINISTRATIVE TRIBUNALS AND THEIR COMPOSITION

Similarities in Administrative Tribunals

- As discussed in *Administrative Law, (4th ed.)* by Evans, Janisch, Mullan and Risk:

- 1) Tribunals enjoy some measure of independence from the government department with overall responsibility for the policy area in which they operate. Tribunal members are immune from direction from colleagues, including the agency chair, on how they should decide any given case.
- 2) Those liable to be affected by decisions are given an opportunity to participate in the decision-making process by producing evidence and making submissions. To this end, tribunals often have more informal procedures and may consider evidence that would not normally be admitted in a court.
- 3) Tribunals usually operate at the front end of the administrative process, meaning where public policy is applied to individuals and groups.
- 4) Tribunals are specialised within a particular area of public policy.

As outlined in the examinations of various administrative tribunals below, members of tribunals are often appointed based on their perceived knowledge in the field in question, and may or may not sit with members that have legal training. While the composition of each tribunal will be mandated by their statute, it is often common in positional hearings for each party to appoint one member with these two members then agreeing on a mutually selected third member as chair.

Below is a brief summary of some of the methodology used in selecting members for administrative tribunals.

Summary of tribunals by jurisdiction

- Potential questions of relevance are:

- q. 1 (Do the non-judicial members sit alone or with judicial members?),
- q. 2 (How are non-judicial members chosen?),
- q. 3 (What is the length of appointment, and is there a possibility of renewal?), and
- q. 4 (Do the non-judicial appointees receive remuneration?)

1. CRIMINAL AND QUASI-CRIMINAL JURISDICTION

a) Ontario Parole Board

Responses to questions:

- q. 1 - panels are composed of one full-time permanent member and one part-time member drawn from the community surrounding the penal institution: neither is a member of the judiciary

- q. 2 - Appointed by order-in-council, approved by the lieutenant-governor, upon recommendation of the premier, the president of the Executive Council and the Executive Council.
- q. 3 - the initial appointment for part-time members is normally for a term of one year. Although reappointment is not automatic, a part-time member may be reappointed to a maximum of six (6) years with any other specific limitations decided by the Ontario Cabinet.
- q. 4 - Per Diem A per diem rate of \$135.00 will be paid for each full day that a member performs work for the board and half day per diem for work up to three hours. Work includes preparation (reading, note taking) time.

b) General Court Martial - National Defence Act

Responses to questions:

- q. 1 - court martials are composed of one military judge, and three or five members holding at least the rank of warrant officer (apart from the military judge, none of the members may be lawyers or notaries)
- q. 2 - members are appointed by the Court Martial Administrator
- q. 3 - members would be appointed for the duration of a particular case
- q. 4 - tribunal members are members of the armed forces and thus receive their regular pay for service with a court martial

Questions of law, or mixed fact and law are decided by the military judge alone.

2. COMMERCIAL AND ECONOMIC TRIBUNALS

a) Bretton Woods and Related Agreements Act

- Convention establishing the multilateral investment guarantee agency

Responses to questions:

- q. 1 - there is no indication as to whether representatives may be judges
- q. 2 - each party to a dispute appoints a representative member - these two representatives then select a third member as president of the panel
- q. 3 - representatives would be appointed for the duration of the arbitration
- q. 4 - each party is responsible for paying half the costs of the arbitration unless decided otherwise by the tribunal

b) Canada Agricultural Products Act

- Board of Arbitration and Review Tribunal

Responses to question:

Board of Arbitration

- q. 1 - no indication that judges may sit as Board members
- q. 2 - Board members selected by the Minister of Agriculture
- q. 3 - Board members' initial term is for not more than five years, and may be re-appointed

- q. 4 - members are paid an amount fixed by the Treasury Board

Review Tribunal

- q. 1 - no indication that judges may sit as members of a review tribunal
q. 2 - Tribunal members appointed by Cabinet
q. 3 - Tribunal members' initial terms is for five years, and may be re-appointed
q. 4 - salary fixed by Cabinet

The Chair of the Tribunal and at least one other member must be lawyers in good standing with a minimum of ten years experience. Members are to be appointed based on knowledge of agricultural issues.

c) Canadian International Trade Tribunal

Responses to questions:

- q. 1 - no indication that judges may sit as members of the Tribunal
q. 2 - Tribunal members appointed by Cabinet
q. 3 - 'permanent' members' initial appointment is for a term not exceeding five years and may be re-appointed for one further term
- 'temporary' members' initial appointment is for a term not exceeding three years and may be re-appointed "on the expiration of a first or subsequent term of office"
q. 4 - remuneration is fixed by Cabinet

d) Commercial Arbitration Act

- Arbitral Tribunal

Responses to questions:

- q. 1 - no indication that judges may sit as members of an arbitration tribunal - parties to select the number of tribunal members, failing which the default number is three
q. 2 - Tribunal member(s) chosen via either a procedure selected by the parties, or a default procedure outlined in the statute
q. 3 - members are appointed for the duration of the arbitration
q. 4 - unclear

e) Competition Tribunal Act

Responses to questions:

- q. 1 - tribunal is composed of three to five members, with at least one member from the judiciary, and lay members
q. 2 - judicial members appointed by the Cabinet on recommendation of the Minister of Justice; lay members appointed by the Cabinet on recommendation of the Minister of Industry
q. 3 - judicial members appointed for term not longer than 7 years provided they remain a

- judge of the Federal Court Trial Division and may be re-appointed
- lay members appointed for initial term not exceeding 7 years and may be re-appointed
- q. 4 - lay member's remuneration fixed by Cabinet

Lay members are to be chosen based on their knowledge in one or more of the following fields; economics, industry, commerce or public affairs and may include, without restricting the generality of the foregoing, individuals chosen from business communities, the legal community, consumer groups and labour.

f) *Aeronautics Act*
- Civil Aviation Tribunal

Responses to questions:

- q. 1 - no indication that judges may be members - members normally sit in a panel of three, but may sit alone with the consent of parties or with more than three with direction of the Chair
- q. 2 - members appointed by Cabinet
- q. 3 - initial appointment for up to seven years with possibility of re-appointment
- q. 4 - remuneration set by Cabinet

Lay members are to be knowledgeable in the field of aeronautics.

3) *ADMINISTRATIVE TRIBUNALS*

a) *Canadian Human Rights Act*
- Canadian Human Rights Tribunal

Responses to questions:

- q. 1 - of the fifteen members, the Chair, and the Vice-Chair must be members of a bar association with at least ten years experience as a lawyer or notary, and at least two other members must also be members of a bar association. If the complaint deals with the constitutionality of legislation, the member must be a lawyer or notary. A tribunal usually consists of one member, but may consist of three members where designated by the Chair due to the complexity of the complaint.
- q. 2 - members are appointed by Cabinet
- q. 3 - the Chair and Vice-Chair are appointed for up to seven years and may be re-appointed
- the other members are appointed for up to five years and may be re-appointed
- q. 4 - remuneration fixed by Cabinet

Lay members are to be knowledgeable in the field of human rights.

b) *Employment Equity Act*
- Employment Equity Review Tribunal

Responses to questions:

- q. 1 - no indication that members may include judges
- q. 2 - members appointed by the Chair of the Employment Equity Review Tribunal from the members of the Human Rights Tribunal - members usually sit alone, but a panel of three may be appointed by the Chair where warranted
- q. 3 - members have been originally appointed to the Canadian Human Rights Tribunal and are appointed to the Employment Equity Review Tribunal for the duration of a case
- q. 4 - members are paid pursuant to their employment with the Canadian Human Rights Tribunal

c) Canada Pension Plan

- Canada Pension Plan Review Tribunal

Responses to questions:

- q. 1 - there is no indication that members may include judges - panels are composed of three members, the Chair of which shall be a lawyer, and at least one member shall be a doctor where the appeal involves a disability benefit
- q. 2 - members are appointed by Cabinet with a minimum of 25% being lawyers, 25% being doctors, and with broad geographic representation from across Canada
- q. 3 - members are appointed for from two to five years and are eligible for re-appointment
- q. 4 - remuneration fixed by the Minister

4) LABOUR AND EMPLOYMENT RELATED TRIBUNALS

a) Status of the Artist Act

- Canadian Artists and Producers Professional Relations Tribunal

Responses to questions:

- q. 1 - there is no mention that members may include judges. Tribunals usually have three members but may have only one for uncontested matters
- q. 2 - members are appointed by Cabinet on the recommendation of the Minister of Justice in consultation with the Minister of Canadian Heritage
- q. 3 - the Chair is appointed for not more than seven years, the Vice-Chair for not less than five years, and other members for not more than three years - all may be re-appointed
- q. 4 - remuneration is fixed by Cabinet

b) National Defence Act

- Canadian Forces Grievance Board

Responses to questions:

- q. 1 - there is no indication that judges may be members
- q. 2 - members are selected by Cabinet
- q. 3 - members are appointed for up to four years, and may be re-appointed
- q. 4 - members would normally receive remuneration as members of the armed forces, but any civilian members are remunerated according to rates set by Cabinet

c) Regulated Health Professions Act (Ontario)

- Governs the conduct of the Ontario College of Physicians and Surgeons' disciplinary hearings

Responses to questions:

- q. 1 - no indication that judges may be members
- q. 2 - both medical and lay members are selected by provincial Cabinet
- q. 3 - members are appointed for up to 3 years, and may be re-appointed once
- q. 4 - members receive remuneration set by provincial Cabinet

Discussions with the Ontario College of Physicians and Surgeons indicate that disciplinary panels have access to a lawyer who assists them in the drafting of reasons. This was felt to be required by the need to buttress disciplinary decisions against the possibility of judicial review.