MAKING SOUND APPOINTMENTS

Report and Recommendations

Prepared by

Administrative Justice Project

for the

Attorney General of British Columbia

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FOREWORD

The following report was prepared for British Columbia's Administrative Justice Project. Established in July 2001, the Project is part of the government's commitment to ensure that the administrative justice system is accessible, efficient, fair and affordable.

Since its inception, the Project has examined fundamental questions about the nature, quality and timeliness of administrative justice services in British Columbia. It has also set forth a series of recommendations to address the most significant challenges facing the system today.

This report discusses issues related to the appointment of administrative tribunal chairs and members – issues which have emerged as central themes in the literature, in discussions with public officials and in the principled assessment of reform initiatives in other jurisdictions. There is strong consensus that, unless appointment issues are addressed in a complete and comprehensive way, success in realizing other administrative justice reforms is likely to be elusive, difficult or short-lived.

The analysis and recommendations presented here support the Administrative Justice Project's White Paper. Copies of the White Paper, other background papers, reports and further information on the Project are available through the Internet at: www.gov.bc.ca/ajp.

Interested readers are invited to provide comments on the White Paper and related reports before November 15, 2002 by:

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INTRODUCTION

Questions about how appointments are made and who has a role in recruitment and selection are critical concerns for government and the tribunals that form the core of the province's system of administrative justice. In this respect, a modern and relevant approach to tribunal appointments requires a commitment to:

- the principle of merit as the basis for appointment decisions;
- the values of transparency, fairness, flexibility, affordability and efficiency.

This report examines appointment issues unique to administrative tribunals and makes recommendations to government for enhancing current appointment practices and processes.[1] The Terms of Reference for the Administrative Justice Project established guidelines for this report in the following way:

> *The relationship between government and administrative agencies has unique qualities that are not found in government's relationship with Crown corporations and other public institutions. While Crown corporations are usually established to achieve business purposes in competitive commercial markets, many Crown corporations are also expected to balance corporate goals with the social and economic policy objectives of government. In choosing appropriate directors for Crown corporations, government is well-advised to seek individuals who can contribute to the effective oversight of the Crown corporations and who can also understand and give effect to government's policy objectives.*
>
> *With respect to administrative agencies, and in particular in those adjudicative tribunals where proceedings involve government as a party, different factors and issues come into play. Government's role in the ongoing operations of administrative agencies is more akin to its role in relation to provincial courts. The principal source of policy with respect to government objectives is expressed through an administrative agency's enabling legislation and regulations. Aside from enacting legislation and regulations, government's primary responsibilities are to choose agency members and adjudicators who are seen as fair, impartial and independent and, in many instances, to provide support services and resources for ongoing agency operations.*
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> *The differences noted here raise a number of issues with respect to the appointments process for administrative agencies. These differences suggest that specific standards and considerations should be set and taken into account in developing government's overall framework for government appointments to administrative justice agencies.*[2]

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1 A background paper, Appointments: A Policy Framework for Administrative Tribunals, was released by the Project in May 2002. The paper and related appendices are available at http://www.gov.bc.ca/ajp.

2 Administrative Justice Project. Terms of Reference, July 2001. Available online at http://www.gov.bc.ca/ajp.

At the centre of the discussion about administrative tribunal appointments is the goal of achieving the right balance between the independence of individual decision makers and the tribunal's formal accountability to the people it serves. In this respect, public accountability flows from the tribunal to the responsible host government minister and ultimately through Cabinet to the Legislature. At the same time, the accountability framework for tribunals must take into account and be respectful of the arm's length role and independence of tribunal members as decision makers in individual proceedings that come before them.

From a broader perspective, administrative tribunals serve a compelling public purpose by providing an accessible and cost effective forum for decision making in matters that affect the everyday lives of British Columbians in their various roles as landlords, tenants, employers, workers, business owners, family and community members. As the principal components of the province's system of administrative justice, administrative tribunals have become an integral part of the services government provides, often representing the only point of contact many people have with the formal justice system.

Three themes have emerged in the course of preparing this report. First, in making appointments to administrative tribunals, there is a compelling need for government to provide greater certainty and consistency in policy and in the processes and standards that are followed and applied. In this respect, it is government's responsibility to ensure that the very best candidates are identified, recruited and appointed, thereby providing both a high level of public confidence and credibility in the administrative justice system and a recognized and respected career choice for the men and women who work in this system.

Government has already taken significant steps towards a framework for public appointments that is open, transparent and merit based. In July, 2001, the Board Resourcing and Development Office was established in the Premier's Office. The office was given responsibility for overseeing appointments to a broad and diverse array of more than 700 public agencies, boards and commissions, all of which operate with varying degrees of autonomy at arm's length from government's line ministries. As such, the mandate of the office is to:

- establish guidelines for all provincial appointments to agencies;
- ensure that all provincial appointments are made on the basis of merit following an open, transparent and consistent appointment process;
- ensure that appointees receive appropriate orientation and ongoing professional development with respect to agency governance issues.

In August 2001, the Board Resourcing and Development Office issued its Public Agency Appointment Guidelines[3] setting out principles for appointments to agencies, boards and commission and defining roles and responsibilities for the public agencies and officials involved in that process. As part of its mandate, the Administrative Justice Project was asked to consider how these guidelines could be applied to administrative tribunals and whether any other issues should be addressed in guidelines for administrative tribunals. This report builds on the work of the Board Resourcing and Development Office by addressing specific issues of interest to government and administrative tribunals.

A second theme involves the need for government to rethink and clarify its expectations of tribunal chairs with respect to both their specific obligations in the appointment process and their other duties as the heads of tribunals. In most cases, Cabinet is responsible for tribunal appointments, whether individuals are appointed as chairs or as members on either a full time or part time basis. In recent years, chairs have been increasingly held to account for the effective and efficient operation of their tribunals, even though they may have had little or no effective voice in selecting the candidates appointed to work with them. In the extreme, this tension can be unworkable and dysfunctional. Accordingly, a central focus of this report is on the evolving responsibilities of the chair and the appropriate role for this position in an appointment process that is open, transparent and merit based.

Third, it is timely for government to consider how it can and should respond to expressed needs within the administrative justice community for a central focus within the public sector to address the policy and legislative requirements of this vital part of the justice system. Across government, 17 ministers of the Crown currently have administrative responsibility for at least one of the tribunals included within the Terms of Reference for the Administrative Justice Project. In most cases, the responsible host ministers also oversee government programs that operate in policy areas related to the tribunals' core mandates. For example, the Minister of Advanced Education is host to the Private Post Secondary Education Commission. In other cases, there may be little substantive policy relationship between host ministers and administrative tribunals.

Deputy ministers and their senior staff have taken on a range of roles in the tribunal appointment process. In the ministries of Attorney General and Public Safety and Solicitor General, which together are host to 18 administrative tribunals, a division has been established to provide

[3] Board Resourcing and Development Office. Public Agency Appointment Guidelines. Available online at http://www.fin.gov.bc.ca/abc.

centralized services, including services to monitor and track requests for tribunal appointments. Part of the division's mandate is to assist in recruitment and selection and to carry out some of the due diligence required to verify credentials of proposed appointees.

In other ministries, appointment responsibilities are often assigned to a corporate policy office or to a program area with a mandate related to the tribunal. Ministry staff may assist on an informal basis by preparing the documentation that goes forward through a minister's office but, otherwise, ministry staff have a more limited role in tracking vacancies, identifying potential candidates and carrying out the necessary due diligence.

Within the province's current tribunal appointment system, there are shortcomings, uncertainties, duplication and overlap in screening, selection and due diligence. For some ministries and tribunals, current practices and processes also give rise to issues about timeliness and delay. Addressing these issues will be central to the achievement of an approach to tribunal appointments that encompasses:

- a planned and transparent process for recruitment and selection;
- a comprehensive and competitive set of terms and conditions of engagement – dealing not only with remuneration, but also with performance expectations, management reviews, benefits, severance and transitions back to other work;
- a well-defined role for tribunal chairs, clearly articulating the respective operational responsibilities and accountabilities of both government and tribunals;
- a framework for government to organize itself, not only with respect to appointments, but also with respect to the other services it provides to administrative tribunals.

Key Concepts

Administrative tribunals apply legal principles and public policy to reach impartial decisions in individual cases – where it is in the public interest to render these decisions at a distance from the normal operations of government. The rationale arises, in some cases, because a government program or official has a stake in the outcome of a proceeding and, as such, government could not be seen to be impartial in reaching decisions that have consequences both for itself and for other affected parties. In other cases, independent administrative tribunals are established because the arm's length nature of the administrative process can be effective in diffusing political influence over decisions that should be based on sound professional or technical principles, knowledge or considerations. Tribunals are also established because their decisions can further the fundamental principles of natural justice, in a manner and forum that are both less formal and more accessible than the courts.

Many other public bodies and officials have adjudicative responsibilities, including the governing bodies of the province's professions and occupations and statutory decision makers in government ministries, such as the superintendent of motor vehicles or the chief forester. These entities are not expressly included within the Terms of Reference[4] for the Administrative Justice Project. However, many of the principles that are developed for administrative tribunals as part of the Project may be of interest or relevant to these other public bodies and officials.

As a general rule, the characteristics of public agencies influence – and are in turn affected by – the kind of appointment process used to recruit and retain members and staff. The methods are commonly used are appointment by Cabinet, appointment by a minister of the Crown or appointment by the administrative head of the public agency (a deputy minister, director or chair). These three methods are discussed in detail below. In addition, for a small number of tribunals, panel members may actually be selected by the parties from an approved list or roster that establishes minimum or representative qualifications.

Order in Council Appointments

If a statute states that the Lieutenant Governor in Council has authority to appoint a person to a public agency, that authority is exercised by Cabinet through an Order in Council signed by the Premier as head of the executive branch of government and by the Lieutenant Governor as the Crown's representative and formal head of government. A person appointed by Order in Council is ultimately accountable to the Premier and Cabinet and may only be removed from office at the end of a prescribed term, or by an order rescinding the original Order in Council, unless some other mechanism for removal is set out in the agency's enabling legislation.

Order in Council appointments have been used for a broad variety of purposes including appointments to the boards of directors of Crown corporations, appointments as members of non-governmental organizations constituted under provincial legislation and appointments to administrative agencies and tribunals. There are at present some 1,500 Order in Council appointments to agencies, boards and commissions across the provincial public sector. As the number of these appointments has increased over time, administrative costs and implications for government have also grown and are now significant.

[4] A list of the administrative tribunals that are part of the Terms of Reference for the Administrative Justice Project is available online at http://www.ag.gov.bc.ca/ajp.

An Order in Council is used for appointments where it is in the public interest to provide for collective scrutiny of a prospective appointee by the elected officials who are responsible (as ministers of the Crown) for overseeing the government's activities. Within the administrative justice system, an Order in Council is typically preferred where:

- an administrative tribunal has a strategic role in implementing government policy;
- public confidence in the independence of the tribunal's decisions is paramount;
- the interests of stakeholders are potentially contentious or conflicting;
- a government ministry is a party before an administrative tribunal which is adjudicating individual rights and benefits;
- the decisions of staff in the tribunal's host ministry are reviewed by that tribunal.

Ministerial Appointments

A minister of the Crown may make appointments either formally – by order under the provisions of a public body's enabling legislation – or more informally through his or her general powers to execute contracts and agreements.

Ministerial orders have been widely used in a variety of circumstances for appointments to advisory bodies, to a limited number of tribunals and to other public program areas that require investigators, administrators or trustees. There are at present some 1,600 formal ministerial appointments to agencies, boards and commissions in the provincial public sector.

A ministerial order is used for appointments where it is in the public interest to provide a level of scrutiny by an elected official but it is not necessary, relevant or expedient to provide for the collective scrutiny of full Cabinet. Ministerial appointments may be appropriate where a ministry has specialized professional or technical expertise, relevant to the selection of prospective appointees. In these circumstances, professional or technical expertise can be given relatively more weight in the process than the scrutiny of Cabinet. Within the administrative justice system, a ministerial appointment may be considered where:

- the minister does not appear as a party in a proceeding before the administrative tribunal;
- the decisions of staff in the tribunal's host ministry are not reviewed by that tribunal;
- the discretion of decision makers is clearly defined in relevant legislation and policy.

Appointments by the Head of a Public Agency

The chair or head of a public agency may have a power to appoint other members to that agency. For administrative tribunals, this arises most commonly where the chair is authorized to appoint

adjudicators, panel members or other decision makers. The chair may also have authority to appoint staff or to retain consultants and contractors.

An appointment by the chair of an administrative tribunal is preferred where the scrutiny of an elected official is neither required nor desired and where the emphasis in the recruitment and selection process is on the professional judgment, technical expertise and qualifications of prospective appointees. Within the administrative justice system, appointments by the chair of an administrative tribunal may be considered where:

- the decisions are highly technical in nature and require specialized knowledge and expertise;
- the discretion of decision makers is relatively narrow and clearly defined in relevant legislation and policy;
- the volume of work is high and there is a need for flexibility and efficiency in appointing tribunal members and assigning cases;
- the work is of a part time nature;
- a range of outcomes is expected and can be tolerated.

In British Columbia, the power to appoint tribunal members has been conferred on the chairs of several tribunals including the Employment Standards Tribunal and the Appeal Division within the Workers' Compensation Board. In amendments tabled recently under the *Workers Compensation Amendment Act (No. 2), 2002*, the chair of the new appeal tribunal will be appointed by Order in Council while the other members of the tribunal will be appointed, following the transitional period, by the chair, after consultation with the host minister.

RECRUITMENT AND SELECTION

An orderly recruitment and selection process should place take place before appointments to administrative tribunals are made. From a policy perspective, it is critical to choose not only the appropriate appointment instrument (as discussed above) but also a recruitment and selection process that furthers government's goals for openness, transparency, accountability and selection based on merit. This point was reinforced in a 1989 report on regulatory boards and commissions for the Ontario government. The report's author, Robert Macaulay, noted that "it is important to distinguish between the quality of appointees and the quality of the appointment procedure".[5] As Macaulay observed, "the test of a good appointee is resident within the

[5] Macaulay, Robert. *Directions: Review of Ontario's Regulatory Agencies: Overview*, Queen's Printer, Toronto, 1989, p. 10.

individual" and even "the very best selection methods and procedures will not guarantee quality appointees". On balance, however, it would appear that effective procedures for recruitment and selection are more likely than not to improve the overall quality of tribunal appointments.

The central challenge for government in designing such procedures is to attract a diverse pool of the best and most qualified candidates and, at the same time, to achieve an appropriate balance between the potentially competing objectives of predictability, openness and responsiveness. In this respect, a recruitment and selection strategy should be:

- transparent, predictable and certain so that government can be held accountable to the public it serves;
- timely, open and fair so that administrative tribunals can be effective in furthering the core values and fundamental principles of the administrative justice system;
- flexible and responsive so that the appointment process itself can meet the ongoing operational needs of government and its administrative tribunals.

These objectives can be achieved more readily through an orderly recruitment and selection process that involves the following steps:

- planning;
- needs assessment;
- the development of selection criteria and position descriptions;
- a clear process for seeking and selecting candidates.

The precise process for recruitment and selection will vary in response to a number of factors including timing, the tribunal's current and particular needs, the characteristics of the current market and environment within which the tribunal operates, the likely availability of potential candidates, the professional and technical qualifications required to carry out the duties of the position being filled, the compensation being offered, the nature and location of the work and the relevant policies, priorities and practices of government. The nature of the process will also be determined in large part by the extent to which the chair is expected or required to play in role in recruitment and selection.

Planning

Careful planning is critical to the development of an effective recruitment and selection strategy. A good recruitment and selection plan should include the following components:

- a statement of the goals to be achieved;
- critical dates and timelines;

- strategies for attracting, selecting and retaining the right people at the right time and cost, including a plan for advertising and communications;
- a plan for consultation with external parties, identifying any protocols or procedures that must be followed in carrying out the consultation;
- a plan for ensuring compliance with applicable central government or ministerial directives;
- a description of the roles and responsibilities of the parties involved in carrying out the plan;
- an estimate of the financial and personnel resources required to implement the plan;
- a statement of the key deliverables.

A comprehensive strategy will have many benefits for the public institutions and individuals involved, including central government programs, host ministries and administrative tribunals. Among these benefits are opportunities to:

- link recruitment goals and strategies to tribunal service plans and performance measures;
- provide a mechanism for forecasting the time and resources required, within a given period, to schedule and manage appointment processes;
- establish a foundation for succession planning for key positions;
- outline a process for developing, maintaining and retaining core competencies;
- provide a mechanism for tribunals to obtain direction from central government programs and host ministers about recruitment and selection processes.

In this respect, tribunals should develop annual appointment plans that set out in advance:

- the number of vacancies anticipated in a given year, including the number to be filled by recruitment efforts and renewals;
- the types of positions to be filled, whether chairs or members and whether full time or part time;
- the kinds of recruitment and outreach activities that will be required, including their potential costs;
- the critical timelines from initiation to completion for key deliverables and appointment decisions.

Experience suggests that between four and six months' lead time is required to complete the recruitment and selection process for each appointment. Where a pool of qualified candidates exists or can be readily assembled, less time may be required. In contrast, where an upcoming vacancy requires candidates with highly specialized professional or technical knowledge and qualifications, considerably more time may be required to identify and recruit the best applicants. It is anticipated that careful planning on an annual basis will assist in shortening the current timelines for appointments.

Needs Assessment

Within the framework of a general strategy for recruitment and selection, a needs assessment defines an administrative tribunal's specific requirements in relation to upcoming vacancies. This assessment is the mechanism for reviewing and articulating requirements for members and, where enabling legislation permits, for the use of alternative adjudicative resources such as cross-appointments and contract adjudicators.

Under the Public Agency Appointment Guidelines, appointees to provincial agencies, boards and commissions are expected to possess certain core competencies, defined as follows:

- ***Personal Attributes:*** High ethical standards and integrity in professional and personal dealings; appreciation of the responsibilities to the public; ability and willingness to raise potentially controversial issues in a manner that encourages dialogue; flexibility, responsiveness and willingness to consider change; ability and willingness to listen to others; capability for a wide perspective on issues; and ability to work as a team member.
- ***Key Qualifications:*** Unique to each agency and include those required by legislation.

The needs of administrative tribunals are constantly evolving as a result of court decisions, changes in legislation, workload and the sophistication of tribunals' management systems and organizational cultures. The needs assessment provides an opportunity for government and tribunals to review requirements on an ongoing basis and to make recruitment and selection decisions within that changing environment. As Macaulay has observed:

> *The most reliable appointment procedures should concentrate not on who wants to be appointed, but rather [sic] the needs of agencies in serving the public interest. Most appointments and the needs of agencies must receive careful analysis before a decision is made because the needs of agencies are very precise and highly specialized dependent on the area of expertise required.*[6]

A needs assessment should further the overall goals of an effective recruitment and selection strategy and satisfy the following criteria:

Competency

- Does the tribunal's current and proposed membership provide the competencies required for effective decision making?

Transparency

- Would it be clear to an interested member of the public how the tribunal's needs were assessed and how the recommendations arising out of the needs assessment would enhance the effectiveness of the tribunal's decision making?

[6] Ibid., p.17.

Fairness

- Is there any evidence of unfairness or bias in the recommendations made in the needs assessment?

Flexibility

- Does the needs assessment provide the tribunal with the ability to use the adjudicative resources it has and to modify these when needed?

Affordability/Efficiency

- Does the assessment of needs for full time, part time and contract adjudicators represent the best use of public resources?
- Will cross-appointments improve the efficiency of the tribunal's operations and enhance the effectiveness of the administrative justice system?

Full Time Members

A tribunal's requirements for full time or part time members will be influenced by a number of factors related to the volume and complexity of the tribunal's work, the timing and location of its hearings and proceedings and its ability to attract qualified candidates.

The potential benefits of full time appointments include:

- enhanced opportunities for attracting and retaining members where compensation is market-based and competitive;
- greater flexibility for tribunal chairs in managing tribunal operations, including the scheduling of hearings and the assignment of cases due to the full time availability of tribunal members;
- greater access to tribunal members who can contribute to and participate in mentoring, training and peer review;
- greater potential for the development of subject matter expertise and familiarity with client groups and tribunal procedures.

From the same perspective, potential disadvantages of full time appointments include:

- increased difficulties in attracting certain professional groups where skills are in high demand and the compensation that a tribunal can offer is neither market-based nor competitive;
- higher operating costs and lack of flexibility in responding to significant fluctuations in workload;
- less flexibility in determining an optimum resource mix;
- an increased likelihood that incumbents may become "stale" or less effective over time, particularly where there are barriers to the transition of incumbents into other careers and opportunities.

From an individual member's perspective, a full time appointment may represent a career choice that offers a measure of income security, stability and certainty. In some situations, tribunal

members may consider that adjudicative experience is part of a career path to the judiciary or to other adjudicative positions. However, if government policies restrict the number of reappointments a full time tribunal member may accept, individuals may need to consider the opportunity costs and trade-offs associated with these appointments. This may have a chilling effect on the size of the potential pool of applicants.

Part Time Members

An administrative tribunal's requirements for part time members may be influenced by factors related to the regional or local services the tribunal offers, the challenges it faces in recruiting full time members and the likelihood that part time members will either be able to combine tribunal responsibilities with other work or devote themselves fully to tribunal work during the term of a part time appointment.

From a tribunal's perspective, the potential benefits of part time appointments include:

- enhanced opportunities for attracting and retaining individuals from certain specialized professional groups where skills are in high demand and full time appointments would be unattractive because the compensation a tribunal can offer is neither market-based nor competitive;
- a potentially broader field of prospective applicants, ensuring the input of current experience in the subject matter area and the fresh perspective that comes with the infusion of new part time members;
- lower operating costs and greater flexibility in responding to significant fluctuations in workload;
- greater flexibility in determining an optimum resource mix.

From the same perspective, potential disadvantages of part time appointments include:

- increased potential for real or perceived conflicts of interest as part time appointees balance their duties and obligations to the tribunal with their private interests, careers and pursuits;
- less flexibility for tribunal chairs in managing tribunal operations, including scheduling hearings and assigning cases, due to the external commitments and obligations of part time members;
- more difficulty in managing training, in developing and sustaining expertise and in developing consistency in the application of policy.

From an individual member's perspective, a part time appointment may offer an opportunity for flexible work arrangements, an appropriate transition from full time employment to retirement or an opportunity to contribute in a public way in circumstances where a full time appointment would not otherwise be appropriate or acceptable.

Contract Adjudicators

The chairs of some tribunals, for example, the Employment Standards Tribunal, have express authority to retain adjudicators under the terms of contracts negotiated between the parties. Where these powers exist, neither the host minister nor the central institutions of government are involved necessarily in the recruitment and selection process. Full responsibility and accountability for appointments rests with the chairs, subject to any legislative provisions or government directives that generally apply to the appointments in question.

Contract adjudicators may be appropriate where a tribunal provides high-volume services in communities across a wide geographic area, where a range of outcomes is expected and can be tolerated, where the potential impact of decisions in individual cases is not likely to have broad implications for public policy and where a high degree of decision making independence is not required to maintain public confidence in the process.

From a tribunal's perspective, the potential benefits of contract adjudicators include:

- the greatest flexibility in responding to significant fluctuations in workload and in managing caseloads and costs;
- the greatest flexibility in attracting and engaging a broad range of individuals who have the required skills and specialized expertise;
- the most direct and efficient process for recruitment and selection.

From the same perspective, potential disadvantages of contract adjudicators include:

- lack of transparency and accountability in the recruitment and selection process in the absence of external screening and vetting to verify and validate the credentials of potential appointees;
- an increased likelihood of apprehensions of bias and concerns about independence based on the contractual nature of the relationship between the tribunal chair and the adjudicator and their respective duties and obligations.[7]

From an individual's perspective, a contractual arrangement may allow for flexible work arrangements or provide an opportunity for adjudicators to contribute in a public way in circumstances where a full time or part time appointment would not otherwise be appropriate or acceptable.

[7] See for example, *Doern and Jones* v. *Police Complaint Commissioner*, 2001 BCCA 446 and *Sekela* v. *Police Complaint Commissioner*, 2001 BCCA 572.

Cross-Appointments

Across the provincial public sector, current government policy discourages individuals from holding appointments to more than one provincial agency, board or commission at the same time.[8] While this policy may work well for Crown corporations and community-based advisory boards, it may not be appropriate for administrative tribunals, given the specialized skills that adjudicators need and the investment that tribunals have made in their training and development.

In fact, there are distinct advantages to cross-appointments within the administrative justice system. For example, cross-appointments to administrative tribunals may be appropriate where:

- several tribunals are engaged in adjudication in complementary or interrelated areas of the law (for example, employment law or environmental law);
- the pool of potential adjudicators has broadly-based expertise in this area;
- the application of broadly-based expertise within a tribunal would enhance the overall functioning and effectiveness of the tribunal and the administrative justice system as a whole.

Cross-appointments may also be appropriate where:

- the objective of the recruitment and selection process is to achieve an appropriate balance between the specialized technical or subject matter expertise of some tribunal members and the adjudicative expertise of others; and
- this balance can best be achieved by strengthening the tribunal's adjudicative skills through the cross-appointment of individuals with significant and current adjudicative experience.

From a tribunal's perspective, the potential benefits of cross-appointments include:

- the opportunity to take advantage of transferable adjudicative skills, for example, skills in case management, the conduct of hearings and decision writing;
- the opportunity to draw on and incorporate innovative procedural practices from other tribunals;
- as with part time appointments, greater flexibility in responding to significant fluctuations in workload.

From the same perspective, potential disadvantages of cross-appointments include:

- at least initially, a new appointee's potential lack of specialized technical or subject matter expertise and competency;

[8] Current policy states that "An individual may be appointed to more than one agency, board or commission. However it is recommended that an appointee serve on no more than one at a time unless there are exceptional circumstances such as the need for a unique skill set or a specific project requirement." See "Compensation for Appointees to Government Agencies, Boards and Commissions", British Columbia Treasury Board, Directive 1/00.

- less flexibility for chairs in managing tribunal operations, including scheduling hearings and assigning cases, due to the external commitments and obligations of the individuals holding several appointments.

From an individual's perspective, cross-appointments may offer more varied professional opportunities and additional financial security. Individuals who hold cross-appointments may also contribute to the smoother operations of the system as a whole through the development of a more systematic perspective and practice.

On balance, the practice of making cross-appointments to tribunals should be considered and encouraged in appropriate circumstances.

Selection Criteria and Position Descriptions

Clearly defined selection criteria and position descriptions are essential components of an appointments process that is open, transparent and accountable. Under the Public Agency Appointment Guidelines, the Board Resourcing and Development Office applies the following principles to all appointments to public agencies, boards and commissions:

- **Merit Based:** Appointments will be governed by the overriding principle of selection based on merit - an objective assessment of the fit between the skills and qualifications of the prospective candidate and the needs of the agency.
- **Transparent:** The guidelines for the appointment process will be clear, understandable and available to the public.
- **Consistent:** The appointment process will be applied consistently in respect of appointments to all agencies.
- **Probity:** Agency members must be committed to the principles and values of public service and perform their duties with integrity.
- **Proportionate:** The appointment process will be subject to the principle of proportionality; that is, the process will be appropriate for the nature of the post and the size and weight of its responsibilities.

These principles can and should be applied equally to administrative tribunals, with the addition of a further principle related to selection on the basis of professional contribution, reputation and esteem. This principle is particularly important in choosing tribunal chairs and in circumstances where tribunal members are drawn from a specialized professional field such as medicine or labour relations. In these cases, appointees should be chosen not only on the basis of skills and personal qualities but also on the basis of the contribution they have made to their chosen field, the reputation they have established within that field and the respect they have garnered amongst their professional colleagues, associates and adversaries.

Accordingly, in order to foster excellence in tribunal adjudication, the following principle should be added to the guidelines as a basis for appointments to administrative tribunals:

- **Professional Contribution, Reputation and Esteem:** Appointees with appropriate skills and qualifications will also be assessed on the basis of contribution to their profession, reputation in their chosen field and respect garnered amongst professional colleagues, associates and adversaries.

An administrative tribunal's enabling legislation may specify the professional skills and experience required for particular appointments. For example, the Review Board, established under the *Criminal Code* to assess the fitness of individuals with a mental illness to stand trial, must include a chair who is a judge or who is qualified for appointment as a judge. The Review Board must also include a panel member who is a psychiatrist registered to practice in the province.[9] More often than not, such statutory criteria are limited in nature. Because of these limitations, it is incumbent on either government or administrative tribunals to develop comprehensive profiles of expectations and core competencies.

Until recently, there has not been a routine practice of setting out, in policy, selection criteria and position descriptions across the province's system of administrative tribunals. These tools are important cornerstones of accountability. Selection criteria can be used to establish the baseline qualifications an applicant must meet. They allow the selection panel to evaluate applicants more impartially and to determine which applicants have the basic qualifications necessary to carry out the position's duties.

Position descriptions define the dimensions of a job and the knowledge, skills and personal attributes required to carry out the work successfully. The functions of a position description are to:

- provide applicants with an understanding of what the job requires before applying for or accepting a position;
- provide recruiters, selection panels and tribunal chairs with a benchmark against which the attributes of all applicants can be assessed and against which future performance can be measured;
- reinforce, for the public, the public sector and individual applicants, the enduring principle of appointment on merit.

[9] The Review Board is constituted under section 672.38 of the *Criminal Code* for the purpose of making or reviewing decisions about individuals who have been accused of a criminal offence and found either not criminally responsible by reason of mental disorder or unfit to stand trial. The statutory qualifications in this instance are more explicit and express than the qualifications for most other administrative tribunals.

While each position is likely to have unique qualities and characteristics, there are also common expectations about core competencies that would apply across the administrative justice system. This is an area where collaboration between administrative tribunals and government would be fruitful, leading ultimately to the identification of core selection criteria and position descriptions.

As discussed earlier in the section on needs assessment, recruitment and selection strategies should be assessed to ensure they meet the following criteria:

Competency

- Will the selection criteria and position descriptions be effective in attracting the most competent individuals to apply for the positions?

Transparency

- Have the requirements for the positions been established objectively?
- Would it be clear to an interested member of the public what the positions entail and what qualifications a person must have to be considered for appointment?

Fairness

- Is there any evidence of unfairness or bias in the way in which the selection criteria and position descriptions are set out?
- Do the selection criteria and position descriptions bear a reasonable and realistic relationship to the needs of the tribunal, the duties to be performed and the environment within which the tribunal operates?

Flexibility

- Do the selection criteria and position descriptions allow for discretion so that well-qualified applicants can be recruited and appointed even if their qualifications are not in strict compliance with the stated requirements?

Affordability/Efficiency

- Will the use of the proposed selection criteria and position descriptions contribute to the effectiveness and efficiency of the recruitment process by clarifying who should and should not apply?

Seeking and Selecting Candidates

An effective recruitment and selection process must attract the best applicants, engage applicants in a screening process that is thorough and fair and lead to appointment decisions that are beyond reproach. Each of these requirements is discussed further below.

The Search

A clear understanding of a tribunal's mandate – coupled with a strong sense of its organizational culture and operating environment – are critical factors in determining how best to attract qualified applicants for positions as tribunal chairs and members. Potential appointees can be identified in a variety of ways, from self-identification to active recruitment by public officials. Discretion on the part of recruiters is essential. In some segments of the administrative justice community, for example, even the hint of a public or shared awareness of who is interested in, or being considered for, a certain position may be prejudicial to both the tribunal and the interested candidate.

Specific search techniques must be chosen to complement and enhance the role and reputation of the administrative tribunals they are designed to serve. These techniques may be simple and straightforward or more time-consuming and complex. They may range from quiet recruitment by word of mouth to elaborate nation-wide searches through search consultants or advertising in newspapers and professional journals. The choice of techniques will be determined by circumstances at the time, including the availability, costs and likely effectiveness of various techniques and the time available to complete the recruitment process. Often a variety of techniques will be selected. Whatever techniques are chosen, the goal is to ensure that the best and most qualified candidates are identified and considered.

Publicizing Vacancies

Vacancies may be advertised on a government or tribunal website, in a newspaper, in a professional journal or in a newsletter circulating within the administrative justice community. If a vacancy is advertised in a public forum, the following considerations should be taken into account:

Method of advertisement

- Will the preferred method of advertisement reach the largest and most appropriate pool of potential applicants?

Closing date

- Will the proposed publication date give potential applicants a reasonable time and opportunity to apply?

Completeness

- Does the proposed advertisement give potential applicants enough information to make a decision about whether they are eligible and interested in being considered, for the position?

Using Existing Inventories

In addition to search techniques that are designed to reach out to as-yet-unidentified candidates, eligibility lists may have been compiled in previous competitions or as part of a centralized bank of information on individuals who have already expressed an interest in particular types of appointments. Existing inventories may be useful as a supplement to direct recruitment if timing is a critical factor or if the position's requirements are of a more common or generic nature. If inventories are compiled, they should be kept up to date and their existence should be made known to those who would use them.

Screening and Interviewing

Screening and interviewing are key components of an effective recruitment and selection strategy. Whether the process involves one or a number of candidates, the overall objective is to ensure that the best candidate is appointed and that this decision can withstand public scrutiny. The screening process itself must treat all applicants with respect and in the same fair, transparent manner.

Choosing a balanced and representative screening panel is also critical. The screening panel should be familiar with the selection criteria, the job description, the functions and mandate of the tribunal and, where appropriate, should participate in the development of the shortlist. It is rarely the paper qualifications of an applicant that are or should be determinative. As the Law Reform Commission of Canada has pointed out:

> *…..one can weigh and total all the "paper qualifications" of respective candidates and still miss crucial attributes, which cannot be quantified – leadership, flair for the task, sensibility and judgment. These qualities will have to be based on reputation, that is, the judgment of friend and foe alike as well as the prospective candidate's likelihood of getting the job done with as little turmoil and acrimony as possible in the circumstances in which it needs doing.*[10]

The choice of screening techniques may include interviews, the review of previous work samples, situational exercises, written tests and the review of past accomplishments and experience. Whatever techniques are selected, the assessment methods must be able to produce results relevant to all the skills and qualifications required.

[10] Law Reform Commission of Canada. *Independent Administrative Agencies (1980)*, Working Paper 25, pp. 161-62.

Due Diligence

Due diligence must be a formal component of every appointment process. Its purposes are to verify and validate the bona fides of every individual who is being considered for appointment to public office. Depending on the nature and sensitivity of the position in question, appropriate due diligence may involve confidential discussions with colleagues and peers, reference checks, background checks and the external confirmation of credentials and qualifications.

References are an essential source of information about a candidate's character, past performance and accomplishments. In exceptional circumstances, reference checks may be the only source of information on a given qualification. However, reference checks are most often used – and should be used – to corroborate, clarify and add to information that has been gathered from other sources.

Candidates for appointment are often drawn from the community of professional advocates who appear before particular administrative tribunals. These individuals should be chosen not only on the basis of skills and personal qualities but also on the basis of contribution to their profession, reputation in their chosen field and respect garnered amongst professional colleagues, associates and adversaries. It is frequently the chair, rather than the minister or a government official, who is most likely to have appropriate ties to a tribunal's professional community and is thus able to seek out and obtain confidential and frank assessments of a candidate's professional contribution, reputation and esteem. Accordingly, for these tribunals, it may be appropriate to assign responsibility for vetting and due diligence to the tribunal chair rather than to the minister's office, the ministry or a central agency of government. In these circumstances, the role of government should be to ensure that the tribunal chair has carried out the required due diligence.

The Decision

The screening and interview process may lead to one of two types of decisions. On the one hand, the selection panel may have the authority to choose the most suitable candidate and make an appointment or an appointment recommendation directly. On the other hand, the selection panel may be required to send a recommended or ranked list of qualified candidates to the government for final decision and confirmation.

Either way, the decision making process should be concluded in as timely a fashion as possible, with appropriate notices and communications to the successful appointees, the other candidates, the administrative tribunal, its staff and the wider community of stakeholders.[11]

Assessing the Recruitment and Selection Process

An assessment of the recruitment and selection process should be carried out on a regular basis and should address the following questions:

Competency

- Did the process allow for the identification, recruitment and screening of the best candidates for the positions?

Transparency

- Were the steps in the recruitment and selection process established objectively?
- Would it be clear to an interested member of the public how and when the positions would be filled?

Fairness

- Did all qualified applicants have an opportunity to be considered for the positions?

Flexibility

- Did the recruitment and selection process have the flexibility required to address any unexpected contingencies that arose?

Affordability/Efficiency

- Was the recruitment and selection process cost effective in light of its outcome?

Recommendations for Recruitment and Selection

In order to support the development of an orderly recruitment and selection process, it is recommended that an annual appointment plan be prepared for each administrative tribunal setting out in advance:

- **the respective roles and responsibilities of government and tribunals;**
- **the number of vacancies anticipated in a given year including the number to be filled by recruitment efforts and renewals;**
- **the types of positions to be filled, whether chairs or members and whether full time or part time;**

[11] The current policy of the Board Resourcing and Development Office is to finalize appointments 30 days prior to their effective date in order to allow lead time from training and orientation.

- **the kinds of recruitment and outreach activities that will be required, including their potential costs;**
- **the critical timelines from initiation to completion for key deliverables and appointment decisions.**

Within the framework of the annual appointment plan, it is recommended that a needs assessment be prepared or updated each time tribunal appointments are required.

It is recommended that tribunals have the capacity to make a variety of appointments tailored to meet their individual needs and circumstances. Where appropriate, it should be possible to make appointments on a full time, part time or contractual basis. Further, cross-appointments should be encouraged where the required adjudicative expertise is transferable and it would not be contrary to the public interest to do so.

It is recommended that job descriptions be developed for administrative tribunal appointees.

It is recommended that recruitment and selection be based on open, transparent and competitive processes that are proportionate to the nature of the position being filled and subject to monitoring and auditing by the Board Resourcing and Development Office.

TERMS AND CONDITIONS OF APPOINTMENT

Administrative tribunals are subject to the inherent supervisory jurisdiction of the courts. Over the course of many years, courts have exercised this jurisdiction by reviewing tribunal decisions to determine whether tribunals have acted within the limits of their legal mandates and whether, in reaching their decisions, tribunals have complied with the principles of natural justice.[12] Recently, courts have also been asked to rule on whether the form and manner of an individual's appointment to an administrative tribunal has the necessary indicia of institutional independence to protect the appointee from the real or perceived influence of the executive branch of government. Central to the most recent cases are questions about an appointee's security of tenure and financial security.[13]

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12 The role of the courts in reviewing the decisions of administrative tribunals is the subject of a separate background paper, Standard of Review on Judicial Review or Appeal, released in December 2001, and a report, Providing Administrative Tribunals with Essential Powers and Procedures, released in July 2002. Both are available through the Administrative Justice Project's website at http://www.gov.bc.ca/ajp.

13 See, for example, *Ocean Port Hotel Ltd.* v. *British Columbia* 2001 S.C.C. 52, *Wells* v. *Newfoundland* (1999), 46 C.C.E.L. (2d) 165 (S.C.C.), 2747 – 3174 *Quebec Inc.* v. *Quebec (Regie des permis d'alcool)*.

The relationship between the independence of tribunal members in exercising their quasi-judicial powers and the overall accountability of tribunal chairs to government for the effective management and operation of administrative tribunals, raises significant policy questions for government. In this respect, courts have asked, and in some respects have answered, the following questions:

- How should tribunal members be appointed and by whom?
- What is the appropriate length and form of their tenure?
- When can a tribunal member be removed from office and by what means?

Until recently, government did not have the benefit of the courts' perspective as a guide to the answers to these types of questions. In fact, legislation was often developed on a case-by-case basis. In the majority of circumstances, statutory provisions for term and tenure were more likely to reflect the perspectives of the individuals drafting the legislation than the considered or systematic perspectives of a larger or more representative group of public policy makers. As a consequence of this ad hoc approach, an extraordinarily diverse array of provisions for term and tenure is now in place.

Given this history, it is timely and appropriate to carry out a critical examination of current circumstances and to identify principles supporting a more transparent, coherent and comprehensible approach to term and tenure in administrative tribunals.

Term and Tenure

Provisions governing term and tenure for tribunal appointees are found in a variety of instruments including:

- a tribunal's enabling legislation;
- legislation of general application (*Interpretation Act*, *Public Service Act*, *Public Service Benefit Plan Act*, *Public Sector Employers Act*);
- Orders in Council and ministerial orders;
- regulations and directives;
- policy documents that set out government's expectations with respect to administrative matters.[14]

The most common forms of tenure are appointments at pleasure, appointments during good behaviour and appointments for fixed terms. In a limited number of cases, an appointment to an administrative tribunal may run for the course of an appointee's working life.

General Provisions for Term and Tenure – the *Interpretation Act*

The *Interpretation Act* is a general statute that applies where no other statute has express provisions covering the same matters. Sections 20 and 22 of the Act deal with the appointment and tenure of public officers who include, by definition, the chairs and members of the province's administrative tribunals. Sections 20 and 22 apply to any appointing authority whether Cabinet, the host minister or the tribunal chair.

If a tribunal's enabling legislation is silent on the issue of appointments or is incomplete or unclear, the *Interpretation Act* sets out, completes or clarifies the powers of the appointing authority to determine an appointee's term and tenure.

Section 20(1) of the *Interpretation Act* establishes a presumption that, unless otherwise specified in an agency's enabling legislation, public officers hold office during pleasure.

The authority to appoint a public officer also includes the authority to set the terms and conditions of the appointment. If Cabinet or a minister has the authority to appoint the chair of an administrative tribunal, the same party also has the authority to set terms and conditions. Section 22 of the *Interpretation Act* provides:

> 22 Words in an enactment authorizing the appointment of a public officer includes power to do the following:
>
> (a) set his or her term of office;
>
> (b) terminate his or her appointment or remove or suspend the public officer;
>
> (c) reappoint or reinstate the public officer;
>
> (d) set the public officer's remuneration and vary or terminate it;
>
> (e) appoint another in his or her place or to act in his or her place;
>
> (f) appoint a person as the public officer's deputy.

Appointments At Pleasure

The concept of "at pleasure" appointments is an old one. An appointment during pleasure, with no other express appointment terms, means that the appointment has no set term and that the appointing order may be rescinded at any time without notice, cause or compensation. An appointment at pleasure offers little or no formal security of tenure, although it may run indefinitely in the absence of an express expiry date in the appointing instrument.

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[14] See, for example, Government Management Policy Summary, (March 1998), Treasury Board Directive 1/00 (pursuant to Sections 4 and 27 of the *Financial Administration Act*).

A number of statutes do not set express appointment terms. For tribunal members or chairs appointed under these statutes, appointment terms would be either at pleasure (by virtue of the operation and application of section 20 of the *Interpretation Act*) or for a term fixed by the appointing authority (under section 22 of the Act).

Some examples of statutes without express appointment terms are:

> ***Assessment Act*** (Property Assessment Appeal Board)
>
> 43(6) The Lieutenant Governor in Council may determine the terms of appointment, duties and remuneration of members, and the terms, duties and remuneration may be different for different members.
>
> ***Petroleum and Natural Gas Act*** (Mediation and Arbitration Board)
>
> 19(1) The Mediation and Arbitration Board is continued, consisting of a chair, vice chair and no more than 7 other members, each appointed by the Lieutenant Governor in Council….
>
> ***Motor Carrier Act*** (Motor Carrier Commission)
>
> 31(1) The Motor Carrier Commission is continued, consisting of not less than 7 persons who are to be appointed by the Lieutenant Governor in Council and hold office during pleasure….
>
> (8) The Lieutenant Governor in Council must set the remuneration of the commissioners and the terms and conditions of their appointments.

It has been argued that, where a person is appointed as an adjudicator at the pleasure of the executive branch of government, that person does not have the degree of independence necessary to carry out his or her adjudicative functions in an appropriate manner – that is, in an impartial way and at arm's length from the executive. The Law Reform Commission of Canada in its 1980 working paper on independent administrative agencies characterized this dilemma in the following way:

> *Unlike judges, who are appointed during good behaviour to a statutory age of retirement, members of most independent agencies are appointed for diverse terms pursuant to the various enabling Acts; those who are not may be appointed "at pleasure". This can create uncertainty in the minds of agency members concerning subsequent employment opportunities. The fact that the career of the member of an agency may depend upon other government appointments together with the fact that the Cabinet itself determines salary ranges and annual increments, means that agency members may feel (or may be thought by the*

> *public to feel) subjected to heavy political pressures owing to their ongoing scrutiny by the government of the day*.[15]

The Supreme Court of Canada in *Ocean Port Hotel v. British Columbia* considered whether the practice of appointing members at pleasure to British Columbia's Liquor Appeal Board was inconsistent with the standard of independence required by the *Liquor Control and Licensing Act*. In a unanimous decision of the court, Chief Justice McLachlin stated:

> *In my view, the legislature's intention that Board members should serve at pleasure, as expressed through s. 20 (2)(a) of the Act, is unequivocal. As such, it does not permit the argument that the statute is ambiguous and hence should read as imposing a higher degree of independence to meet the requirements of natural justice, if indeed higher standards is [sic] required. It is easy to imagine more exacting safeguards of independence – longer, fixed-term appointments; full time appointments; a panel selection process for appointing members to panels instead of the chair's discretion. However, in each case one must face the question: "is this what the legislature intended?" Given the legislature's willingness to countenance "at pleasure" appointments with the full knowledge of the processes and penalties involved, it is impossible to answer the question in the affirmative…Where the intention of the legislature, as here, is unequivocal, there is no room to import common law doctrines of independence, however inviting it may be for the Court to do so*.[16]

However, the court also noted that different considerations may apply to administrative tribunals which engage a *Charter* right to an independent tribunal under sections 7 or 11 (d).[17]

Appointments during Good Behaviour

An appointment "during good behaviour" means that an incumbent may only be removed from office for cause or incapacity. Unlike an appointment at pleasure, where removal is at the discretion of government, an appointment during good behaviour offers a high degree of security of tenure.

Appointments during good behaviour are not common in the provincial public sector. Section 17 of the *Provincial Court Act* establishes this standard for provincial court judges. Members of the purchasing commission, a public body outside the Terms of Reference for the Project, are appointed during good behaviour.

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15 See Law Reform Commission of Canada, supra., pp. 163-164.

16 *Ocean Port Hotel v. British Columbia*, 2001 S.C.C. 52, at para. 27.

17 Ibid., at para 29.

The Public Service Appeal Board is the only provincial administrative tribunal whose members are appointed during good behaviour. Significantly, though, the length of the term is limited to three years. Section 16 of the *Public Service Act* provides that:

> 16(3) A member of the appeal board appointed under subsection (2) holds office during good behaviour for a term not exceeding 3 years and serves on a full or part time basis as the Lieutenant Governor in Council may order.

In a 1995 review of federal administrative agencies, the Honourable Marcel Masse observed that appointments during good behaviour are normally reserved for members of "quasi-judicial or administrative tribunals which have adjudicative functions…where independence from government is crucial".[18] Masse recommended that appointees to most administrative agencies continue to serve at pleasure and that appointments during good behaviour be limited to those public offices where the need for independence and impartiality justifies it. No formal legislative steps were taken by Parliament to implement Masse's recommendation, although current federal policies permit both at pleasure appointments and appointments during good behaviour.[19]

Term for a Working Life

"Term for a working life" means that an incumbent remains in office until a prescribed age. Term for a working life is extremely rare in the provincial public sector but is permitted in statutes such as the *Coroners Act*. Section 1 of that Act provides:

> ***Coroners Act*** (Coroners Service)
>
> 1(2) A coroner ceases to hold office on reaching 65 years of age, but the Lieutenant Governor in Council may extend the coroner's term for any period not beyond the date of the coroner's 70th birthday.

When combined with an appointment during good behaviour, term for a working life offers the highest level of independence and greatest security of tenure available to a public officer under provincial legislation. Provincial court judges enjoy this form of term and tenure. They are appointed during good behaviour and remain in office until they reach 70 years of age.

The Supreme Court of Canada recently awarded damages to a person appointed to an administrative board during good behaviour until the age of 70 years. The appointment ended

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18 Marcel Masse. Agency Review: Final Report. Ottawa: Office of the President of the Queen's Privy Council of Canada, February 1995, p. 5.

19 Canada. "Terms and Conditions of Employment for Full time Governor in Council Appointees", June 1997.

prematurely after the board was reconfigured by legislation.[20] The court found an employment-like relationship between the government and the appointee and applied general principles of contract law to the relationship. In essence and subject to a duty to mitigate, the appointee was entitled to compensation to the end of the term and to damages for breach of contract in the absence of an express legislative provision that removed his right to compensation.

Fixed Term Appointments

By far the most common approach to appointment terms is to fix them, either in legislation or in the terms of an appointing order or agreement. The length of the fixed term varies, generally within a range of three to six years. Under some statutes, there may also be an upper limit on the number of times an individual can be reappointed.

The following examples illustrate how fixed terms have been addressed in the enabling statutes for several administrative tribunals:

> ***Expropriation Compensation Act*** (Expropriation Compensation Board)
>
> 53(2) The chair and vice chair
>
> (a) must be appointed for a 5 year term, and
>
> (b) may be reappointed for further terms, none of which may exceed 5 years.
>
> ***Financial Institutions Act*** (Financial Institutions Commission)
>
> 202(4) The chair and the other members of the commission appointed by the Lieutenant Governor in Council may be appointed
>
> (a) on conditions, including remuneration, and
>
> (b) for terms of office, each not exceeding 3 years, that may vary for different members.
>
> ***Land Reserve Commission Act*** (Land Reserve Commission)
>
> 4(5) The term of office of a member is during pleasure but, except for the chair, must not exceed 4 years.

The courts have found that adjudicators need not have the same security of tenure as judges in order to effectively safeguard their independence and impartiality. In articulating this principle,

[20] *Wells* v. *Newfoundland* (1999), 46 C.C.E.L. (2d) 165 (S.C.C.).

the Supreme Court of Canada ruled in 1996 that:

> *The minimum requirements for independence do not require that all administrative adjudicators, like judges of courts of law, hold office for life. Fixed term appointments, which are common, are acceptable. However, the removal of adjudicators must not be simply at the pleasure of the executive*.[21]

The Ontario Court of Appeal recently considered the relationship between fixed term appointments and the power to remove at pleasure. The court found that three vice chairs of the Ontario Labour Relations Board were entitled to financial compensation, but not to reinstatement, when their three-year appointments were revoked mid term.[22] As a matter of statutory interpretation, the court held that the general legislative power to appoint and remove at pleasure was superceded by a provision in the Order in Council appointing the vice chairs for fixed terms. In this respect, there appears to be emerging judicial support for appointments to administrative tribunals that are made for fixed terms and that continue during good behaviour rather than at pleasure.[23]

While the courts have determined that some appointments with fixed terms provide the safeguards necessary to protect the independence of adjudicators, this question has not been fully and finally resolved. In a case that was, at the time of this writing, the subject of an application for leave to appeal to the Supreme Court of Canada, the Montreal Bar Association has challenged the provisions of Quebec's provincial tribunal on the grounds that the combination of a five year initial term and a process for reappointment do not provide sufficient guarantees of independence.[24]

Staff Appointments

The focus of this report is on the appointments of chairs and members to administrative tribunals. However, there is also a wide variation in practice for the appointment of administrative tribunal staff, particularly with respect to whether the *Public Service Act* applies and whether and to what extent the provisions of public sector pension and benefits legislation apply. This area should be examined and reviewed in the future.

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21 2747 – 3174 *Quebec Inc. v. Quebec (Regie des permis d'alcool)* (1996), 140 D.L.R. (4th) 577 (S.C.C.).

22 *Hewat* v. *Ontario* (1998), 35 C.C.E.L. (2d) 32 (Ont. C.A.).

23 Katrina M. Wyman discusses several recent cases in "The Independence of Administrative Tribunals in an Era of Ever Expensive Judicial Independence" (2000/2001) 14.1 C.J.A.L.P. at pp. 108 - 111.

24 *Barreau de Montreal* c. *Quebec (Procureur general*) (1999), [2000] R.J.Q. 125 (S.C. Quebec).

Assessing the Framework for Term and Tenure

The earlier standard of appointments at pleasure has given way to a more widespread use of fixed terms as the basis for appointments to administrative tribunals. A number of factors have contributed to this shift. First has been the recognition that appropriate tenure is necessary in order to attract and retain the highly skilled practitioners who make the system of administrative justice work. Second has been the development of case law enhancing and supporting the independent, quasi-judicial functions of administrative tribunals and the need to provide security of tenure for tribunal decision makers. Third has been maturing and professionalization within the administrative justice system itself. While there is certainly a strong element of public service in the work that adjudicators do, there is also an emerging awareness that, like their counterparts in the senior ranks of the public service and on the bench, full time adjudicators make significant career choices and commitments when they accept appointments to administrative tribunals. In addition, they must possess specialized expertise and competence in order to carry out their adjudicative duties and responsibilities effectively.

The current approach to term and tenure across the administrative justice system is inconsistent, confusing and uncertain. The immediate challenges for government are to:

- establish a framework for term and tenure that will allow individual tribunals to achieve the appropriate balance between the adjudicators' need for independence in decision making and the public sector's need for administrative accountability;
- ensure that ministers, ministry staff and appointees share a clear and common understanding of appointment terms, expectations and obligations.

Balancing the Values of Independence and Accountability

The first and most fundamental step in establishing an effective framework for appointments is to specify the appropriate term and tenure for the chairs and members of the province's administrative tribunals. Term and tenure need not be the same for the chair and the tribunal's members or for each tribunal member. Similarly, term and tenure need not be the same across all tribunals. However, as a matter of principle, every person who accepts an appointment to an administrative tribunal should know with certainty how long the term will be, whether and on what conditions the term can be renewed and how and under what circumstances the term can be ended. In this respect, government should establish principles for term and tenure and guidelines for their application. Host ministers and tribunal chairs can then determine how those principles and guidelines are to be applied in individual circumstances.

The specific characteristics of each tribunal and the environment within which the tribunal operates will have a significant influence on decisions about what terms and tenure are appropriate. For example, a tribunal might make a considerable investment in training its adjudicators and then not realize the full potential of that investment if adjudicators, who build up significant experience and expertise, are then lost to the system because terms are short and opportunities for renewal are limited.

In this respect, circumstances that support shorter or nonrenewable terms would include:

- the ready availability of a large pool of individuals with the interests, skills and qualifications the tribunal's work requires;
- the ready availability of suitable individuals who do not need extensive training or orientation to become effective tribunal members;
- a workload that involves more generic issues of a less technical or specialized nature;
- a decision making environment where discretion is relatively narrow or the opportunities for its exercise are clearly defined in the relevant legislation and policy;
- an environment where a range of outcomes is expected and can be tolerated.

Circumstances that support longer or renewable terms would include:

- a known shortage of individuals with the interests, skills and qualifications the tribunal's work requires;
- a knowledge that new appointees require extensive training and orientation;
- a knowledge that all appointees require ongoing opportunities for the development and maintenance of professional or technical competence;
- a workload that involves legal issues or highly technical issues of a specialized nature;
- a decision making environment where discretion is broad and the opportunities for its exercise are not precisely defined in the relevant legislation and policy;
- an environment where a range of outcomes is undesirable or cannot be tolerated.

Developing Shared Understandings about Terms, Expectations and Obligations

The second step in establishing an effective framework for appointments is to ensure that appointing instruments set out clear terms, expectations and obligations. At present, there is a decided lack of coherence and clarity in approaches to term and tenure for tribunals, whether set out in legislation or as implemented in practice.

Uncertainty works to the disadvantage of both appointees and government. It causes delays, increases costs and leaves open the possibility of unnecessary litigation. The potentially arbitrary and uncertain characteristics of appointments at pleasure can lead to the adoption of what are essentially private arrangements, establishing additional terms for tenure and compensation in the event of termination. Furthermore, in the absence of the application of sound management

principles to issues of term and tenure, it is often unclear how a tribunal's adjudicative independence and administrative accountability can be made to work in a practical and realistic way.

It may very well be necessary and appropriate, from a public policy perspective, to provide discretion in defining precise conditions for term and tenure in order to respond effectively to prevailing market conditions in certain sectors. However, the overriding goals of transparency and openness will not be realized – or will be frustrated – where the framework for term and tenure does not support the application of sound management principles. Appointees, host ministers and their staff need clarity about appointment terms and conditions and the public should demand no less.

Reappointments

Unless appointments are open-ended, with no term specified, questions about reappointments will arise and recur. As a general principle, reappointment decisions should be linked to a tribunal's overall retention and succession strategies and be made in a timely, fair way. Performance evaluations are also essential and should be considered before reappointment decisions are made.

The Role of the Chair

British Columbia's Public Agency Appointment Guidelines state that, as a general rule, the chairs of public agencies should be involved in the reappointment process, providing advice as to whether an appointee has performed satisfactorily and should be considered for reappointment.

The role of a tribunal chair in the reappointment process should be clearly defined, strong and parallel to the chair's role in recruitment and selection. Professional expertise and competence are core requirements for tribunal members and chairs are in the best position to:

- appreciate the independent adjudicative role of tribunal members;
- evaluate the members' performance in those roles;
- advise government on whether and for how long appointments should be renewed.

In certain circumstances, it may also be appropriate for a tribunal chair to recommend the addition of specific performance-related terms and conditions to an appointing order or agreement.

Reappointment Policies

The Public Agency Appointment Guidelines state that, under normal circumstances, individuals may be appointed for an initial term of one year and may be eligible for reappointment for two further terms of two and three years each. The guidelines also suggest that there may be circumstances where it would be appropriate to consider extensions beyond six years.

In a 1990 report to the Canadian Bar Association on the independence of federal administrative tribunals, Ed Ratushny raised, but did not answer, the following questions about appointments and reappointments:

> *Is there a possibility, towards the end of a term, that decision making will be guided by the thought of re-appointment? What steps might be taken to guard against that possibility? Is it fair to bring someone to a job, perhaps from across the country, and, in the absence of cause, not to renew his or her term?*[25]

Several Canadian provinces, New Zealand and the United Kingdom have adopted the practice of limiting the number of times an individual may be reappointed to an administrative tribunal. More often than not, policy specifies a maximum term of 10 to 15 years.

In contrast, the Australian Administrative Review Council concluded that the advantages of permitting successive reappointments outweigh the advantages of restricting reappointments – provided that selection criteria are public and open competitions are held. The council recommended that tribunal members seeking reappointment be required to reapply on the expiry of their terms in a competitive selection process. As recommended by the council, incumbents would then be assessed for suitability against the same selection criteria as new applicants.[26]

These examples illustrate the diversity of views about what should happen when an appointment expires. Certainly, the enabling legislation for administrative tribunals offers little by way of consistency in approach and no clear consensus could be said to have emerged from recent discussions about these issues with public officials, tribunal chairs and members. At a minimum, however, tribunal chairs should have some means of evaluating performance as a basis for advising government on reappointments.

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25 Ed Ratushny. Report of the Canadian Bar Association Task Force on the Independence of Federal Administrative Tribunals and Agencies in Canada, September 1990, p. 21.

26 Australia Administrative Review Council. “Report to the Minister of Justice. Better Decisions: Review of Commonwealth Merits Review Tribunals”, Report No. 39, August 1995, p. 84.

Initial or Probationary Appointments

It may be desirable to make short-term appointments of a probationary nature at the outset so appointees and tribunals can mutually assess their compatibility and fit. This approach can accommodate a graceful and respectful exit for an appointee when there is not a good fit.

At least one administrative tribunal has adopted a practice of entering into probationary-style agreements with potential candidates outside its formal appointment structure. Candidates who perform well are then recommended for formal appointments at the end of their probation. This practice reflects the interest that some administrative tribunals have in providing a formal opportunity for early reassessment when subsequent appointments have long or unspecified terms.

If initial or probationary appointments are considered, care should be taken to ensure that these appointments are consistent with requirements for independence and security of tenure.

Subsequent Appointments

The authority to reappoint to subsequent terms may be set out in enabling legislation. Where the statute is silent, renewal is at the discretion of the appointing authority. The three examples which follow illustrate the range of provisions currently found in enabling statutes for the province's administrative tribunals:

> **Reappointment prohibited** - *Parole Act* (Board of Parole):
>
> 2(4) A member of the board must not be reappointed except as chair.
>
> **Reappointment permitted for one term only** - *Human Rights Code* (Human Rights Tribunal):
>
> 31(5) A member of the tribunal is eligible to be reappointed for one additional term of five years.
>
> **Reappointment permitted for an unspecified number of additional terms** - *Utilities Commission Act* (Utilities Commission):
>
> 2(3) A person whose service as a commissioner has ended may be reappointed.

Reappointments and Performance Reviews

The expiry of a time-limited appointment may provide the impetus for a host minister or tribunal chair to carry out a performance review. While it is certainly appropriate to carry out a performance review before a time-limited appointment is renewed, this is not the only time when

performance should be addressed. In fact, timing a performance review to coincide with the expiry of an appointee's term may indicate unwillingness or reluctance on the part of a tribunal chair to take a proactive role in tribunal management.

Performance reviews should be an integral part of every tribunal's ongoing accountability. As a matter of sound policy and best practices, the timing of performance reviews should not be linked exclusively to the timing and cycle of reappointments. In this respect, if legislative amendments are required to clarify the management roles and responsibilities of tribunal chairs, this is the preferred route to ensure full and proper accountability.

Notice of Decision not to Reappoint

It is not uncommon for administrative tribunals and appointees to experience great uncertainty as appointment terms draw to a close. In some circumstances, appointments have been known simply to lapse. Some uncertainty is inevitable as Cabinet is often involved in making final decisions. However, most such Cabinet decisions are based on recommendations from ministers, staff or tribunal chairs – and these recommendations can usually be made well in advance and communicated, on a confidential basis at least, to affected appointees and tribunals.

The basic principles of fairness that inform tribunals' work should also attach to decisions not to reappoint. Appointees, particularly in full time positions, should have as much advance notice as possible if recommendations are going forward not to reappoint. As part of its draft Appointment Agreement, the province of Ontario has proposed a notice period of three months and stipulated that, if notice is not given, full time appointees are entitled to remuneration for three months from the date their terms expire. Under the Ontario proposal, similar provisions would apply on a pro-rated basis to part time appointees.

While Ontario has not implemented its draft Appointment Agreement, Quebec has enacted legislation establishing notice requirements for both government and tribunal appointees. Section 48 of the *Administrative Justice Act* provides that:

> 48. The term of office of a member shall be renewed for five years:
>
> (1) unless the member is notified otherwise at least three months before the expiry of his term by the agent authorized thereof by the government;
>
> (2) unless the member requests otherwise and so notifies the minister at least three months before the expiry of his term.[27]

[27] *An Act Respecting Administrative Justice*, 1996 R.S.Q., c. 54.

Acting or Interim Appointments

In limited circumstances, the capacity to make a short-term, interim appointment would be desirable. It would allow tribunals to adapt to sudden or unexpected changes, to maintain operations through a transitional period or to accommodate approved leaves of absence. Within a broader context of independence and accountability, enabling legislation should provide for this kind of operational flexibility.

Matters Pending when Appointment Ends

Administrative tribunals deal with matters that may be put over or continued at a later time. It is a fundamental principle of fairness that the same adjudicator or panel hear and deal with all of the evidence in each case. Once a hearing has commenced, the matter must either be heard and decided by the same adjudicator or panel or be adjourned and started again.

Appointments can expire before a hearing is concluded. When this happens, it is essential for the tribunal's members to have the capacity to continue their duties until the pending matter is completed. The following examples illustrate how these issues have been addressed for workers' compensation appeals and in matters before the Expropriation Compensation Board:

> ***Workers Compensation Act*** (Appeal Division)
>
> 86(6) Where an appeal commissioner resigns or his or her appointment terminates, he or she may carry out and complete his or her duties and responsibilities and continue to exercise his or her powers as an appeal commissioner, in relation to a proceeding in which he or she participated, until the proceeding is completed.
>
> ***Expropriation Act*** (Expropriation Compensation Board)
>
> 53(7) The chair, vice chair or any other member of the board who resigns his or her appointment or whose term on the board expires may, after the resignation or expiry of the term,
>
> (a) give judgment in a hearing in respect of which he or she was, while holding office, sitting as a member of or presiding over the panel appointed under subsection (4), and the judgment is valid and effective as though he or she still held office,
>
> (b) continue with the hearing of any matter referred to in paragraph (a), and the jurisdiction to hear the matter and give judgment is valid and effective as though he or she still held office.

Assessing the Framework for Reappointments

The institutions of administrative justice have matured, bringing with them a professional cadre of administrative law specialists who appear before them or serve as tribunal adjudicators. The way

in which these professionals are appointed has been largely unaffected by the process of growth and maturation.

It is time to rethink why individuals continue to be appointed and reappointed to serve on tribunals using old, cumbersome and possibly inappropriate practices. Tribunals need to be accessible to the people they serve. They also need highly skilled professional and technical decision makers who make career choices and commitments when they accept tribunal appointments.

Tribunals invest significant time and public resources bringing new appointees to full productivity. Unless new appointees have served previously in an adjudicative capacity in similar tribunals, it is unlikely that their previous training and experience will have encompassed the broad range of skills required to be an effective adjudicator. To address these issues, tribunals will often provide internal mentoring, or support external training programs, to familiarize new appointees with the fundamental principles of administrative law, effective decision writing and administrative practices and procedures. Significantly, in British Columbia, these training programs have been developed by the administrative tribunals themselves through their own initiatives, efforts and associations.

In circumstances where two or three years' experience is required before a tribunal member becomes fully productive, an appointment policy based on terms of five years or less with no renewals can be at least inefficient and quite possibly counterproductive. Such policies may well be appropriate for community-based boards and public advisory bodies where more generalized skills, knowledge and perspectives are required. However, obvious questions arise when these policies are applied to specialized decision making bodies like administrative tribunals.

Choosing the right approach is always a question of balance. Tribunals need renewal and fresh ideas. They also need continuity, stability and the long view that develops through lengthy appointments and tenure. In the normal course of daily and professional life, people move and move on. They change communities, they change careers and they change what they do. In this respect, the question for government is whether it is necessary to establish timelines for administrative tribunal renewal through its powers to limit reappointments or whether it is acceptable to leave the timing of renewals to the normal ebb and flow of professional life. Put another way, the question for government is why it is necessary to make specific provisions for the term of appointments to administrative tribunals when similar provisions are not in place for either the professional public service or the courts. In fact, for both the professional public service and the courts, it is understood and widely accepted that incumbents have indefinite tenure.

The basic principles that apply to decisions about the length of appointments also apply to decisions about whether reappointments should be permitted or considered. These principles are discussed in detail in the Term and Tenure section of this report. In addition, it may be desirable to limit the number of reappointments where there is likelihood that, over time:

- adjudicators will become stale, captive or biased in favour of a particular group of clients or stakeholders;
- as a matter of policy, opportunities for participation should be opened to a wider community or to the public generally.

Similarly, it may be desirable to encourage long-term renewable appointments where there is likelihood that, over time, ongoing appointments will:

- enhance a tribunal's ability to recruit and retain members;
- enhance the tribunal's capacity for decision making, by capitalizing on and protecting its investments in adjudicator training;
- be more efficient and less time-consuming to administer.

Termination and Severance

The distinction between individuals appointed at the pleasure of the Crown and individuals hired under the terms of an employment contract is significant, particularly as it applies to termination and severance. For individuals appointed at pleasure, appointments can be terminated at any time without cause, notice or compensation. In contrast, an employment relationship can only be terminated in accordance with the provisions of the contract and any other applicable laws of general application. In British Columbia, these include the common law, the *Employment Standards Act* or the *Public Sector Employers Act*. For most employees, termination without cause normally requires notice or severance in lieu of notice.

At common law, all public officials were initially deemed to be appointed at pleasure. Over time and with the unionization of the public service, employment contracts have replaced the common law conditions of at pleasure appointments for many public officials. In recent years, the distinction between at pleasure appointees and public sector employees has been blurred in a number of ways. First, the legislature has modified the essential character of at pleasure appointments by introducing the notion of at pleasure appointments for fixed terms and by giving appointing authorities the power to set additional terms and conditions. Second, appointing authorities and at pleasure appointees have entered into agreements with many of the hallmarks of employment contracts. Third, the courts have intervened to provide remedies for at pleasure appointees who were terminated before the end of their fixed terms or were terminated contrary to other conditions of their appointing agreements. Very recently, the Supreme Court of Canada

inferred a contract of employment in the terms of an order appointing an individual to a provincial administrative board.[28]

As a consequence, it is now common for appointees to administrative tribunals to negotiate appointment agreements on an individual basis without reference to consistent, clear or comprehensive policies and standards. In the result, government has no ready capacity to assess or account for its overall potential liability for early terminations and severance.

Severance – Definition and Application

Within the employment law context, severance means "a payment made in lieu of the notice period".[29] Notice and severance are not required when:

- an employee is terminated for cause;
- an employment contract with a definite term comes to an end;
- an employee resigns voluntarily or retires.

The extent of government's general obligation to pay severance to members of administrative tribunals has not been addressed completely and directly, either by the courts or by the legislature.

On the one hand, courts have established the principle of institutional independence for members of administrative tribunals. This principle includes security of tenure and financial security, both intended to protect tribunal members from dismissal without cause by the executive branch of government. While the courts have determined that different considerations may apply to tribunals which engage a *Charter* right to an independent tribunal under sections 7 or 11 (d), it cannot be determined with certainty at this time:

- which tribunals have jurisdiction to apply and interpret the *Charter* and hence which tribunal members would be subject to the court's protection in the event they were terminated without cause;
- whether and to what extent other tribunals also require institutional independence and security of tenure.

On the other hand, the *Public Sector Employers Act* and the Employment Termination Standards Regulation[30] establish severance standards for many non-unionized employees in the public sector. These standards adopt common law principles for severance and override any

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28 See *Wells* v. *Newfoundland*, (1999), 46 C.C.E.L. (2d) 165 (S.C.C.).

29 See for example section 5(2) of the Employment Termination Standards Regulation, B.C. Reg. 379/97.

30 B.C. Reg. 379/97.

inconsistent severance provisions in agreements negotiated between the parties. Maximum severance in lieu of notice is 24 months and terminated employees have a duty to mitigate.

Although the *Public Sector Employers Act* does not apply to justices or to individuals covered by collective agreements, it has not been established with certainty how the Act applies to individuals appointed to administrative tribunals. In the absence of express legislation setting out the severance obligations of government, existing contractual arrangements between appointing authorities and tribunal members are, subject to a duty to mitigate, most likely enforceable.

In moving forward to more open and transparent appointment practices, government should address whether and to what extent it is appropriate to implement common severance standards for administrative tribunals. These standards can be set through policy, through individual enabling statutes or, in a general way, through amendments to the *Public Sector Employers Act*.

Authority to Terminate Appointments

In most circumstances, the person who has the power to appoint also has the power to dismiss. Members of administrative tribunals appointed by Cabinet may be removed from office by Cabinet and ministerial appointments may be rescinded by ministers. Exceptions are rare and must be set out expressly in legislation. For example, under the *Workers Compensation Act*, appeal commissioners negotiate agreements with the chief appeal commissioner but, once appointed, they may only be removed from office for cause by the governors.

> ***Workers Compensation Act*** (Appeal Division*)*
>
> 85(4) An appeal commissioner other than the chief appeal commissioner must be appointed for a term agreed on between the appeal commissioner and the chief appeal commissioner and is eligible for reappointment or extension of his or her appointment, but may be removed by the governors at any time for just cause.

The effect of this provision is to enhance security of tenure for appeal commissioners by transferring authority for termination decisions from the chief appeal commissioner, where it would otherwise reside, to the full board of governors.

Within the administrative justice system, the most secure form of tenure is given to the chair of the Labour Relations Board. While the chair is appointed by Cabinet, section 131 of the *Labour Relations Code* authorizes removal only by the legislature.

***Labour Relations Code* (Labour Relations Board)**

131(1) The chair shall hold office for a term of not less than five years specified by the Lieutenant Governor in Council and shall not be removed before the expiration of that term except by an Act or resolution of the Legislature.

Grounds for Terminating Appointments

The timing and grounds for terminating appointments to administrative tribunals are diverse and include terminations:

- at any time without cause, notice or compensation;
- at any time for cause, with or without notice;
- at any time for misconduct, neglect of duty or incapacity;
- at the end of a prescribed term of appointment.

In individual cases, precise grounds for termination must be determined by examining the enabling legislation, the appointing order and any related appointment agreements. Confusion arises when there is conflict or inconsistency between general terms set out in an Act or Order in Council and more specific terms negotiated as part of an appointment agreement. The courts have confirmed that at pleasure appointments may be terminated at any time. However, where another instrument or agreement specifies a fixed term, the appointee may be entitled to compensation for the term remaining after the termination, subject only to the appointee's duty to mitigate.

In 1994, the British Columbia Court of Appeal found no inconsistency between a statutory provision that an appointment was at pleasure and a provision in an appointing instrument that set a specific date for the expiry of the term of office.[31] In considering how the two potentially contradictory provisions could be made to work together, the court decided that the appointment could be terminated at any time during its term because the appointment was at pleasure. However, the appointee was entitled to compensation for the full term, including the remainder of the term after the date of termination, because the term of office was specified in the appointing instrument.

More recently, the Supreme Court of Canada determined that a person appointed to a provincial board during good behaviour for a fixed term was entitled to compensation for the balance of the term – even though the board was restructured and the position was eliminated before the end of the term. The appointee had a duty to mitigate but was otherwise entitled, under the ordinary

[31] *Preston* v. *British Columbia* (1994), 92 B.C.L.R. (2d) 298 (B.C.C.A).

principles of contract law, to compensation and benefits pursuant to the appointment agreement with the board.[32] In effect, the repeal of the legislation and the premature revocation of the appointment were characterized as breaches of contract, thus entitling the appointee to damages.

Process for Terminating Appointments

Canadian courts have set down basic procedures governments should follow when terminating Order in Council appointments. In a 1990 decision, the Supreme Court of Canada ruled that administrative law principles may be invoked to impose basic fairness requirements on decisions to dismiss public office holders who serve at pleasure, even when these requirements are not stipulated in the relevant statute or employment contract.[33] In deciding to dismiss individuals appointed at pleasure to public office, the court found that decision makers must be cognizant of all relevant circumstances surrounding the employment and its termination. They must ensure that appointees understand the reasons for the termination and have an opportunity to respond and be heard.

Assessing the Framework for Termination and Severance

Arbitrary terminations can have chilling effects, particularly in the administrative justice community where the objective is to provide fair and certain results. Arbitrary terminations can also give rise to litigation alleging unlawful interference with the independent role of administrative tribunals. In recent years, through court decisions and the interrelated activities of government, emphasis has begun to shift from appointments at pleasure to a hybrid range of appointments, often with characteristics similar to or reflecting more conventional employment relationships. It is timely to crystallize government policy and practice so that host ministers, administrative tribunals, appointees and members of the public know – with a high degree of certainty – how, under what circumstances and at what cost appointments to administrative tribunals can be terminated before terms expire. The key components of a termination framework include:

- criteria for determining who should have the power of termination in individual circumstances;
- criteria for assessing and applying appropriate grounds for termination in individual circumstances;
- guidelines for implementing a fair, respectful and reasonable process for making and implementing termination decisions.

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32 *Wells* v. *Newfoundland* (1999), 46 C.C.E.L. (2d) 165 (S.C.C.).

33 See *Knight* v. *Indian Head School Division 19*, [1990] 1 S.C.R. 653.

The key components of a framework for severance include:

- guidelines on appropriate notice periods or severance in lieu of notice;
- guidelines on the range and amount of severance that is fair, reasonable, consistent and affordable.

Assessing Appointment Terms and Conditions

A comprehensive framework for appointments should address preliminary questions about who makes the appointment and for how long. It should also address whether appointees can be reappointed and what should happen when an appointment comes to an end. In this respect, an effective framework for administrative tribunal appointments should further the following strategic goals and address the following questions:

Competency

- Will the terms and conditions of appointment attract a sufficient pool of qualified candidates from which the most competent candidates can be selected?
- Will the terms and conditions of appointment provide the right incentives and protections to qualified candidates so that they can leave and potentially return to other employment on an appropriate basis?

Transparency

- Have the terms and conditions of appointment been established objectively?
- Would it be clear to an interested member of the public how the terms and conditions of appointment are to be applied with respect to particular tribunals and appointments?

Fairness

- Is there any evidence of unfairness or bias in the way in which the terms and conditions of appointment have been set out?
- Do the terms and conditions of appointment establish a common set of expectations and obligations that can be applied evenly and fairly across the administrative justice system?

Flexibility

- Do the terms and conditions of appointment accommodate the diverse needs of individual tribunals thus allowing for principled choices within an appropriate range of options?

Affordability/Efficiency

- Do the terms and conditions of appointment contribute to the overall effectiveness and efficiency of the appointment process by minimizing the length, expense and complexity of appointment negotiations?
- Does the tribunal have the resources to meet its obligations to appointees?

Recommendations for Appointment Terms and Conditions

In order to implement polices and procedures that will further government's strategic goals, it is recommended that the following guidelines for appointments to administrative tribunals be adopted. While there should be a general commitment to the principle of consistency, there should also be sufficient flexibility in practice to allow individual tribunals to adjust or adapt to particular or unusual circumstances. Accordingly, government should:

- **discontinue the practice of making tribunal appointments at pleasure or for the term of an appointee's working life and instead establish fixed term appointments within a range of 3 to 5 years with appropriate provisions for tenure, reappointment, termination and severance;**
- **in appropriate circumstances, permit initial appointments for terms of less than 2 years for the purpose of early performance reviews and assessments;**
- **remove current policy restrictions on the number of subsequent appointments an appointee may expect or accept;**
- **provide capacity to appoint tribunal members on a short-term acting or interim basis for the purpose of maintaining tribunal operations through transitional periods or for accommodating leaves of absence;**
- **establish consistent practices for providing notice to appointees of decisions not to reappoint or to terminate;**
- **clarify in legislation that tribunal members have the capacity to complete deliberations in proceedings that continue after they have resigned or their appointments have lapsed;**
- **initiate a review of current practices with respect to the appointment of staff to administrative tribunals and develop recommendations for further clarification and reform.**

In order to enhance the overall effectiveness of tribunal operations, it is recommended that government provide tribunal chairs with the capacity to delegate responsibilities and duties to other tribunal members.

COMPENSATION AND BENEFITS

No comprehensive framework exists for setting and reviewing compensation levels for appointees to administrative tribunals. Compensation for part time appointees is determined under Treasury Board directives that have been in place since 1990. Compensation for full time appointees is usually negotiated under the general provisions of tribunals' enabling legislation.

Salary ranges for positions in the provincial public sector and for the province's judges are a matter of public record. Within the public service generally, comparable positions are ranked and placed within a grid. Compensation in individual cases is then set within the range for each position and any required negotiations take place within the limits of that range. In each of the

province's courts, compensation for individual judges, other than for senior administrative judges or justices, is the same. This kind of transparency does not exist for appointees to administrative tribunals although, with considerable effort, information on salaries for individual appointees can be obtained.

In the absence of a comprehensive, transparent compensation framework, no formal requirement for public accountability has been established. As a consequence, wide variation in compensation practices has developed. In addition, there is evidence to suggest that, in some cases, separate agreements between the parties have been used to clarify or supplement compensation and benefits available under the limited directives that now exist.

Compensation for Full Time Appointees

In some ministries and for some tribunals, compensation for full time appointees is tied, either formally or informally, to a benchmark – a comparable position within the system of classification for other public sector employees. Benchmarking has the advantage of providing some degree of objectivity and transparency. However, by virtue of the specialized nature of an adjudicator's role and mandate, there are inherent difficulties in making valid or reliable comparisons between adjudicative positions and senior positions in the public sector.

As a matter of practice, benchmarking has not been used on a consistent basis across the administrative justice system.[34] In order to reflect prevailing market conditions, compensation packages have been negotiated outside the few public sector guidelines that exist in situations where the competencies required are highly specialized or in limited supply. Furthermore, where benchmarking is used, compensation has often been tied to the level in place on the date an appointment was made so that subsequent adjustments to compensation can only be made by amending an appointing order. This process is particularly cumbersome where an appointment is made by Order in Council.

[34] The federal government has developed a separate classification system for adjudicators that is distinct from the general public service classification system.

Compensation for Part Time Appointees

Part time adjudicators are paid the daily or per diem rates set by Treasury Board.[35] These rates apply to all provincial agencies, boards and commission and provide what is characterized as an honorarium for an appointee's contribution to public service.

The following rates were set for adjudicators in 1990 and remain in effect:

Position	Per Diem Rate
Chair	350
Vice-Chair	300
Member	250

The work of administrative tribunals is distinct from the more community-service oriented activities of many other provincial agencies, boards and commission. Although these distinctions are reflected in the rates paid to part time tribunal members, current compensation rates are low and bear scant relationship to the qualifications and skills that adjudicators must bring to the work they do. As such these rates may not be fully effective in attracting the widest array of highly skilled individuals.

Many part time adjudicators also maintain active professional practices in related fields like law, labour relations or medicine. To offset low per diem rates, some tribunals have entered into retainer agreements with part time members where the annual volume of cases can be predicted with some certainty. The effect of such agreements is to guarantee the tribunal a larger and more reliable pool of part time adjudicators and to provide greater certainty for individual members with respect to the time commitment and income they can expect as a result of their adjudicative responsibilities.

[35] See Order in Council 806/89. Treasury Board Directive 1/00 states that per diem rates are not intended to compensate for lost income from regular employment and that only one full per diem can be paid to an appointee in each 24-hour period.

Benefits

Benefits like pensions, health care coverage and leave are normally part of any compensation package. For individuals appointed to tribunals, the benefits in their compensation package may be:

- determined at the discretion of the appointing authority under the authority of the administrative tribunal's enabling legislation;
- set out expressly in the administrative tribunal's enabling legislation by reference to other enactments like the *Public Service Benefit Plan Act*;
- where the legislation is silent, determined at the discretion of the Lieutenant Governor in Council or the host minister under section 22 of the *Interpretation Act*.

Given the breadth of this discretion, and as noted with respect to compensation generally, there are wide variations in practice regarding benefits across the administrative justice system.

Establishing a Compensation Framework

A more comprehensive and consistent framework is needed to determine compensation and benefits for appointees to administrative tribunals. This would enhance the overall transparency and accountability of the administrative justice system. The principal objectives of a more comprehensive and consistent approach are to:

- provide a framework that is contemporary and affordable, thus allowing administrative tribunals to attract and retain the qualified individuals they need to fulfill their mandates effectively;
- provide adequate flexibility and discretion within the overall framework so that appointing authorities can address in a timely and realistic way prevailing market conditions and circumstances;
- ensure that the expenditure of public funds is managed effectively within limits that are known and reasonable;
- result in a compensation framework that is fair, understandable, transparent and can be held to full account by the public.

To achieve these objectives, a comprehensive and consistent framework for compensation and benefits should include:

- a system of classification for administrative tribunals that accurately reflects both the complexity of functions that each tribunal performs and the scope and dimensions of the respective responsibilities of chairs and members, whether full time or part time;
- a range of fees for each class of administrative tribunal, for chairs and members and for full time and part time appointees;

- guidelines for administrative tribunals and host ministries in negotiating individual agreements with prospective members and chairs;
- a process for monitoring compliance, approving exceptions and ensuring that the overall compensation framework remains current, relevant and effective.

In establishing appropriate fees and ranges, the following considerations should be taken into account:

- full time or part time nature of the appointment;
- complexity of the functions and expertise required;
- nature of the decision making and the degree of independence required or expected;
- length of time needed to learn the job;
- prevailing market conditions and environmental considerations;
- recruitment and retention issues;
- opportunity costs for appointees in accepting appointments;
- anticipated transition issues and costs associated with post-appointment employment.

Across the public sector, it is common practice to review compensation issues on a periodic basis. A similar practice should apply, in a predictable way, to administrative tribunals. This is not to suggest that a separate compensation council or administrative process should be put in place. In fact, given the relative size of the province's administrative justice system, the number of other mechanisms already in place for reviewing compensation across the public sector – and the limited time and capacity of both government and the administrative justice community to engage in compensation reviews and negotiations – it will likely be more effective and efficient if compensation reviews are linked to one of the processes already in place. In this respect, compensation adjustments could be tied to changes in widely accepted indices or to changes in compensation for selected public sector managers or provincial court judges. Whatever mechanisms are chosen, the approved process should be clearly defined and well understood by host ministers, administrative tribunals, appointees and the public.

Assessing the Compensation Framework

Any proposed changes to the existing framework for establishing and reviewing compensation and benefits for appointees to administrative tribunals should meet the following strategic objectives and address the following questions:

Competency

- Will the proposed framework for compensation and benefits attract a sufficient pool of qualified candidates from which the most competent can be selected?

Transparency

- Have compensation rates, ranges and review processes been defined and established objectively?
- Would it be clear to an interested member of the public how the compensation framework is to be applied with respect to particular tribunals and appointees?

Fairness

- Is there any evidence of unfairness or bias in the way in which the framework for compensation has been set out?
- Does the compensation framework establish a common set of expectations that can be applied evenly and fairly across the administrative system with the result that appointees in similar or comparable positions are treated in the same way?

Flexibility

- Does the compensation framework accommodate the diverse needs of individual tribunals thus allowing for principled choices within an appropriate range of options?

Affordability/Efficiency

- Does the compensation framework contribute to the overall effectiveness and efficiency of the administrative justice system by minimizing the time, expense and complexity of compensation negotiations?
- Are the compensation ranges and per diems reasonable and affordable in the current fiscal climate?

Recommendations for Compensation and Benefits

It is recommended that government review and implement changes to compensation and benefits for tribunal chairs and members in two stages:

- **first, to reflect changes in overall compensation levels since 1990;**
- **second, to define appropriate benchmarks and provide more consistency in and accountability for compensation levels across tribunals.**

INSTITUTIONAL CONSIDERATIONS AND OPTIONS

Earlier parts of this report addressed the substantive components of a comprehensive appointment policy, including recruitment and selection, term and tenure, termination and severance and compensation and benefits. Following is an examination of how appointment policies can be given operational effect through a more precise delineation of roles and responsibilities. The institutional considerations addressed include:

- the respective roles of government and tribunal chairs in the appointment process;
- the organizational options for managing the appointment process;

- the policy instruments that may be used as the basis for agreements between government, tribunals and appointees.

Shared Responsibilities for Recruitment and Selection

In its Public Agency Appointment Guidelines, the Board Resourcing and Development Office has established general rules for agencies and officials involved in making public appointments. The guidelines set out the respective responsibilities of the various parties in the following way:

- **Board Resourcing Development Office**: Sets the appointment guidelines, works with agencies and ministries to develop skills and experience profiles for vacancies, seeks out and screens potential candidates, recommends qualified candidates for appointment and generally oversees and monitors appointments to agencies.
- **Responsible Minister:** Appoints (in the case of Minister's Order) or recommends an appointment (in the case of appointments by Order in Council).
- **Ministry Officials:** Assist or manage the appointment process for the agencies within its domain.
- **Agency:** Prepares the skills and experience profile, recommends candidates to fill vacancies and assists in the recommendation process where appropriate.
- **Candidate:** Provides personal information and acknowledges, by formal signature, duties owed to the agency.

While this statement of roles and responsibilities can be applied generally to the appointment process for administrative tribunals, the role of the chair should be more fully, clearly and separately defined. Government and the tribunal chair should have a common understanding about the chair's role and this issue should be addressed in the appointment agreement from the outset of the chair's term of office.

For tribunal members, professional qualifications and reputation are critically important and should outweigh more general considerations based on diversity, community contribution, social values and affiliations. It is frequently the chair, rather than the minister or a government official, who is most likely to have appropriate ties to a tribunal's professional community. As such, the chair may be able to seek out and obtain confidential and frank assessments of a candidate's professional contribution, reputation and esteem.

Government's overarching principles of openness, transparency and accountability must be applied to the appointment process for tribunal members and to a redefined role for the tribunal chair in that process. At the end of the day, it must be clear to an interested member of the public how candidates for appointment are recruited and selected. In this regard, the following

additional responsibility for tribunal chairs should be added to the list in the Public Agency Appointment Guidelines:

- **Tribunal Chair:** Makes recommendations to government on all candidates whose names are being considered for appointment to the chair's administrative tribunal.

Selecting and Appointing Tribunal Chairs

The tribunal chair serves as a link between the policy objectives of government and the host minister, on the one hand, and the adjudicative decisions and processes of the tribunal, on the other. It is essential that government have confidence in the chair and that the chair be held to public account for the tribunal's overall performance and effectiveness. These considerations weigh strongly in favour of Order in Council appointments for tribunal chairs, with a coordinating role for the Board Resourcing and Development Office.

Selecting and Appointing Tribunal Members

Government has formal responsibility and final accountability for the performance of administrative tribunals. The chair's role in appointing members is not generally well-defined, either in legislation or as a matter of practice. In some circumstances, chairs participate with government in the recruitment and selection of other tribunal members. In other instances, tribunal members may be appointed by Cabinet or the host minister, with little or no involvement of the chair. As a matter of current practice, tribunal members are appointed in one of the following ways by:

- the Lieutenant Governor in Council (Cabinet);
- the host minister;
- the host minister after consultation with the chair;
- the chair with the approval of the host minister;
- the chair directly.

The choice of process is essentially a matter of policy and emphasis. A legislated role for the chair is more rigid and difficult to modify should circumstances change. On the other hand, an approach based on best practices offers the greatest degree of flexibility but can give rise potentially to inconsistencies and uncertainties. Within this framework, a tribunal chair may be expected to do one or more of the following:

- ensure that appropriate selection criteria are in place for upcoming appointments;
- provide advice to government on a list of potential appointees identified through a variety of sources including the chair;

- carry out due diligence for government on a list of potential appointees identified through a variety of sources including the chair;
- conduct a formal recruitment and selection process, providing a list of qualified appointees to government for final selection and appointment;
- conduct a formal recruitment and selection process, providing names of appointees to government for appointment;
- conduct a formal recruitment and selection process, making appointments directly after consultation or with the approval of the host minister;
- conduct a formal recruitment and selection process, making appointments directly.

Variations in the role of the chair are inevitable across the system. These variations reflect the nature of the tribunal, the characteristics of the environment within which it operates and whether the chair is full time or part time. However, the chair's role in the appointment process should be in harmony with the chair's other tribunal responsibilities. Particularly in cases where tribunal chairs have full time executive management responsibilities for the tribunal's fiscal and operational performance, accountability is undermined if chairs have little or no opportunity to participate in appointing tribunal members.

Appointment Models

Experience across common law jurisdictions has given rise to a range of options for structuring the administrative tribunal appointment process. The central issue for policy makers lies in choosing the model that best reflects prevailing values about the appropriate and necessary balance between public accountability and independent decision making. As noted earlier in this report, the accountability of the executive branch of government is strengthened where Cabinet and host ministers play a strong role in the appointment process while the independence of tribunals is enhanced where tribunals themselves or tribunal chairs play a pivotal role in the appointment process. At the same time, a strong role for the tribunal chair in the appointment process can be an effective technique for strengthening the tribunal's overall accountability to government. Across the continuum of accountability and independence, the following appointment models have been identified:

Model 1 – Responsibility Centralized in an Agency in the Premier's Office

Model 2 – Responsibility Vested in Host Ministries

Model 3 – Responsibility Centralized in a Public Sector Human Resource Agency

Model 4 – Responsibility Centralized in a Government Services Ministry

Model 5 – Responsibility for Member Appointments Vested in Administrative Tribunals

Model 6 – Responsibility Centralized in a Council of Administrative Tribunals

These models are not mutually exclusive. In choosing a system that best reflects the core values and principles of government and addresses the needs of administrative tribunals, aspects or components of one model may be combined with features of another. What the models are intended to highlight here is the range of choices and perspectives that should be taken into account in designing an appropriate appointment system for administrative tribunals in British Columbia.

In the following discussion, it is the roles of the various public agencies and officials that provide the focus. The types of instrument which are ultimately chosen to give effect to the appointment or to set its terms and conditions are discussed in the next part of this report.

Model 1 – Responsibility Centralized in an Agency in the Premier's Office

In circumstances where a public body's success is measured by how well it interprets or gives effect to the policy goals and values of government, opportunities for success will be enhanced if a centralized agency in the Premier's office plays a pivotal role in the appointment process. Such an agency is in an ideal position to develop a direct understanding of government's goals and values and to take these into account in the recruitment and selection process.

In a recent review of administrative practices and procedures in the United Kingdom, Sir Andrew Leggatt discussed the implications of centralizing overall responsibility for administrative tribunals in the Prime Minister's office. In Leggatt's view, while this move would undoubtedly elevate the importance and profile of the tribunal system, it could also undermine the system's independence by linking it very directly to the delivery of government policies.[36] Additionally, Leggatt observed that the establishment of a centralized office for tribunal administration would add a significant workload to the Prime Minister's office – a workload without comparable functions in that office in the United Kingdom.

[36] Sir Andrew Leggatt. "Tribunals for Users: One System, One Service", Report of the Review of Tribunals, March 2001, p. 2.23.

A centralized agency in the Premier's office with primary responsibility for tribunal appointments would have the following benefits and disadvantages:

Possible Benefits:

- opportunities to implement more consistent policies and practices across the administrative justice system;
- opportunities to achieve administrative efficiencies through the centralized pooling and assessment of candidates suitable for a variety of vacancies;
- potentially stronger role for tribunal chairs in providing expert advice and recommendations on appointments to a centralized agency;
- better separation (and hence greater independence) between ongoing government operations and tribunals, particularly where government decisions are subject to tribunal review.

Possible Disadvantages:

- potential loss of policy expertise and the contextual knowledge that host ministries bring or apply to the appointment process;
- potential weakening of the relationship between tribunal chairs and host ministers with a resultant loss in overall accountability.

British Columbia has implemented a modified version of this model for managing appointments to its Crown corporations and agencies.[37] Under this model, the Board Resourcing and Development Office has the lead role in the recruitment and selection process, advising the Premier on recommendations for Order in Council appointments. In practice, the Board Resourcing and Development Office works closely with government officials and agency chairs to identify candidates, assess their qualifications and make appointment recommendations to Cabinet. In this respect, the model balances public accountability for the appointment process with the policy expertise and detailed contextual knowledge of government and its officials and agencies.

Model 2 – Responsibility Vested in Host Ministries

Administrative tribunals have been established over the course of many years for a diverse variety of purposes. In some instances, tribunals, like the Employment Standards Tribunal, are mandated to review decisions of officials in their host ministries. In other instances, tribunals and host ministries have similar mandates. For example, the Labour Relations Board and the Ministry of Skills Development and Labour share a commonality of mandate over issues that arise in the

[37] For further information see, Office of the Premier. "Service Plan 2002/2003 – 2004/2005", February, 2000; Public Agency Appointment Guidelines and "Crown Corporations Board of Directors Appointment Guidelines".

workplace. There are also instances where a tribunal's relationship with its host ministry is based on more informal considerations. For example, the choice of the Ministry of Attorney General as the host ministry for the Expropriation Compensation Board is more likely a reflection of the particular interests and concerns of the host minister than an expression of a shared or common mandate between the ministry and the tribunal.

Prior to the establishment of the Board Resourcing and Development Office and its predecessor (the Appointment Office for Agencies, Boards and Commissions), host ministries and administrative tribunals developed a diverse array of arrangements for managing the appointment process. Factors that influenced these arrangements included:

- the number and size of administrative tribunals within the host minister's portfolio;
- the history of the relationship between the host ministry and the tribunal;
- the unique needs and circumstances of the tribunal;
- the scope and range of other services the host ministry provides.

In the simplest cases and with varying degrees of assistance from officials in host ministries, tribunal chairs would identify potential candidates and forward a name or a list of candidates to the deputy minister for approval by the host minister or Cabinet. In more complex cases, the tribunal chair, the host ministry or the Premier's office might carry out a full-blown and very public recruitment and selection process, in some instances with the assistance of executive recruiting firms. The ad hoc nature of the process afforded great flexibility but little certainty, transparency or public accountability.

From this perspective, a decentralized process for appointments with primary responsibilities vested in host ministries would have the following benefits and disadvantages:

Possible Benefits:

- opportunities to maintain a flexible approach that is responsive to the unique needs and circumstances of individual tribunals, thus ensuring a good "fit" between candidates and individual tribunals;
- opportunities to effect cost savings and efficiencies by simplifying the process and reducing the number of required approvals;
- opportunities to improve the timeliness of decision making;
- opportunities to strengthen the working relationship between tribunal chairs and host ministers;
- opportunities to draw on policy expertise and contextual knowledge of host ministries.

Possible Disadvantages:

- potential loss of public confidence in the openness and transparency of the appointment process;
- perceived interference with the impartiality and independence of a tribunal, particularly where ministry decisions are subject to tribunal review;
- less consistency in approach and greater variation across the administrative justice system.

Experience has shown that, where host ministries deal with appointments for one or two small tribunals, the appointment process is very often ad hoc, flexible and responsive to immediate needs. However, if host ministries actively manage appointments for several large tribunals or for a large number of smaller ones, administrative systems are usually in place to:

- manage the appointment process and keep track of upcoming vacancies;
- provide current information on the nature of the organization and the types of appointments required;
- provide advice to others on the skills and qualifications required for the appointment;
- provide information or recommendations on issues of reappointment;
- make recommendations on proposed terms and conditions of appointment;
- meet any other legislative or Cabinet requirements associated with the appointment.

With the announcement of an expanded mandate for the Board Resourcing and Development Office, the province has begun to move away from a ministerial model for tribunal appointments. Where previously the host minister or tribunal chair would have taken the lead in identifying and screening potential candidates, the process now involves several parties and requires considerable coordination and management attention to administer. In this context, the benefits of improved central coordination need to be balanced against the potential disadvantages of duplication and overlap where ministerial programs and services already exist.

Diversity in practice can be beneficial and constructive. For host ministries that, for a variety of reasons, have not developed effective internal administrative systems and practices, a strong role for a centralized appointments office is likely to enhance the quality and timeliness of appointments. However, for host ministries that have been extensively involved in the appointments process and have already developed close working relationships with tribunal chairs, some adjustments in the currently defined roles and responsibilities of both the Board Resourcing and Development Office and the host ministries would assist in streamlining current processes and in improving overall effectiveness. Within the context of a model that balances the

political accountability of a centralized process with the substantive expertise of host ministries, potential areas for improvement and clarification include:

- a strong and ongoing role for the central agencies of government in the selection and appointment of tribunal chairs;
- a strong and ongoing role for host ministers and tribunal chairs in the selection and appointment of tribunal members;
- where host ministries have not developed effective internal systems, a strong role for the central agencies of government in the appointment process;
- where host ministries have developed effective internal systems, a role for the central agencies of government in the appointment process more akin to an audit function.

Model 3 – Responsibility Centralized in a Public Sector Human Resource Agency

Most governments in common law jurisdictions have established centralized agencies, policies and practices for human resource management across the public sector. Under a so-called civil service model of recruitment and selection, standardized, commonly accepted and objective processes are put in place for find and choose the most qualified candidates for appointment to administrative positions within the executive branch of government. The underlying goal of the civil service model is to ensure that public service appointments are based on merit and not influenced by political considerations. In contrast to models where the value of political accountability is high, the civil service model emphasizes neutrality by sheltering appointments from the political processes of the day.

In British Columbia, the Public Service Employee Relations Commission manages recruitment and selection for most civil servants within the provincial public sector. Significantly, senior government executives (deputy and assistant deputy ministers) may be recruited outside this process. While government directives on many issues like compensation and benefits apply to these senior officials, it has become common practice for government ministers to be much more involved in selecting the senior officials with whom they will work most closely. The minister's role in this respect clearly acknowledges that personal trust and confidence lie at the core of working relationships with senior officials.

It may be desirable to foster a similar relationship of trust and confidence between host ministers and tribunal chairs. In these circumstances, a more neutral civil service model of recruitment and selection would not likely be suitable for appointing tribunal chairs. However, responsibility for the recruitment and selection of other tribunal members could be tied more closely to a neutral process like that of the Public Services Employee Relations Commission. The integration of this

responsibility with a neutral public service approach to recruitment and selection would have the following benefits and disadvantages:

Possible Benefits:

- opportunities to implement more consistent policies and practices across the administrative justice system and to establish a more neutral and transparent process for recruitment and selection;
- opportunities to achieve administrative efficiencies through the centralized pooling and assessment of candidates suitable for a variety of vacancies;
- potentially stronger role for tribunal chairs in providing expert advice and recommendations on appointments;
- better separation (and hence greater independence) between ongoing government operations and tribunals, particularly where government decisions are subject to tribunal review.

Possible Disadvantages:

- potential loss of policy expertise and the contextual knowledge that host ministries bring or apply to the appointment process;
- potential weakening of the relationship between tribunal chairs and host ministers with a resultant loss in overall accountability;
- potential increases in costs associated with the involvement of another public agency in the appointment process and with the application of long-term hiring practices to term appointments;
- potential loss of flexibility in adapting the appointment process to meet particular needs and circumstances and ensuring the best "fit" between candidates and individual tribunals.

Model 4 – Responsibility Centralized in a Government Services Ministry

A variation on the neutral civil service model can be achieved by centralizing responsibility for all administrative tribunal matters, including appointments, in a single government services ministry. This model is currently being considered in the United Kingdom by the Lord Chancellor's office in response to the Leggatt report.

Appointments constitute only one dimension of the ongoing administrative relationship between government and tribunals. At present in British Columbia, 17 host ministries are involved to a greater or lesser extent in providing services and supports to administrative tribunals. These services and supports range from appointments through administrative services to financial planning and budgeting. In this respect, host ministers may:

- make recommendations to Cabinet with respect to the establishment, consolidation or elimination of agencies;

- consult with tribunal chairs and others on significant new directions or changes to a tribunal's enabling legislation;
- advise tribunal chairs of government's priorities and broad policy directions;
- report and respond to Cabinet and the legislature on a tribunal's performance and its compliance with the government's broad policy directions and operational policies;
- receive and table a tribunal's annual report in the legislature;
- obtain funding for a tribunal through the government's budgetary processes.

While some tribunals have very little in common with the substantive mandates of their host ministries, there are clearly strong linkages for others. Maintaining an appropriately balanced and arm's length relationship is always a challenge, particularly when a tribunal is mandated to review the decisions of its host ministry. The 1990 Ratushny report for the Canadian Bar Association expressed its support for a more consolidated approach to tribunal appointments in the following way:

> *….There is another reason for concentrating these appointments under one Minister. The numbers involved would justify having in place staff who are dedicated to the task of seeking out well-qualified persons and gathering information about names that are received from other sources. In other words, the task of making appointments could be organized on a systematic, comprehensive and ongoing basis.*[38]

Viewed from a systemic perspective, government's overall responsibilities for administrative tribunals, including its role in tribunal appointments, could be further consolidated by transferring primary responsibilities to:

- a government services ministry like the Ministry of Management Services;
- the Ministry of Attorney General, as part of the ministry's overall mandate and responsibility for the province's justice system;
- a few key ministries with policy responsibilities in broad social or economic areas.

A more centralized model would have the following benefits and disadvantages:

Possible Benefits:

- opportunities to implement consistent policies and practices across the administrative justice system and to focus resources on issues of a systemic or common nature;
- opportunities to achieve administrative efficiencies through the centralized pooling and assessment of candidates suitable for a variety of vacancies;
- better separation (and hence greater independence) between ongoing government operations and tribunals, particularly where ministry decisions are subject to tribunal review.

[38] Ratushny, supra., p. 82.

Possible Disadvantages:

- potential loss of policy expertise and the contextual knowledge that host ministries bring or apply to the appointment process;
- potential loss of flexibility in adapting the appointment process to meet particular needs and circumstances and in ensuring the best "fit" between candidates and individual tribunals.

Model 5 – Responsibility for Member Appointments Vested in Administrative Tribunals

Where government places a high value on accountability for delivering programs and services, the chair of an administrative tribunal can be held to account most effectively if the chair has a significant role in the recruitment and selection of the tribunal's members. As a matter of sound management practice, if chairs are to be held to account for the operations and effectiveness of their tribunals, they must have a strong, but not necessarily deciding, voice in the appointment process.

For most of British Columbia's administrative tribunals, members are currently appointed either by Order in Council or by the host minister. The two notable exceptions are the Employment Standards Tribunal and the Appeal Division of the Workers' Compensation Board. For these tribunals, the chair has responsibility for appointments and is accountable for all aspects of human resource management including recruitment and selection, due diligence and performance management. However, in amendments tabled recently under the *Workers Compensation Amendment Act (No. 2), 2002*, the chair of the new appeal tribunal will be appointed by Order in Council while the other members of the tribunal will be appointed, following the transitional period, by the chair, after consultation with the host minister.

A decentralized model with primary responsibility for member appointments vested in tribunal chairs would have the following benefits and disadvantages:

Possible Benefits:

- opportunities to maintain a flexible approach that is responsive to the unique needs and circumstances of individual tribunals, thus ensuring the best "fit" between candidates and individual tribunals;
- opportunities to reduce the workload of host ministries and the central agencies of government;
- opportunities to effect cost savings and efficiencies by simplifying the process and reducing the number of required approvals;
- opportunities to improve the timeliness of decision making;
- opportunities to draw on policy expertise and the contextual knowledge of host ministries.

Possible Disadvantages:

- loss of political accountability for appointment decisions;
- loss of public confidence in the openness and transparency of the appointment process;
- lack of consistency in approach and great variation across the administrative justice system.

Vesting primary responsibility for the appointment of members in tribunal chairs is consistent with best governance practices for Crown corporations.[39] However, in the context of administrative justice, direct appointments by the chair may raise issues about the independence and impartiality of tribunal members. To address these concerns, it may be desirable under this model and as a matter of practice, to limit the authority of the chair by:

- obliging chairs to consult with host ministers before appointments are finalized;
- establishing a formal framework for the periodic external review and audit of the appointment process itself.

Model 6 – Responsibility Centralized in a Council of Administrative Tribunals

Under this model, government would establish an independent arm's length council for administrative tribunals that would have broad responsibilities for tribunal appointments and other administrative justice issues. This model directly addresses tribunal appointments from the perspective of the administrative justice system as a whole and reinforces the values of impartiality and independence for all tribunal members. It is similar in structure to the model British Columbia has put in place for appointments to its provincial courts. Under this model, the council would have primary responsibility for recruitment and selection, due diligence and the subsequent investigation of complaints about appointees.

The province's judicial council is a council of this nature. It is appointed under the *Provincial Court Act* and chaired by the Chief Judge of the Provincial Court. The judicial council has eight representatives from the general public, the legal profession and the judiciary. Its mandate is to make recommendations to the Attorney General on appointments to the provincial court.

In the United Kingdom, Sir Andrew Leggatt recently recommended the establishment of a new independent Tribunals Board to advise the Lord Chancellor on tribunal appointments,

[39] See, for example, the 2000 Report of the Auditor General of Canada at pp. 12-13. The report commented on three models for recruiting board members for federal Crown corporations. In circumstances where the Crown corporation's board played a significant role in recruitment and selection, the Auditor General observed strong support for subsequent accountability and performance.

qualifications and complaints.[40] Significantly, the Lord Chancellor's neutrality is also assured as the office's policy responsibilities are not reviewable by any administrative tribunals.

The British Columbia Council of Administrative Tribunals (BCCAT)[41] has recently recommended that government establish a similar administrative justice council to "coordinate activities and advise government and tribunals on issues relevant to the effective and efficient functioning of the administrative justice system".[42] As proposed by BCCAT, the administrative justice council would provide advice on appointment issues but would not necessarily play a formal role in the recruitment and selection process. Similar recommendations were made by administrative agency chairs to the Ontario Management Board Secretariat in 1992.[43]

An independent, arm's length council with primary responsibility for tribunal appointments would have the following benefits and disadvantages:

Possible Benefits:

- opportunities to enhance public confidence in the independence and impartiality of administrative tribunals;
- opportunities to implement consistent policies and practices across the administrative justice system, to establish a neutral and transparent process for recruitment and selection and to focus resources on issues of a systemic or common nature;
- opportunities to achieve administrative efficiencies through the centralized pooling and assessment of candidates suitable for a variety of vacancies;
- potentially stronger role for tribunal chairs in providing expert advice and recommendations on appointments;
- clear separation between ongoing government operations and tribunals, particularly where government decisions are subject to tribunal review.

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40 Leggatt Report, supra, Recommendations 2.1 and 2.4.

41 The British Columbia Council of Administrative Tribunals (BCCAT) was established in 1996. Its mandate is to serve the public interest by contributing to the development and improvement of administrative justice in a non-partisan, independent and objective manner. BCCAT is an incorporated society created, governed and maintained by its members. With a membership of more than 200, BCCAT represents a broad cross-section of the administrative justice community including adjudicators, mediators, lawyers, regulators and government officials. BCCAT prepared a research report on appointment issues in 1997 and, most recently, has made a formal submission to the Attorney General on the work that is currently being undertaken by the Administrative Justice Project.

42 British Columbia Council of Administrative Tribunals: "Administrative Justice in British Columbia: Ensuring Fairness and Accountability", March 2002, p. 2.

43 D. MacDonald: "Ontario's Agencies, Boards and Commissions Come of Age", Canadian Public Administration, vol. 26, No. 3, pp. 349-363.

Possible Disadvantages:

- potential loss of political accountability for appointment decisions;
- potential loss of policy expertise and the contextual knowledge that host ministries bring or apply to the appointment process;
- potential increases in costs associated with the creation of a new public agency;
- potential loss of flexibility in adapting the appointment process to meet particular needs and circumstances and in ensuring the best "fit" between candidates and individual tribunals.

Assessing Appointment Models

As noted previously, the debate about appointment models centres on issues of public accountability and independence in decision making. Changes to the current appointment process have the potential to achieve economies of scale, realize efficiencies through shared services, improve timeliness and streamline approval processes. These improvements will ensure that:

- the model supports competency based recruitment and selection through a process that is open, fair and transparent;
- the roles and responsibilities of the parties involved in the appointment process are clearly defined and set out in legislation or in the policies and agreements that govern their relationships;
- the resulting processes are affordable, efficient and flexible enough to provide consistency yet accommodate the unique features and characteristics of each of the tribunals within the administrative justice system.

The assessment of appointment models must also take into account other dimensions of the ongoing relationships between host ministries and administrative tribunals. Some models would centralize appointment responsibilities in one agency, leaving administrative arrangements for other services such as finance, training and technology to host ministries. Other models would decentralize appointments, thus providing opportunities for closer integration between the appointment process and other inter-related administrative services provided to individual tribunals. In this respect, the discussion in this report raises questions about whether tribunals should remain with their current host ministries or whether they should derive their support and associated services from a central ministry (like the Ministry of Management Services), from the Attorney General as minister responsible for the overall administration of the provincial justice system or from an independent, arm's length council of administrative tribunals.

Recommendations for an Appointment Model

Consistent with government's overall commitment to ministerial accountability and the delegation of powers from central government, the appointment model proposed here represents a significant devolution of responsibility from Cabinet to host ministries and administrative tribunals. The model addresses the critical need of tribunal chairs for a larger and more clearly defined role in the appointment process. At the same time, the model is proportionate to the size and scope of the province's administrative justice system, builds on existing institutions and processes rather than creating new ones and reflects current fiscal conditions within the provincial public sector.

Under the proposed model, public accountability for the appointment of tribunal chairs rests clearly with Cabinet, while accountability for the appointment of tribunal members rests with host ministers and tribunal chairs. As such the recommendations are a hybrid based on selected features from Models 1, 2 and 4. This approach will enhance the independence of individual tribunals by giving chairs a clearly defined role in the appointment of tribunal members and enhance tribunals' accountability to government through the office of the chair.

It is recommended that the Board Resourcing and Development Office continue to take the lead in the recruitment and selection of tribunal chairs and that tribunal chairs, in consultation with the Board Resourcing and Development Office, take the lead in the recruitment and selection of tribunal members, subject to formal approval and appointment by Cabinet.

Subject to specific considerations within individual tribunals, it is recommended that government:

- **amend legislation, where necessary, to provide for the appointment of:**
  - **tribunal chairs by Order in Council;**
  - **tribunal members by Order in Council on the recommendation of tribunal chairs and after completion of a merit based recruitment process;**
- **reduce, from 17, the number of host ministries with responsibilities for administrative tribunals;**
- **provide centralized coordination and support to tribunal chairs in the development of appointment plans, recruitment strategies and processes.**

It is recommended that the Board Resourcing and Development Office have an ongoing supervisory role in standard setting and in monitoring and auditing the recruitment and selection practices of host ministries and tribunals.

Policy Instruments

A variety of policy instruments may be used, either alone or in combination, to give effect to appointment agreements. Taken as a whole, these agreements should cover terms of office, reporting and accountability, compensation and benefits, reappointments, termination, severance, standards of conduct and conflicts of interest. In individual circumstances, the range of instruments used to give effect to an appointment agreement might include:

- general legislation or regulations governing appointments and their terms and conditions;[44]
- specific legislation in a tribunal's enabling statue setting out the terms and conditions of an appointment;
- terms and conditions of an Order in Council or ministerial order;
- terms and conditions in a memorandum of understanding between a host ministry and an administrative tribunal;
- general policy guidelines of the appointing authority or host ministry;
- terms and conditions of an appointment agreement or contract between the appointing authority and an appointee.

No consistent practices for administrative tribunals are currently in place in British Columbia. For many appointees, neither the tribunal's enabling legislation nor the appointing order sets out clearly defined expectations and responsibilities.

For members of a few tribunals, enabling legislation confers express authority for entering into appointment agreements. Section 131(4) of the *Labour Relations Code* provides one example:

> ***Labour Relations Code*** (Labour Relations Board)
>
> 131(4) The minister, on behalf of the government may make a contract with the chair, vice chairs or other members of the board containing mutually agreed terms and conditions not inconsistent with this code.

In many other circumstances, appointing authorities and appointees have entered into separate and essentially private contractual arrangements to address obvious deficiencies and uncertainties in either the tribunal's legislation or the appointing order.

In an environment where government is committed to greater openness and public accountability, there is a pressing need to develop an appropriate framework with open and transparent guidelines for appointments to administrative tribunals.

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[44] See the *Public Service Act*, the *Public Sector Employers Act* and the general terms and conditions of Order in Council appointments set out in OIC 806/99.

Enabling Legislation, Regulations and Orders in Council

A systematic review of the formal framework for appointments should be undertaken as part of the recommended review of the enabling statutes for administrative tribunals. It should be clear that government, tribunal chairs and the tribunals themselves have the full range of powers they require to give effect to the appointment recommendations in this report.

Memorandum of Understanding

Governments frequently enter into memoranda of understanding to clarify the roles and responsibilities of departments and agencies whose mandates are contiguous or overlapping. These agreements are used to articulate mutual understandings and to establish operating relationships between government ministries, between ministries and other levels of government, or between ministries and arm's length agencies such as Crown corporations or administrative tribunals.

For a number of months prior to the initiation of the Administrative Justice Project, a joint working committee of government officials and members of the administrative justice community had been discussing and developing a draft Memorandum of Understanding (MOU) to formalize arrangements between host ministers, ministries and administrative tribunals.[45] For each of the intended parties to the agreement, the draft MOU set out basic roles, responsibilities, expectations and accountabilities. As such, the draft MOU provided an important framework within which tribunals and government could discuss not only appointment issues but also other issues of shared concern with respect to mandate, policy, planning, finances, staffing and administration.

On the issue of appointments, the draft MOU established the general principle that the minister is responsible for making appointments or recommendations about appointments to Cabinet in a timely way after appropriate consultation with the tribunal chair. The draft MOU stated that the chair's responsibilities in the appointment process should be to:

- provide, in a timely and appropriate way, input and recommendations about the appointment and reappointment of tribunal members;
- establish and monitor performance of tribunal members and staff.

[45] Ministry of Attorney General. Model Memorandum of Understanding: A Guide For Ministries of the Provincial Government and Associated Agencies, Boards and Commissions. For Discussion, July 2000.

The Circle of Chairs[46] raised a number of concerns about the draft MOU and its implementation in correspondence with government in October 2000. Given the very different history and circumstances of individual tribunals, the Circle emphasized ongoing requirements for:

- flexibility in adapting the terms of the MOU through specific agreements between individual host ministries and tribunals;
- adequate resources to support effective implementation of the MOU;
- enhancements to the role of the tribunal chair in monitoring and being held accountable for the performance of the tribunal and its members.

To date, these issues have not been fully addressed. Implementation of the draft MOU was deferred following the initiation of the Administrative Justice Project in July 2001. As a consequence, the issues that will be addressed in implementing the Project's appointment recommendations will include not only the draft MOU but also the as-yet-unresolved concerns of the Circle of Chairs.

Appointment Agreements

An appointment agreement is the key component of an effective appointment policy. It is a specific document that sets out, within the framework of a tribunal's enabling legislation, the precise obligations and expectations of appointing authorities and appointees. As Roderick MacDonald observed in comments to a BCCAT conference in 1998:

> *…a touchstone to accountability is accountability to oneself: detailed mandate letters for OIC appointments, phrased in terms of aspiration and not in terms of minimum duties, can set the tone for fidelity to an ethic of personal responsibility, without which no agency can succeed.*[47]

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[46] The Circle of Chairs was established to provide a separate forum for the chairs of administrative tribunals to meet and discuss tribunal management issues. Membership in the Circle is restricted to chairs or to those who have management responsibilities for an independent agency, board or commission that is created by provincial legislation, performs an adjudicative function and maintains an arm's length relationship with government. It is not open to government employees who exercise similar functions within a line ministry of government.

In February 2002, the Circle presented a paper on "Appointments to Administrative Tribunals" to the Administrative Justice Project. The paper addresses issues of independence and accountability and provides commentary on various appointment models, the role of the chair in the appointment process and the need for a process that is open, transparent and merit based.

[47] Comments made by Roderick A. MacDonald "Measure for Measure – Audits and Accountability" to BCCAT conference November 1998.

In Ontario, the Management Board Secretariat has developed a draft appointment agreement that is similar in structure to a contract of employment. Discussions related to its implementation are ongoing. The agreement itself addresses or confirms mutual expectations about an appointee's:

- term of office;
- remuneration and benefits;
- standards of conduct, including the obligation to comply with the lawful direction of the chair;
- participation in orientation and training;
- indemnification;
- duty to disclose real or perceived conflicts of interest;
- duty to maintain confidentiality;
- duty to comply with policy and procedures;
- agreement to participate in performance evaluations;
- right to participate in a complaints procedure;
- options for renewal or reappointment;
- rights on reorganization;
- right to notice of non-renewal;
- revocation for cause;
- obligation to provide reasonable notice upon resignation.

Recommended Policy Instruments

It is recommended that government clarify the roles and responsibilities of the Board Resourcing and Development Office, host ministries and tribunals through an operating agreement, amending the agreement where necessary and appropriate to ensure that all partners in the appointment process are signatories to a formal agreement.

It is recommended that government:

- **develop and implement a standard form of appointment agreement for administrative tribunals setting out government's expectations with respect to term and tenure, reappointment, notice, termination and severance, compensation and benefits;**
- **if necessary, amend the *Public Sector Employers Act* to clarify how and to what extent that Act applies to administrative tribunals.**

CONCLUSION AND RECOMMENDATIONS

Questions about how appointments are made and who has a role in recruitment and selection are critical issues for government and for the tribunals that form the core of the province's system of administrative justice. In this respect, a modern and relevant approach to tribunal appointments requires a commitment to:

- the principle of merit as the basis for appointment decisions;
- the values of transparency, fairness, flexibility, affordability and efficiency.

In meeting these commitments, it is also essential to provide an appropriate balance between the independence of individual tribunal decision makers and the public accountability of administrative tribunals to the people they serve, bearing in mind that tribunals often represent the only point of contact many people have with the formal justice system.

As discussed in this report, an effective framework for tribunal appointments must address three key issues:

- the compelling need for government to provide greater certainty and consistency in policy and in the processes and standards that are followed and applied;
- the need for government to clarify its expectations of tribunal chairs with respect to both their specific obligations in the appointment process and their other duties as the heads of administrative tribunals;
- the expressed need within the administrative justice community for a central focus within the public sector to address the policy and legislative requirements of this vital part of the justice system.

Within British Columbia's current tribunal appointment system there are shortcomings, uncertainties, duplication and overlap. For some ministries and tribunals, current practices and processes also give rise to issues about timeliness and delay. Addressing these issues will be central to the achievement of an approach to tribunal appointments that encompasses:

- a planned and transparent process for recruitment and selection;
- a comprehensive and competitive set of terms and conditions of engagement – dealing not only with remuneration, but also with performance expectations, management reviews, benefits, severance and transition back to other work;
- a well-defined role for tribunal chairs, clearly articulating the respective operational responsibilities and accountabilities of both government and tribunals;
- a framework for government to organize itself, not only with respect to appointments, but also with respect to the other services it provides to administrative tribunals.

The recommendations that follow are intended to provide a more centralized focus for appointment issues. They build on government's recent initiatives with respect to public

appointments – such as the establishment of the Board Resourcing and Development Office – by addressing issues that arise specifically within the administrative justice system.

Recommendations

By making sound appointments to administrative tribunals, government can foster public confidence in the administrative justice system, enhance the transparency of the appointment process, ensure fair and open recruitment practices and provide for appointments that are based on merit. Implementation of the following recommendations will allow government to achieve these objectives.

Recommendations for Recruitment and Selection

In order to support the development of an orderly recruitment and selection process, it is recommended that an annual appointment plan be prepared for each administrative tribunal setting out in advance:

- **the respective roles and responsibilities of host ministries and tribunals;**
- **the number of vacancies anticipated in a given year including the number to be filled by recruitment efforts and renewals;**
- **the types of positions to be filled, whether chairs or members and whether full time or part time;**
- **the kinds of recruitment and outreach activities that will be required, including their potential costs;**
- **the critical timelines from initiation to completion for key deliverables and appointment decisions.**

Within the framework of an annual appointment plan, it is recommended that a needs assessment be prepared or updated each time tribunal appointments are required.

It is recommended that tribunals have the capacity to make a variety of appointments tailored to meet their individual needs and circumstances. Where appropriate, it should be possible to make appointments on a full time, part time or contractual basis. Further, cross-appointments should be encouraged where the required adjudicative expertise is transferable and it would not be contrary to the public interest to do so.

It is recommended that job descriptions be developed for administrative tribunal appointees.

It is recommended that recruitment and selection be based on open, transparent and competitive processes that are proportionate to the nature of the position being filled and subject to monitoring and auditing by the Board Resourcing and Development Office.

Recommendations for Appointment Terms and Conditions

In order to implement polices and procedures that will further government's strategic goals, it is recommended that the following guidelines for appointments to administrative tribunals be adopted. While there should be a general commitment to the principle of consistency, there should also be sufficient flexibility in practice to allow individual tribunals to adjust or adapt to particular or unusual circumstances. Accordingly, government should:

- **discontinue the practice of making tribunal appointments at pleasure or for the term of an appointee's working life and instead establish fixed term appointments within a range of 3 to 5 years with appropriate provisions for tenure, reappointment, termination and severance;**
- **in appropriate circumstances, permit initial appointments for terms of less than 2 years for the purpose of early performance reviews and assessments;**
- **remove current policy restrictions on the number of subsequent appointments an appointee may expect or accept;**
- **provide capacity to appoint tribunal members on a short-term acting or interim basis for the purpose of maintaining tribunal operations through transitional periods or for accommodating leaves of absence;**
- **establish consistent practices for providing notice to appointees of decisions not to reappoint or to terminate;**
- **clarify in legislation that tribunal members have the capacity to complete deliberations in proceedings that continue after they have resigned or their appointments have lapsed;**
- **initiate a review of current legislation and practices with respect to the appointment of staff to administrative tribunals and develop recommendations for further clarification and reform.**

In order to enhance the overall effectiveness of tribunal operations, it is recommended that government provide tribunal chairs with the capacity to delegate responsibilities and duties to other tribunal members.

Recommendations for Compensation and Benefits

It is recommended that government review and implement changes to compensation and benefits for tribunal chairs and members in two stages:

- **first, to reflect changes in overall compensation levels since 1990;**
- **second, to define appropriate benchmarks and provide more consistency in and accountability for compensation levels across tribunals.**

Recommendations for an Appointment Model

It is recommended that the Board Resourcing and Development Office continue to take the lead in the recruitment and selection of tribunal chairs and that tribunal chairs, in consultation with the Board Resourcing and Development Office, take the lead in the recruitment and selection of tribunal members, subject to formal approval and appointment by Cabinet.

Subject to specific considerations within individual tribunals, it is recommended that government:

- **amend legislation, where necessary, to provide for the appointment of:**
  - **tribunal chairs by Order in Council;**
  - **tribunal members by Order in Council on the recommendation of tribunal chairs and after completion of a merit based recruitment process;**
- **reduce, from 17, the number of host ministries with responsibilities for administrative tribunals;**
- **provide centralized coordination and support to tribunal chairs in the development of appointment plans, recruitment strategies and processes.**

It is recommended that the Board Resourcing and Development Office have an ongoing supervisory role in standard setting and in monitoring and auditing the recruitment and selection practices of host ministries and tribunals.

Recommended Policy Instruments

It is recommended that government clarify the roles and responsibilities of the Board Resourcing and Development Office, host ministries and tribunals through an operating agreement, amending the agreement where necessary and appropriate to ensure that all partners in the appointment process are signatories to a formal agreement.

It is recommended that government:

- **develop and implement a standard form of appointment agreement for administrative tribunals setting out government's expectations with respect to term and tenure, reappointment, notice, termination and severance, compensation and benefits;**
- **if necessary, amend the *Public Sector Employers Act* to clarify how and to what extent that Act applies to administrative tribunals.**