

Reappointment of Tribunal Members: Insufficient safeguards for fairness and independence

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Introduction

Tribunal members are appointed pursuant to the terms of statute. Frequently, those statutes permit reappointments. In this paper, I look at the legal principles governing the reappointment of tribunal members, and argue that they are inadequate to safeguard tribunal independence or basic fairness to tribunal members seeking reappointment.

I begin by reviewing some of the applicable British Columbia statutes and policy documents. I then focus on a current proceeding before the British Columbia Human Rights Tribunal that, in my view, demonstrates some of the negative consequences of the lack of a fair, transparent and merit-based reappointment process. Finally, I canvass some potential measures that might improve the fairness of the reappointment process, and with it, the independence of administrative tribunals.

British Columbia legislation

In British Columbia, a variety of statutes regulate the appointment and reappointment of tribunal members. The most important is the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the “ATA”). The ATA is an omnibus statute, particular provisions of which may be made applicable to individual tribunals by way of amendment to their enabling statutes. With respect to the tribunals to whom it applies, s. 2 provides:

Chair's initial term and reappointment

- 2 (1) The chair of the tribunal may be appointed by the appointing authority, after a merit based process, to hold office for an initial term of 3 to 5 years.
- (2) The chair may be reappointed by the appointing authority for additional terms of up to 5 years.

Member's initial term and reappointment

- 3(1) A member, other than the chair, may be appointed by the appointing authority, after a merit based process and consultation with the chair, to hold office for an initial term of 2 to 4 years.
- (2) A member may be reappointed by the appointing authority as a member of the tribunal for additional terms of up to 5 years.

Other statutes have their own provisions with respect to the appointment and reappointment. For example, the *Human Rights Code*, R.S.B.C. 1996, c. 210 provides:

Human Rights Tribunal

- 31(1) The British Columbia Human Rights Tribunal is continued consisting of the following individuals appointed by the Lieutenant Governor in Council after a merit based process:
 - (a) a member designated as the chair;
 - (b) other members appointed after consultation with the chair.
- (2) All members hold office for an initial term of 5 years and may be reappointed for additional terms of 5 years.

What is notable is that these, and other statutes creating or continuing administrative tribunals in British Columbia, consistently mandate a “merit based process” and consultation with the chair for initial appointments. Also notable is that reappointments are permitted, but no merit based process is required. Nor is the appointing authority statutorily required to consult with the chair before making reappointments: see, for example, *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 115, and *Workers Compensation Act*, R.S.B.C. 1996, c. 492, s. 232. Further, these statutes provide no criteria governing the reappointment of tribunal chairs.

Thus, beyond permitting members to be reappointed, there is typically no statutory guidance provided with respect to how the reappointment of tribunal members is to be addressed.

Appointment Guidelines

The British Columbia government has created the Board Resourcing and Development Office (“BRDO”), which, according to BRDO, is “the office responsible for overseeing all public sector appointments in the province including establishing appointment guidelines, ensuring individual candidates for appointment are chosen based on merit and ensuring that appointees receive adequate professional development”. BRDO has developed “Appointment Guidelines – Administrative Tribunals”, last revised May 14, 2007. According to their terms, these Guidelines are intended to provide a framework for the appointment of members to every administrative tribunal in British Columbia. An Appendix to the Guidelines lists the tribunals to which ss. 2-10 of the *ATA* apply. However, the application of the Guidelines is not limited to these tribunals.

With respect to reappointments, the Guidelines state:

15. Reappointments

While reappointments to administrative tribunals are not guaranteed, an appointee may be considered for reappointment if the appointee’s performance has been satisfactory and there are no other considerations that would militate against the reappointment. In this respect, tribunal appointees should be made aware that their performance will be a factor that is taken into account when reappointment recommendations are made. (Note: Part 11, above, “Chair’s Obligation to Assess Members”.)

Some of the factors that may be considered in determining whether an appointee has performed satisfactorily include:

- the appointee’s contribution to the achievement of the tribunal’s goals and service plans;
- the general decorum of the appointee in carrying out the tribunal’s work;

- the timeliness of the appointee's decisions;
- the appointee's attendance;
- the appointee's other activities in support of the work of the tribunal.

In assessing the performance of an individual appointee against the overall needs of the tribunal, tribunal chairs should weigh the benefits of expertise gained through experience against the fresh views that new appointees can bring to the tribunal's work.

If the tribunal chair considers that may be appropriate to recommend an incumbent's reappointment:

- the incumbent should confirm in writing his or her willingness to serve;
- the tribunal chair should advise the host minister that the incumbent is being recommended for reappointment; and
- the incumbent should be advised that his or her reappointment will be recommended:
 - on an individual basis;
 - along with any other qualified candidates who have expressed an interest in the appointment; or
 - as part of a full recruitment and selection process.

Circumstances such as the timing of a reappointment, the availability of other qualified individuals interested in and willing to accept a tribunal appointment, the expertise of the incumbent, the ongoing workload of the tribunal and the costs and commitment required to carry out a formal recruitment process or to train a new appointee will be factors that are taken into account in determining whether to recommend a reappointment without going through the full recruitment and selection process that is set out in these guidelines.

Tribunal chairs should be guided in their recommendations by government's underlying commitment to openness and transparency and to merit as the basis for all tribunal appointments. Tribunal positions should be filled by candidates with the best qualifications to meet the tribunal's requirements.... (pp. 22-23)

Under the Guidelines, tribunal members may be reappointed. Performance as a tribunal member is a relevant consideration, although other considerations may also be taken into account. The chair may recommend a member for reappointment, which entails the member requesting reappointment in writing, the

chair making the recommendation to the “host ministry”, and the member being advised of the nature of the recommendation.

In essence, what the Guidelines attempt to do is establish a reappointment process which incorporates the “merit based process” and consultation with the chair not mandated by the applicable legislation. Both elements are admirable.

In particular, the attempt, through the Guidelines, to ensure that chairs are consulted is important, as it is essential to the effective operation of any tribunal that the chair has a significant if not determinative role in the reappointment process.¹ Indeed, it has been argued that the failure of an appointment authority to accept a chair’s recommendation on reappointment should be seen as a vote of non-confidence, tantamount to constructive dismissal.²

As the Guidelines recognize on their face, they do not have the force of legislation, and the applicable legislation prevails to the extent of any inconsistency. Given the statutory silence with respect to the criteria and procedure for reappointments, however, there is no legislation with which these Guidelines could be inconsistent on this issue.

Like the applicable legislation the Guidelines do not speak to the process whereby a chair of a tribunal may be reappointed.

¹ Heather M. MacNaughton, “Future Directions for Administrative Tribunals: Canadian Administrative Justice – Where Do We Go From Here?”, in *Tribunals in the Common Law World*, Creyke, R., ed. (Australia: Federation Press, 2009), p. 216.

² S. Ron Ellis, Q.C., “Administrative Justice System Reform”, (1996) 10 Cdn. Journal of Admin. Law & Practice 1, p. 32.

Brar and others v. BCVMA and Osborne: a case study in a flawed reappointment process

Given this lack of legislative guidance on reappointments, how are reappointments handled in practice? Recent developments with respect to the British Columbia Human Rights Tribunal illustrate, in my view, the current lack of adequate safeguards for fairness and independence in the reappointment process, and the potential negative consequences for the administration of justice.

As has been widely reported, in July 2010 the British Columbia government chose not to reappoint Heather MacNaughton, the Chair of the Human Rights Tribunal since August 2000, and Judy Parrack, a full-time member of the Tribunal between 1999 and 2002, who had been reappointed again in November 2004.³

Both Ms. MacNaughton and Ms. Parrack sought reappointment in advance of the expiry of their latest five-year terms on July 31, 2010. As I shall discuss in more detail below, it is a matter of public record that Ms. MacNaughton, as Chair, recommended Ms. Parrack's reappointment. Both were well-respected and experienced human rights adjudicators; Ms. MacNaughton had overseen the Tribunal through the challenges of the transition from the former Commission-model to the present direct-access model.⁴ I am unaware of any objective merit basis upon which it could be argued that either should not have been eligible for reappointment.

The Attorney General declined to reappoint both Ms. MacNaughton and Ms. Parrack. So far as I am aware, no hearing was provided, nor any reasons for the decisions not

³ See, for example, Charlie Smith, *Georgia Straight*, July 15, 2010, <http://www.straight.com/article-333824/vancouver/bc-liberals-shake-humanrights-tribunal>.

⁴ I should make clear that, until my resignation in March 2010, I served with both Ms. MacNaughton and Ms. Parrack as a member of the Tribunal.

to reappointment. Little notice was provided to either; in Ms. Parrack's case, she was only advised that, despite the Chair's recommendation, she would not be reappointed on July 9, some three weeks before the expiry of her term.

We are privy to an unusual amount of information about the circumstances of Ms. Parrack's non-reappointment because they figure so prominently in an ongoing proceeding before the Human Rights Tribunal.

That proceeding is a hearing into a complaint by a group of Indo-Canadian veterinarians against the British Columbia Veterinary Medical Association and its Registrar (together, the "BCVMA"), alleging, *inter alia*, discrimination on the basis of their place of origin. Ms. Parrack was designated to hear that complaint. The hearing has gone on for some 200 days, and has resulted in 18 written preliminary and interim decisions. Many more days will be necessary to conclude this extraordinarily lengthy hearing, and many more days after that to provide a final decision.

In the most recent of the 18 preliminary and interim decisions, Ms. Parrack denied an application brought by the BCVMA seeking to have her recuse herself from continuing to hear the matter: *Brar and others v. BCVMA and Osborne (No. 18)*, 2010 BCHRT 308.

The decision sets out the background to the recusal application. On July 13, Ms. Parrack adjourned the hearing. In doing so, she advised the parties:

As you are aware, I am subject to a five-year appointment that expires on July 31st, 2010. I sought a reappointment that was supported by the current chair of the Tribunal, Heather MacNaughton. My request was communicated to the Attorney General in November 2009. As both a lawyer and a Tribunal Member I acknowledge and accept that I have a professional responsibility to the parties to this hearing and I fully intended to meet this obligation and that is why I sought a reappointment in order to complete this hearing and to render a decision.

I have been advised by the Chair that she made repeated requests to have the issue of my reappointment addressed. It was only on the afternoon of Friday July the 9th, 2010 that the Chair was advised and who then advised me that the Minister intended to let my appointment expire and that I would not be reappointed for another five-year term. The Chair has also advised me that any further issues with respect to a continuation of my appointment, the only one being a possible six-month Chair's appointment pursuant to the *Administrative Tribunals Act*, would be addressed by the new Chair in August 2010 when that person will be appointed. The effect of these decisions is that as of July 31st, 2010 I will no longer be a member of the Human Rights Tribunal. I have had no written or direct oral communications from the Minister other than what has been communicated to me above and as such I am unable to provide you with any further information or answer any questions you may have. Clearly having only been provided with three weeks notice regarding the status of my appointment, I have not had a full opportunity to consider the professional impact that the Minister's decision has on me and the number of matters that continue before me including this hearing. (para. 8)

Ms. Parrack went on to state that she had decided that, in view of the resulting uncertainty, it would be unfair to the parties to have them continue to expend resources on the hearing before her. She adjourned the hearing dates scheduled for the remainder of July, directed the parties to hold the remaining scheduled hearing dates, and advised them they would be contacted by the Tribunal with an update, likely in August.

The parties reacted to this extraordinary turn of events. As recounted in the decision, counsel for the complainants wrote to both the Attorney General and the Chair, seeking either to have Ms. Parrack reappointed by the Attorney General or her designation on this matter continued by the Chair under her authority under s. 7 of the *ATA*: paras. 11-12 and 15. Counsel for the respondents wrote the same persons, opposing any reappointment or continuation of Ms. Parrack's appointment for the purposes of this case, and arguing that her actions, in adjourning the hearing, had created a reasonable apprehension of bias such that she could not, in any event, continue to hear the matter: paras. 13-14 and 17.

Both parties' correspondence to the Chair and the Attorney General are quoted at length in the decision. The following extract from one of the respondents' counsel's letters to the Attorney General gives some indication of the tenor of the respondents' correspondence:

We are very concerned about how this matter has unfolded. There was no need for Ms. Parrack to adjourn the proceedings in the Brar case after she learned she was not being re-appointed. She could very easily have simply continued with the hearing to the point of her expiry of her appointment, awaiting a determination by the incoming Chair as to whether her appointment would be extended to allow her to complete this matter.

Instead, Ms. Parrack and the Chair, who was also not re-appointed, have used Ms. Parrack's situation to create a controversy about the Government's intentions regarding the Human Rights Tribunal. Their politicization of the situation has, in our respectful submission, made it impossible for Ms. Parrack to now continue to complete this case, particularly since the lead Complainant has been quoted as saying that the Government's action of not re-appointing Ms. Parrack constitutes further discrimination against Indo-Canadian veterinarians.

As we explained in a letter we have sent to Chair MacNaughton, in light of what has transpired, there would be an overwhelming perception of bias if Ms. Parrack were now to continue to hearing this case. Mr. Bhullar and his lawyers have become the advocates for the re-appointment of Ms. Parrack. She will reasonably be perceived by the Respondents to be in the Complainants' debt.

Further, the not-uncommon situation of Tribunal members having ongoing cases when their appointment expires has been "politicized" by Ms. Parrack and the Chair. This use of the case to further another agenda contributes to the perception that the Respondents will be unable to obtain a fair hearing if Ms. Parrack continues. And now that the Complainants and their lawyer have joined in her cause, it is impossible for her to continue with this case.

That is not to say that the case has to start again. By consent of the parties, a new Member can be appointed to continue with the hearing. However, the new Member should be appointed by the Acting Chair and not by Ms. MacNaughton, given Ms. MacNaughton's involvement in the politicization of this matter.

There is a further reason why, in our respectful view, you should not be urging Ms. MacNaughton to extend Ms. Parrack's appointment for the purpose of this proceeding. Ms. MacNaughton's own appointment as Chair of the Tribunal expires in two weeks. The new incoming chair will then take over. For the reasons stated above, we think it would be wrong for the incoming Chair to extend Ms. Parrack's appointment for the purpose of this proceeding, just as it would be wrong for Ms. MacNaughton to do so. But additionally, if Ms. MacNaughton were now to make the extension being urged upon her by the Complainants, it would bind her imminent successor to a decision that could affect the Tribunal's operations for as much as the next two years (based on estimates of how long it will take to complete the hearing of this matter and receive a decision). (para. 14)

Complainants' counsel's reply was as follows:

Our communication was made solely for the purpose of ensuring that the conditions of independence essential to natural justice are fully met in this case. These conditions are well established in law by the Supreme Court of Canada. Three factors must be satisfied for independence to be established: security of tenure, security of remuneration, and administrative control.

Security of tenure has been described as tenure for a term or specific adjudicative task that is secure from interference by the Executive or other appointing authority in a discretionary or arbitrary manner. The essence of security of remuneration has been described as the right to salary and pension established by law and not subject to interference by the Executive in a manner that could affect independence....

Our concern is only the fairness of the hearing process and ensuring that a Tribunal Member who has heard over 200 days of a human rights proceeding of great importance is allowed to complete that hearing in a manner that protects her independence.

The principles of natural justice also require that in order to properly render a decision, an adjudicator must hear all of the evidence of the matters at issue. Having a new Tribunal Member appointed to this case at this point to hear only the Respondents' side of the case in person, and presumably to rely on transcripts for the Complainants' case, is fundamentally unfair and contrary the principles of natural justice. (para. 15)

In response, Ms. MacNaughton advised the parties she would not be making any decision about whether to authorize Ms. Parrack to continue hearing the case: para.

16. A new Acting Chair was appointed on August 1. On August 5, the Ministry advised the parties that their correspondence had been forwarded to him: para. 20. On August 12, the Acting Chair wrote the parties, advising them that he had exercised his authority under s. 7 of the *ATA* to authorize Ms. Parrack to continue to hear the matter, and that any natural justice concerns arising out of this sequence of events could be raised before her: para. 21.

The respondents filed an application to have Ms. Parrack recuse herself from continuing to hear the matter on the basis of a reasonable apprehension of bias. In support of that application, they also applied to her for an order requiring the Tribunal to disclose its file with respect to her reappointment.

Ms. Parrack declined to address the merits of the disclosure application: *Brar and others v. BCVMA and Osborne (No. 17)*, 2010 BCHRT 260.

Ms. Parrack denied the recusal application. She rejected the respondents' arguments that there was a reasonable apprehension of bias, actual bias, or that the Tribunal lacked institutional independence as a result of her adjourning the hearing on July 13 and providing the reasons for doing so that she did at that time.

As stated in the decision, the focus of the respondents' arguments in support of a reasonable apprehension of bias can be found in the following submission:

In our submission, a reasonable apprehension of bias was caused by your actions on July 13, 2010, in making the "statement" you did and immediately adjourning the hearing for an indefinite period. This had the consequence of inciting the Complainants to champion your reappointment by alleging that the Government's decision to deny your request for reappointment was due to a conspiracy between the Government and the Respondents to discriminate against them. (Application, p.1)

The central focus on an apprehension of bias application is the perception of the reasonable person, fully informed of all the

circumstances. In this case, the most important fact or circumstance is that you incited the Complainants to campaign for your reappointment in a manner that associated your reappointment with the discrimination claim of the Complainants. Whether you expected this to occur, or even knew it had occurred, is irrelevant. What is relevant, and of great concern, is that it did occur, which makes it impossible for you to continue adjudicating this case. A reasonable person would not perceive you to be an impartial adjudicator in these circumstances. (Application, p. 6) (para. 107)

Ms. Parrack found that a reasonable person would not conclude that she had sought to incite the complainants to campaign for her reappointment. Nor would such a reasonable person conclude that her ability to impartially adjudicate the matter was impaired by the actions taken by the complainants subsequent to the adjournment. There was therefore no reasonable apprehension of bias: paras. 107-111.

Ms. Parrack also found that the respondents had provided no evidence to support their serious allegations about her personal and professional integrity and conduct. There was therefore no basis for a finding of actual bias: para. 112.

So far as institutional independence is concerned, Ms. Parrack noted the respondents' submissions that her adjournment decision somehow suggested that the decision not to reappoint her was related to this complaint, and that her decision to adjourn brought into question not only her impartiality but also that of the Tribunal as a whole.

In response, Ms. Parrack noted that there was no evidence that the decision not to reappoint her was related to this complaint. She stated that, if she were aware of any evidence of a connection between the two, she would not continue to hear the complaint. She further noted that she was not given any reasons for her non-reappointment, and was not prepared to speculate about those reasons: para. 187.

In conclusion on this point, Ms. Parrack held that no reasonable person would conclude that the Tribunal had lost independence such that she could not continue to hear the matter: paras. 181-192.

In the result, Ms. Parrack denied the recusal application, and stated the hearing would proceed, as scheduled, on November 15.

By any account, this is an extraordinary decision arising out of an extraordinary sequence of events. The end, one fears, is not yet near. My purpose in recounting it has not been to argue the merits of the recusal application. Rather, it is to illustrate some of the dangers inherent in the current, entirely unsystematic, system for dealing with tribunal reappointments, not only in British Columbia, but throughout the country.

How can the reappointment process be improved?

Most recent litigation with respect to administrative tribunal independence has focused on mid-term terminations of tribunal members: see, for example, *McKenzie v. British Columbia (Minister of Public Safety and Solicitor General)*, [2006] B.C.J. No. 2061 (B.C.S.C.), appeal dismissed as moot [2007] B.C.J. No. 2270 (B.C.C.A.), leave to appeal denied [2007] S.C.C.A. No. 601; *Keen v. Canada (Attorney General)*, [2009] F.C.J. No. 402; and *Saskatchewan Federation of Labour v. Saskatchewan Government and General Employee's Union*, [2010] S.J. No. 614 (S.K.Q.B.).

Outside of Québec, there has been little if any judicial consideration of the legal principles governing reappointments.⁵ Nonetheless, it is generally accepted

⁵ I do not attempt in this paper to trace the unique and ongoing history of the development of tenured appointments in Québec from *Barreau de Montréal c. Québec (Procureur général)*, 2001 CarswellQue 1950, 48 Admin L.R. (3d) 82 (Que. C.A.), leave to appeal refused (2002), 2002 CarswellQue 2078 (S.C.C.); through the 2005 amendment to Article 38 of the *Act respecting administrative justice* (S.Q. 1996, c. 54) to replace the previous five year renewable appointments to the Administrative Tribunal of Québec (the “TAC”) with lifetime “at pleasure”

throughout Canada (perhaps with the exception of Québec) that governments have an unfettered right to decide whether to reappoint or not any member at the end of their term.⁶ Members who want to continue, must, as the expiry of their term approaches, petition the relevant appointing authority (either directly or through the chair) for reappointment. A tribunal member whose petition is not accepted is not entitled to, or given warning or notice of, a decision that is not in their favour. They are not given reasons for the decision nor are they entitled to compensation in recognition of their service or to assist them in their transition to other employment. The decision not to reappoint may create a significant hardship for the expired member, who is likely to have had little or no opportunity to seek alternative employment prior to the expiry of their term.

Ron Ellis has argued persuasively that the requirement to petition government for reappointment in circumstances where the decision is entirely discretionary, and where the denial means career disruption or financial hardship, renders independence illusory. Not just for the member who has been unsuccessful in his or her petition, but for all other members for whom a potential reappointment is looming.⁷

In my view, while these dangers may be true to a greater or lesser extent in respect of members of all administrative tribunals, it is especially true of members of those tribunals who are required to adjudicate disputes in which the body that appoints them may, in some cases, also be a direct party, or otherwise have a interest, direct or indirect, in the outcome of proceedings before them. Human rights tribunals are perhaps the best example of such a tribunal, as governments are a frequent

appointments; to the current litigation challenging on independence grounds a number of aspects of the legislation creating both the TAC and other administrative tribunals in that province.

⁶ Ellis, "The *Justicizing* of Quasi-Judicial Tribunals Part II", (2007) 20 Cdn. Journal of Admin. Law & Practice 69, p. 81.

⁷ *Ibid*, p. 82.

respondent to human rights complaints, and may have a variety of interests in the outcome of cases to which they are not a party.

Further, and while I have great regard for the integrity and professionalism of administrative decision-makers, the risk is ever present that a member may seek to curry favour with the appointing authority by rendering decisions likely to be satisfactory to them. An even greater risk is the possibility that parties, counsel or the public at large may perceive members as doing so, thereby jeopardizing the public's confidence in tribunal decisions and decision-makers. This is a particularly significant risk in respect of tribunals, such as human rights tribunals, which are required to make decisions on potentially controversial subjects.

The *Brar* case illustrates a number of these dangers. Ms. Parrack petitioned the Attorney General, through her Chair, for reappointment. She did so in a timely manner, and insofar as the record shows, in order to fulfill her sense of professional obligation to the parties in the ongoing *Brar* hearing. Given the tremendous public resources already invested in this hearing, and the consequences to the parties had Ms. Parrack not been prepared to continue to hear the case, this sense of professional obligation was well-placed.

Despite her petition, and her Chair's recommendation, the Attorney General chose not to reappoint Ms. Parrack. Despite Ms. Parrack having sought reappointment approximately eight months prior to the expiry of her term, only three weeks notice was given of this decision. This is a woefully inadequate notice period. Such inadequate notice may cause real financial hardship to the member suddenly forced to seek new employment. It also renders it impossible for a member to fulfill her professional obligations to complete the tasks before her. It is an insult to a person who has sought to serve the public interest through being an administrative adjudicator.

As is the norm, no reasons were given Ms. Parrack: see para. 187 of her decision. In the case of a member who has served full-time for a significant period of time, this is disrespectful. In this case, that lack of reasons appears to have been one of the many elements encouraging further litigation, as the parties speculated about the reasons for the Attorney General's decision and whether it was related to the *Brar* case.

The government is not a party in the *Brar* litigation. Government is, however, a frequent party before the Human Rights Tribunal. Further, in this litigation, the parties' submissions indicate that they speculated about the relationship between this case and the government's decision not to reappoint Ms. Parrack and accused her of doing the same.

I do not know why the Attorney General decided not to reappoint Ms. Parrack or whether it had anything to do with the *Brar* case. I would suggest that the fact that Ms. Parrack was in the midst of the lengthiest hearing in the history of the Human Rights Tribunal, and the consequences to that proceeding of not reappointing her, would have been highly relevant considerations in deciding whether to reappoint her. However, the point, for present purposes, is not what the reasons were or whether there was a connection between the case and the decision. The point is that the current system, which gives the appointing authority, in this case the Attorney General, the unfettered right to make reappointment decisions creates the potential for the sort of unseemly speculation evident in *Brar*.

Further, the present system can, as it did in this case, work a real unfairness on members of administrative tribunals. Tribunal members serve the public for often-inadequate remuneration, little professional recognition, and at times in the unkind glare of the media spotlight. Ongoing problems in the attraction and retention of qualified tribunal members will not be assisted by reappointment decisions that show such little respect for them, their work, their reputations, and their future.

How do we fix this problem? Many fixes have been suggested. While none is without difficulties of its own, all are worthy of consideration and debate.

Lifetime tenured appointments eliminate the problems associated with reappointments, but at the cost of eliminating government's arguably legitimate role in shaping the makeup of administrative bodies.⁸ It has also been argued that tenured appointments would undermine a chair's ability to hold members accountable and foster institutional decision-making.⁹ Lengthier non-renewable appointments would also eliminate the problem of reappointments, but may make tribunal appointments less attractive to those seeking to forge a career in administrative law and at a loss of opportunity for tribunals to develop institutional expertise.

Requiring that minimal procedural fairness be provided to tribunal members, in particular, some form of hearing and reasons for non-reappointment, would go a long way to improving the situation. Access to a neutral grievance procedure, about these and perhaps other issues, such as mid-term performance evaluations, could also substantially improve fairness.¹⁰

A significant improvement, from the point of view of departing tribunal members, would be a statutory entitlement to notice and/or pay in lieu of continued appointment.¹¹ Such a measure, while it would come at some financial cost to government, would not represent any limitation on government's executive

⁸ Ellis, *supra*, pp. 22-28.

⁹ Ellis, "Misconceiving Tribunal Members: Memorandum to Québec", (2005) 18 Cdn. Journal of Admin. Law & Practice 189, pp. 205-214.

¹⁰ MacNaughton, *supra*.

¹¹ Ellis, "Administrative Justice System Reform", *supra*, p. 32.

authority to make reappointment decisions, and may therefore be somewhat more palatable than some of the other possible solutions canvassed.

Another alternative would be the creation of independent bodies at arms length from government to assess and have effective decision-making authority with respect to petitions for reappointment.¹² Given the significant restraint on government's authority such a body would entail, such a proposal seems unlikely to gain support.

In the absence of the kind of statutory amendments necessary to introduce any of these measures, judicial review remains a potential avenue for a member to challenge a reappointment decision.¹³ Given that the applicable legislation authorizes appointing authorities to reappoint members, it seems clear that reappointment decisions are administrative decisions potentially subject to judicial review, both on grounds of abuse of discretion and breach of procedural fairness.

Such a challenge would have to overcome the Supreme Court's decision in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, which limited the circumstances in which public office holders are entitled to a public law duty of procedural fairness.

I would argue that *Dunsmuir* does not eliminate a duty of fairness in reappointment decisions because tribunal members are not employed pursuant to a typical, if any, contract of employment: para. 112. Further, given that tribunal members are not otherwise entitled to reasonable notice or pay in lieu of notice on the expiry of their terms, it is clear that private law does not provide them with a remedy, let alone a fair and principled one: para. 110. I would argue that tribunal members seeking reappointment are among those "truly subject to the will of the Crown", with the

¹² Ellis, "The *Justicizing* of Quasi-Judicial Tribunals Part II", *supra*, p. 86.

¹³ *Ibid*, pp. 86-87.

result that “procedural fairness is required to ensure that public power is not exercised capriciously”: para. 115.

Conclusion

There are no effective restraints on government’s authority to decide whom to reappoint as members of administrative tribunals. Such an unfettered discretion is inconsistent with the most fundamental of Canadian administrative law principles: *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1. It is potentially unfair to tribunal members, can only harm the prospects of attracting qualified persons to serve as tribunal members, tends to bring the administration of administrative justice into disrepute, and undermines any semblance of administrative tribunal independence.

New mechanisms to improve the fairness of the reappointment process, and with it the independence of administrative tribunals, are essential to a fair, effective and respected administrative justice system.