Administrative Justice: Independence and Responsibility — Towards a Common Regime for Independent Adjudicators

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1. INTRODUCTION

The following is a summary of the findings and recommendations published by the authors in February, 2014, as the outcome of a four-year research project dealing with independent administrative adjudicators in Québec.[1] The project was funded by the Fondation du Barreau du Québec, the Conférence des juges administratifs du Québec, the Association des juges administratifs de la Commission des lésions professionnelles and the Canadian Council of Administrative Tribunals.

The process of appointing public office-holders sometimes referred to as "administrative judges" periodically comes up for comment and questioning among the public and in the media. Such adjudicators are to be found in a number of public agencies set up either to regulate some sector of the economy or to rule, as part of the administrative justice process, over individual entitlements or obligations under a wide range of Québec statutes. Because the work of these agencies is more or less closely akin to that of a court of justice, they are often loosely described as belonging to the class of "administrative tribunals". Only some of these agencies, however, come within the statutory description of "bodies of the administrative branch charged with settling disputes between a citizen and an administrative authority", *i.e.* "bodies exercising adjudicative functions" in the narrow sense.[2]

The authors' research looks at the environment in which these agencies and their members deliver administrative justice. The analysis focuses on the status of administrative adjudicators and brings out a number of issues relating to the process by which they are appointed or reappointed. Among the matters surveyed are the following. In what context, following what procedure and under what criteria are adjudicators appointed? Does this appointment regime have due regard for the requirements of independence and impartiality associated with adjudication? Does it conform to the standards of transparency that are nowadays commonly expected of public institutions? Does it lead to appointments being made on the basis of

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1 *La justice administrative : entre indépendance et responsabilité. Jalons pour la création d'un régime commun des décideurs administratifs indépendants*, Cowansville, Éditions Yvon Blais, 2014.

2 *Public Administration Act*, CQLR c. A-6.01, s. 5; *An Act respecting Administrative Justice*, CQLR c. J-3, s. 9.

competence, experience, and personal abilities? What are the effects of this appointment regime on the manner in which adjudicators carry out their functions on a day-to-day basis? How does this regime compare with the rules governing the appointment of similar adjudicators elsewhere in Canada? Is the process for appointing administrative adjudicators in need of rationalization? If so, what are the available options?

The first part of the study includes a discussion of the statutes and regulations currently governing the appointment of adjudicators and the performance of their duties. The second part presents the results of interviews conducted with administrative adjudicators; this provides some empirical evidence of the effects of the current regime on the day-to-day performance of their functions by adjudicators and the agencies to which they belong. The third and last part develops a set of recommendations aimed at strengthening the independence of administrative adjudicators.

2. THE INSTITUTIONAL CONTEXT OF ADJUDICATION: ENVIRONMENT AND REQUIREMENTS

The study extends to the members of fifteen agencies loosely described as "administrative tribunals". Agencies brought under this generic term, however, display wide differences in jurisdiction, form of activity and origin. Some carry out administrative functions, including functions related to economic regulation. Others carry out adjudicative functions in the narrow sense, *i.e.* the hearing of proceedings against a decision of some minister or agency. Yet others combine these two types of functions. In all cases, however, what is involved in these functions is individualized decision-making. Such decision-making is therefore the core activity common to all fifteen agencies. Thus members of these agencies may be characterized as independent administrative adjudicators:

- Their function consists in making individual decisions in respect of a citizen, pursuant to norms or standards prescribed by law; they are therefore adjudicators in the broad sense of that term.
- They are part of an administrative agency, *i.e.* an entity that itself forms part of the executive branch of Government, but stands apart from the departmental structure to which it is linked; they are therefore administrative adjudicators.
- Neither adjudicators nor the agency to which they belong are normally subordinate to any hierarchical authority; further, adjudicators personally exercise decision-making power, and may not devolve it onto subordinates; these two features combined set them as independent administrative adjudicators.

The specific object of the study is to examine to what extent existing rules and practices guarantee the independence inherent in the function of such adjudicators.

By its very nature, adjudication implies that some distance is maintained in relation to persons or entities involved in a matter about which the adjudicator is called upon to make a decision. In the field in which most of these fifteen agencies operate, one of the entities directly involved will often be some legal agent belonging to the executive branch of Government. In order to satisfy the requirements of impartiality in the exercise of individualized decision-making, administrative adju-

dicators should enjoy an appropriate degree of independence in relation to the rest of the executive branch.

This need for independence in administrative adjudication is not easily met, for it has to manage with the tension between two imperatives, both grounded in a constitutional principle. On the one hand, one must regard the requirements of accountability derived from the principle of responsible government. On the other, inherent in the rule of law, stands out the duty of independence attaching to anyone who is called upon to determine the rights or interests of others on the basis of law. Obviously, tension between these two principles is in no way specific to Québec; it may be found at the center of administrative adjudication in many other legal systems. Each system manages it differently, consistent with the overarching concepts of public law in that system. Thus, the first part of the study aims at establishing what foundations, requirements and possible limits apply in respect of the independence of administrative adjudicators in the legal context of Québec.

The study thereby seeks to bring out what factors of general relevance bear on the appropriate balance to be achieved between responsible government and independent adjudication in the case of independent administrative adjudicators in Québec.

As far as the independence of courts of justice is concerned, legal doctrine, as set out in case-law and learned writing, distinguishes between the individual and the institutional dimensions of independence. *Individual independence* refers to a state of mind and describes a decision-maker's ability to determine an issue without being influenced by any external pressure. Such ability is part and parcel of the implied "contract for justice" between a judge and a party coming before him. *Institutional independence* refers instead to the nature of relationships existing between a judicial body and other seats of social or political power. As regards relationships within Government, institutional independence requires that the Judiciary be sheltered from interference by the Legislative or the Executive. Therein lies the most salient element of the principle of separation of powers.

Judicial independence as a principle, and more specifically the applicability of the principle to "administrative tribunals" (whatever is brought within that description), have been over the last quarter of a century the subject of much discussion in the legal literature. These writings reflect the abundance and sophistication of the case-law since the *Valente*[3] case in 1985. Thanks to these developments in the law, the contents of the principle of judicial independence, as well as its role as a precondition to the impartial delivery of justice, now attract a large degree of consensus, as any survey of doctrinal writings will make apparent. Further, it is now clear that independence as a principle also has validity for at least some "administrative tribunals". However, the case-law does not allow for a precise determination of the scope and consequences of extending the principle to such tribunals; this is a matter that only legislation can settle. But then, current Québec legislation does not provide comprehensive and precise treatment of the matter as regards independent ad-

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3 *R. v. Valente (No. 2)*, 1985 CarswellOnt 948, 1985 CarswellOnt 129, *(*sub nom. *Valente v. R.)* [1985] 2 S.C.R. 673, 52 O.R. (2d) 779, 23 C.C.C. (3d) 193, 49 C.R. (3d) 97, 24 D.L.R. (4th) 161, 37 M.V.R. 9, 19 C.R.R. 354, *(*sub nom. *Valente c. R.)* [1986] D.L.Q. 85, 64 N.R. 1, 14 O.A.C. 79, [1985] S.C.J. No. 77 (S.C.C.).

ministrative adjudicators. Yet, the matter needs to be addressed adequately in order to preserve public confidence in the quality of decisions made by adjudicators. Preserving public confidence is particularly important whenever citizens have to defer to an independent administrative adjudicator for the determination of their rights and interests in the context of a dispute with some Government entity: such an adjudicator must indeed be independent, both in terms of his personal outlook and in terms of institutional relationships involving the agency to whom he belongs.

Structurally, the devolution of activities and decision-making powers on non-departmental agencies tends to favour the independence of decision-makers. However, the principle of the government's responsibility before the National Assembly inevitably acts as a counterweight to the autonomy conferred on such decision-makers and agencies. Indeed, the principle requires, in order that the government may be held responsible, that the Cabinet or individual ministers exercise some measure of control over agency activity, even when such activity consists in adjudication. The government must have the ability to account for the proper working of agencies, which in turn requires that agencies be accountable before the responsible minister. In order that channels of supervision and accountability not hamper unduly the independence of agencies, they must be carefully designed and spelled out in precise terms.

While in a number of instances, the Legislature's intent has been on minimizing the scope of supervisory powers given to the government, especially as regards individualized decisions of agencies, several powers associated with the executive function are liable to disturb the appropriate balance to be kept between the respective requirements of independent adjudication and of responsible government. An illustration of this is the power to select, appoint, and remove independent administrative adjudicators.

In the search for appropriate balance between the independence required by the functions of administrative adjudicators, on the one hand, and the government's responsibility before the National Assembly, on the other, one is confronted with the classic issue of the relationship between law and policy in the context of action by public authorities. This search for balance also brings out contemporary tensions permeating the management of public action. Quite frequently nowadays, conflicting views are advocated in this regard: an approach based on regulation through law is set against a managerial approach, derived from market-related practices and focused on operational concerns. As a consequence, the achievement of measurable outcomes and the insistence on tight management of Government resources may well collide with a view of individualized adjudication as a highly specific activity, characterized by independence of the adjudicators. Indeed, fully integrating independent administrative adjudication into the general business of the supervising department would rapidly reduce adjudication to a mere instrument of departmental policy. This would disrupt the balance between independent adjudication and responsible government. Such pitfalls can only be guarded against through promoting and protecting adjudicator and agency independence.

3. SOME GENERAL FINDINGS

A number of features clearly stand out from the general profile of the fifteen agencies covered by the study. For all of them, individualized adjudication accounts for the major or predominant part of agency activity, if not for the totality of

such activity. In all cases also, the government or a minister have been granted statutory authority enabling them to influence, in a general way, the manner in which adjudicators carry out their functions. For instance, the government or the responsible minister have regulation-making powers, or at least powers of approval over regulations, in matters that affect adjudicators; they have direct or indirect control over the budget made available to adjudicators; and of course they select and appoint adjudicators, as will be described later. While the study does indicate that the supervisory powers exercised through the departmental structure do not allow the government to intervene in a specific case, at a more global level the independence of administrative adjudicators may be at risk.

Further, the study shows clearly that Québec, unlike some other provinces, approaches the matter of selecting and appointing independent administrative adjudicators *without the benefit of a single, unified statutory framework based on principles of general application*. The present state of the legislation makes it difficult to formulate findings that would apply across the board to all agencies comprised of independent adjudicators. This, of course, is no reason to abstain from defining common requirements, especially with a view to ensuring the independence of individualized adjudication, and inducing thereby some rationalization of that part of our administrative justice system. In-depth analysis of the missions and functions of the various agencies involved would assist in defining permanently the features of any agency charged with making individualized decisions through independent adjudicators.

4. THE LACK OF UNIFORMITY IN THE STATUS OF ADJUDICATORS

The researchers conducted a detailed survey of legal rules governing the status of independent administrative adjudicators. Part of this legal status is defined by the enabling statute of the agency to which they belong. Generally speaking, it is to that statute, together with complementary rules, not all of them of a legal nature, that one should look to for specification of the following matters: the number and qualifications of adjudicators, criteria and procedure for selecting and appointing adjudicators, remuneration and conditions of employment, the direction and distribution of work within the agency, ethical standards for adjudicators, lines of authority within the agency, the length of term as well as criteria and procedure for reappointing adjudicators, and the grounds and procedure for removing an adjudicator from office.

Again, this aspect of the Québec system of administrative justice displays very *little homogeneity* among statutory provisions. Thus, while in the case of some agencies the number of adjudicators is precisely set out in the statute, in other cases the applicable provisions will instead specify a minimum and a maximum number. In yet other cases, the number of adjudicators is entirely left at the government's discretion. The same occurs with regard to the qualifications required from prospective appointees. In most cases (nine out of fifteen), no qualification is required by statute, whereas in the case of the remaining agencies, legal qualifications are required, often only indirectly, for at least part of the agency's members.

Of course, such absence of specification might be made up through the existence of a rigorous selection process. But again, *in the majority of cases (nine out of fifteen) no such selection process is provided for in the legislation*. In one of these

cases (the Commission québécoise des libérations conditionnelles) a selection policy document has been published, but it carries no binding effect. Statutory provision for a selection process only exists, therefore, in the case of six of the agencies; for five of these, the process must be established through a regulation, such a regulation having been indeed adopted (the anomalous case in this group in the Régie de l'énergie). The regulation, in turn, provides for the establishment of selection, for the examination of candidates by a committee, for a committee report assessing the candidates, for a time-limit within which appointments may be made from a short list of candidates selected by a committee, etc.

Much the same may be observed with regard to the *setting of the remuneration* paid to independent administrative adjudicators; lack of homogeneity is compounded here by lack of precision. The overall effect of rules in this respect is to leave the matter of remuneration and conditions of employment within the purview of the government, as is case with all senior officials of the Executive branch. Four agencies, having in common their being subject to the disciplinary jurisdiction of the Conseil de la justice administrative (namely, the Commission des lésions professionnelles, the Commission des relations du travail, the Régie du logement and the Tribunal administratif du Québec), come under slightly different rules, but this does not detract from the overall finding; their enabling statute takes some care to confer more visibility, stability and binding effect to the rules governing remuneration, but in actual fact these rules do not distinguish adjudicators serving in those four agencies from the rest of senior office-holders.

From the standpoint of the independence of adjudicators, no issue seems to be raised by the rules governing the *distribution of assignments* within each of the agencies under study. Assignments are handed out by the chairperson or a vice-chair and are not subject to interference from the government. Further, chairpersons also have authority to determine the composition of panels of members, to rule on situations suggesting that an adjudicator may be involved in a conflict of interests, and to promote a high level of quality and consistency in adjudication — one means to the latter being the development of broad policy guidelines through discussion among the agency's adjudicators. The carrying out of those mandates by the chairperson should not normally involve the strong-handed exercise of hierarchical authority; yet, empirical evidence from the study suggests that it sometimes does. In addition, the chairperson is also charged with periodically assessing each adjudicator's performance of his or her duties. Insofar as it has no impact on that adjudicator's financial security, measuring "performance" is not by itself inimical to the independence associated with adjudication. Overall, considering only the normative framework, it would not seem that the authority conferred on an agency's chairperson entails a significant risk for the independence of adjudicators in relation to the agency to which they belong; much would seem to depend, however, on the manner in which such authority is exercised.

With regard to *ethics*, independent administrative adjudicators are subject to standards that are defined very differently depending on the agency. The fifteen agencies covered by the study come under three different sets of standards. One set is established under the *Act respecting Administrative Justice*; it applies to four agencies: Commission des lésions professionnelles, Commission des relations du travail, Régie du logement and Tribunal administratif du Québec. Then, each of the two agencies directly related to the National Assembly (Commission d'accès à

l'information, Commission de la function publique) has its own set of ethical standards. And finally, the nine other agencies come under the *Regulation respecting ethics and professional conduct of public office-holders*. These three regimes differ sharply as regards the machinery for imposing disciplinary sanctions. Nevertheless, all three appear, on the whole and in terms of substance as well as procedure, to foster individual independence and minimize the risk that ethical standards become an instrument in the hands of the Executive or of other adjudicators.

Issues related to the *length of terms of office* and to reappointments do not arise in the case of the Tribunal administratif du Québec, since its members are appointed to serve until retirement, during good behaviour. For five of the other fourteen agencies, the enabling statute provides for uniform five-year terms; such is the case with the four agencies specializing in the settlement of disputes (Bureau de décision et de révision, Commission des lésions professionnelles, Commission des relations du travail, and Régie du logement) and with the Régie de l'énergie. For the other nine agencies, however, appointments may be for any term under the maximum of five years. Reappointment is dealt with in a variety of ways. Thus, in the case of the three agencies coming under the disciplinary authority of the Conseil de la justice administrative (Commission des lésions professionnelles, Commission des relations du travail, and Régie du logement), the five-year rule is mandatory for reappointments as it is for initial appointments. The enabling statutes of three other agencies (Bureau de décision et de révision, Commission de protection du territoire agricole, and Régie des alcools, des courses et des jeux) do not even mention the possibility of reappointments. Other statutes contemplate reappointments, but say nothing as to the rules that would apply. The appointing authority therefore enjoys a wide discretion in fixing the length of appointments. Further, some agencies (*e.g.* the Commission québécoise des libérations conditionnelles) include several categories of adjudicators, with different rules as to the length of initial appointments and the possibility of reappointments. The procedure leading to a reappointment is another area of stark contrast between the detailed rules set out in the case of the three agencies coming under the disciplinary authority of the Conseil de la justice administrative (Commission des lésions professionnelles, Commission des relations du travail, and Régie du logement) and the informal and opaque arrangements prevailing in the case of the eleven other agencies, where specific provisions may only be found in the orders-in-council dealing with an individual's initial appointment.

As regards *revocation* of appointments, again, an adjudicator's position will depend on the agency to which he or she belongs. Members of the four agencies coming under the disciplinary jurisdiction of the Conseil de la justice administrative enjoy a relatively safe position; the agencies' enabling statutes spell out in precise terms the grounds on which revocation proceedings may be instituted. This also holds true for the two agencies having a direct relationship with the National Assembly (Commission d'accès à l'information and Commission de la fonction publique). Allowing for some variations, the position of adjudicators belonging to the nine other agencies is much more insecure, since authority to appoint implies authority to revoke. Orders-in-council appointing persons to such offices indeed specify, as a condition of the appointment, that the appointee "agrees that the government may revoke [his or her] appointment at any time, without notice or com-

pensation, on grounds of defalcation, mismanagement, gross fault or any ground of equal seriousness, proof of which lies upon the government".

The *decision not to reappoint* raises an issue different in nature, but having a comparable impact. Again, members of the Tribunal administratif du Québec are sheltered from this difficulty by their being appointed during good behaviour. But members of the other fourteen agencies under study are confronted with a very different position. True, members of the three agencies coming under the disciplinary jurisdiction of the Conseil de la justice administrative enjoy the right to receive prior notice that the examining committee intends to make an unfavourable recommendation; but beyond that point, no clear time-frame applies to the processing of their case. As far as the other eleven agencies are concerned, orders-in-council appointing their members provide that the appointee shall be given six months' advance notice of the responsible minister's intention to recommend a reappointment. Until that deadline has passed, the adjudicator will be uncertain about his position; once it has passed without notice being received — which occurs frequently — uncertainty persists. Such insecurity of tenure is apt to undermine an adjudicator's independence; the work environment thus created is hardly conducive to serene application of legal rules, as the empirical part of the study has disclosed.

Finally, the study has surveyed *post-term rules*. These differ according to the different types of situations contemplated. Thus, conflict of interests rules prevent some public office-holders to engage into activities considered as incompatible with their former office. Other rules, on the other hand, aim at preserving an adjudicator's financial security for some time following his departure from office. This is meant to avoid that an anticipated sharp decrease in income interfere with an adjudicator's independence of judgment. Such a safeguard applies essentially to persons who, before their tenure of office, did not belong to the public service. Public servants appointed to an office of independent administrative adjudicator go on leave without pay and are entitled, at the end of their term, to return to their former department. Making allowance for such distinctions, an examination of post-term rules as they apply to each of the fifteen agencies under study suggests that they do not materially differ and discloses fairly homogeneous treatment.

5. SUMMARY OF FINDINGS

Overall, the survey of the rules that govern the status of independent administrative adjudicators has shown the difficulty of formulating any statement of general application concerning that status. Any such statement immediately calls for qualifications or exceptions to account for the special case of this agency or that. On most aspects of the matter, the most that can be achieved in the way of valid generalization is to distinguish between two groups of agencies. On the one hand, the group made up of the four agencies coming under the disciplinary authority of the Conseil de la justice administrative enjoys as a group a fairly homogeneous regime, as well as clearly stronger safeguards for adjudicator independence. On the other hand, the motley group of eleven agencies, displaying a great diversity of regimes, does not — apart from the Commission d'accès à l'information and the Commission de la fonction publique — benefit from the same degree of concern for the independence of adjudication.

Through this diversity of rules, one clearly discerns that statutory safeguards for the independence of adjudicators serving in these fifteen agencies are of uneven

strength and are in many respects subject to the exercise of discretion by other actors in Government. Granted, some provisions of statutes or regulations do include safeguards tending to ensure that individualized adjudication will be carried out with all due independence. However, other provisions leave room for direct or indirect influence from the Executive over such adjudication. This is particularly so as regards the provisions governing appointments, the criteria for selecting appointees, the process leading to reappointments, and the revocation process.

6. FINDINGS FROM THE EMPIRICAL RESEARCH CONDUCTED AMONG ADJUDICATORS

An empirical investigation was also conducted among independent administrative adjudicators themselves as part of this study. Twenty-eight adjudicators belonging to the fifteen agencies under study agreed to take part in a semi-directive interview.

An exhaustive analysis of these interviews discloses a state of affairs that, in some respects, gives even more cause for alarm. While the interviews confirm some of the findings based on the survey of statutes and other relevant norms, they also reveal the problematic nature of situations that, viewed strictly from the angle of textual analysis, might not appear objectionable; as it turns out, such situations do indeed undermine, on a regular basis, the independence of adjudicators belonging to the agencies under study.

Thus, the interviews are evidence that requirements of transparency, legitimacy, and competence, all three being preconditions of adjudicator independence, are not complied with, to a very substantial extent: in at least nine of the fifteen agencies, the absence of criteria for selecting appointees, as well as the opaque character of processes, both at the selection stage and for reappointments, are quite incompatible with those requirements. For lack of any adequate normative framework, it becomes impossible to verify that prospective appointees or incumbent adjudicators do meet the proper standards of independence.

The empirical part of the study also demonstrates that the appointment process, as a whole, does not preserve the appropriate balance between the principle of independent adjudication and the principle of responsible government (the latter, derived from the democratic principle). In the absence of rules, in the proper sense of the word, to govern the selection of adjudicators, an examination of actual practice confirms that such an imbalance leaves the process open to party political influences, indeed to patronage, in the exercise of the appointing power. Analysis of the interviews also brings out the fact that the staff of the Secrétariat aux emplois supérieurs does not differentiate appointing a candidate to an office of adjudicator from appointing someone to a senior position as administrator of state; this indiscriminate approach hampers the design of an appointment process that would suit the specific requirements and duties attached to adjudication.

The empirical research into actual practice shows that the power to appoint and reappoint adjudicators, and to set the length of their term of office, is regularly used to provide a convenient posting for some favoured candidate, to reassign public officials no longer welcome in their position, or to offer employment to specific individuals on the eve of a change of government. Important decision-making powers are thereby regularly conferred on individuals who do not have the appropriate

qualifications. As is made clear by the interviews conducted as part of this study, such a course of action may undermine the very legitimacy of appointments.

On a more general level, the uneven level of competence among adjudicators in a given agency generates a form of dependence: adjudicators that are less well prepared for these functions, or that are simply incompetent, depend on other adjudicators. This becomes particularly apparent where adjudication is being conducted by panels of adjudicators. Clearly such a state of affairs undermines the independence of those that lack the necessary abilities — including even the ability to write a decision.

The interviews also provide evidence that the absence of rules concerning the reappointment of adjudicators, and the fact of the reappointment process being conducted by the Secrétariat aux emplois supérieurs, a unit placed directly under the Executive Council, are both incompatible with the notions of transparency and legitimacy that should govern the accession to the office of independent administrative adjudicator. The empirical part of the research confirms that the exercise of the government's appointing power is left without guidance and thus exposed to arbitrary decisions being made. Under such conditions, the exercise of that power may result in adjudicators unanimously viewed as competent being replaced by others less well prepared (or less competent).

In the case of the six agencies for which a precise procedure has indeed been established for the selection of appointees and the reappointment of incumbents, the interviews demonstrate that the reappointment process is often viewed as cumbersome and useless, incumbents being systematically reappointed.

The empirical part of the research also shows that the fact of the government retaining discretion in the matter of reappointments has undesirable consequences on the state of mind of adjudicators whose appointment comes up for review. At the very least, this situation and the attendant uncertainty raise a doubt as to the ability of some adjudicators to perform their duties serenely, or indeed to preserve their independence of judgment, while the decision on their reappointment is still pending; some interviewees, at least, had witnessed such situations among their colleagues.

On the issue of salary determination and employment benefits, absence of uniformity among adjudicators is also viewed by them as creating the risk of arbitrary treatment of individual adjudicators. Interviewees were quite explicit about this matter. This situation may well give rise to tensions within groups of adjudicators.

Finally, the empirical research shows that adjudicators serving in an administrative office within an agency (*i.e.* as chair or vice-chair) play a more significant role than would be expected on reading the relevant statutory provisions. On the one hand, it appears from the interviews that even though the chairperson is required to provide an annual assessment of the performance of every adjudicator in his agency, such assessments carry little weight in the making of decisions about reappointments. Indeed, the interviews suggest that, generally, the chairperson is not involved in the decision to appoint an adjudicator to his agency nor in the decision to reappoint an incumbent. Yet, on the other hand, interviewees hinted at the possibility that a chairperson might use his or her authority to distribute cases among adjudicators in order to favour certain general outcomes on issues considered as sensitive, thereby undermining the independence of adjudicators or that of the agency.

7. THE STATUS OF ADJUDICATORS IN COMPARATIVE LAW: NOVA SCOTIA, BRITISH COLUMBIA, ALBERTA AND ONTARIO

The study also contains an examination of the legislation and policies governing the status of independent administrative adjudicators, including the processes for their selection and appointment, in four provinces of Canada: Nova Scotia, British Columbia, Alberta, and Ontario. The legal and administrative regimes of the various provinces display significant differences, both among themselves and in relation to the current regime in Québec. These differences indicate that the issue of independence as it relates to administrative adjudicators should be approached keeping in mind the legal, political and historical environment that is specific to each institutional system.

Unlike Québec, those four provinces have dealt with the status of independent administrative adjudicators within a broader policy framework that extends to the selection and appointment of members for all agencies of Government. This global approach is particularly conspicuous in the case of Alberta. The other three provinces have treated separately the status of office-holders whose functions correspond, more or less, to those exercised in Québec by independent administrative adjudicators; nevertheless, they have also given attention to the selection and appointment of the members of other types of Government agencies.

The regime set up in any of those four provinces could not be transplanted wholesale in the Québec context. However, some features present in one or more of them could provide useful ideas in the perspective of improving the status of independent administrative adjudicators in Québec. One such idea is the existence of a uniform statutory framework, governing the selection and appointment of adjudicators. Other ideas include an open, public and transparent process for selecting adjudicators; selection criteria emphasizing the competence, experience, and personal qualifications of candidates; a mechanism for assessing the performance of adjudicators; standard rules governing the length of terms as well as reappointments; a more precise definition of the authority of chairpersons. Recommendations put forward in the concluding part of the study take into account the experience of those four provinces, especially in respect of these features.

8. RECOMMENDATIONS

Based on the study summarized above, the researchers recommend that a framework statute be adopted, laying down the general rules governing the selection, appointment, and reappointment of independent administrative adjudicators (Recommendation no. 1). This new legislation should also deal with the remuneration of adjudicators, their conditions of employment, as well as the management of agencies entrusted with adjudicative functions to be exercised by independent adjudicators.

The framework legislation should also:

- institute, as an entity directly related to the National Assembly, a Secretariat charged with the administration of the selection process for independent administrative adjudicators (Recommendation no. 2);
- set out criteria of competence applying to independent administrative adjudicators generally (Recommendation no. 3);

- provide that any appointment to an office of independent administrative adjudicator shall have to be justified on the basis of experience, competence, ability to contribute to the agency's mission and ability to perform individualized adjudication (Recommendation no. 3);
- require from every independent administrative adjudicator that he or she exercise that function with independence, impartiality, and integrity (Recommendation no. 3);
- provide that no one may be candidate for an appointment as an independent administrative adjudicator unless he or she can demonstrate at least seven years of work experience (Recommendation no. 4);
- provide, in terms similar to those of s. 42 of the *Act respecting Administrative Justice*, that independent administrative adjudicators be selected among persons declared apt according to a procedure established by regulation; such regulation should determine, in particular: 1) the publicity that must be given to the recruiting process and the content of such publicity; 2) the procedure by which a person may become a candidate; 3) the rules governing the establishment of selection committees by the Secretariat; and 4) the information a committee may require from a candidate and the consultations it may hold (Recommendation no. 5);
- provide that at the conclusion of the selection process, the selection committee shall declare apt to be appointed to an office as independent administrative adjudicator a number of candidates equal to double the number of positions for which the recruitment process is being held; that the committee shall transmit to the appointing authority the list of such candidates, without setting an order of priority among them but assessing each of the listed candidates; that the period during which a declaration of aptitude remains valid shall be determined by regulation; and that the appointing authority shall appoint candidates from that list, after obtaining the advice of the chairperson of the agency to which the appointment is to be made (Recommendations nos. 6 and 27);
- provide that a selection committee shall be composed of five persons, two of these representing the public and being chosen from a name bank maintained by the Secretariat with due regard to the need for broad social representation and for gender equality in the composition of committees as well as in the appointment of independent administrative adjudicators (Recommendation no. 7);
- designate the responsible minister as the appointing authority for independent administrative adjudicators belonging to agencies for which he is responsible, subject to approval of appointments by the government (Recommendation no. 8);
- provide that the initial term of office for every independent administrative adjudicator shall have a duration of five years, that any subsequent term shall also have a duration of five years, and that any reappointment of an adjudicator shall require previous demonstration of his or her competence (Recommendation no. 10);

- provide, as regards the process leading to the reappointment of an independent administrative adjudicator, in particular: that the adjudicator shall receive notice of the government's decision at least three months before the expiration of the adjudicator's term of office, failing which the adjudicator shall automatically stand reappointed; that the appointing authority shall reappoint an adjudicator whenever the chairperson of the agency has recommended that he or she be reappointed; and that the chairperson shall make such recommendation whenever the adjudicator's annual assessment of performance has been satisfactory (Recommendations nos. 11, 12 and 13);
- mandate the chairperson of an agency to preserve the integrity of the agency's adjudicative function, to make recommendations to the appointing authority concerning the reappointment of adjudicators belonging to the agency, and to report such recommendations, in quantitative terms, in the agency's annual report of activities (Recommendation no. 14);
- confer on any independent administrative adjudicator who is not reappointed and does not pursue a career in the public sector the right to a transition allowance (Recommendation no. 15);
- require that any public servant appointed to an office as independent administrative adjudicator resign from the public service when he or she is first reappointed as an adjudicator (Recommendation no. 16);
- bring all independent administrative adjudicators under the disciplinary jurisdiction of the Conseil de la justice administrative and confer on the Conseil authority to establish by regulation a code of ethics applying to all adjudicators (Recommendation no. 18);
- determine, for all independent administrative adjudicators, in terms similar to those of the *Act respecting Administrative Justice*, the occurrences giving rise to disciplinary sanctions, the situations considered incompatible with an adjudicator's office, the disciplinary procedure, and the applicable sanctions (Recommendation no. 17);
- provide for the annual assessment of an adjudicator's performance of his or her duties, set out the purposes of such assessment and confer on the government authority to establish by regulation assessment criteria (recommendation no. 19);
- list the factors based on which an adjudicator's initial remuneration shall be fixed; confer on the government, in terms partly similar to those of the *Act respecting Administrative Justice*, regulation-making authority over the remuneration and employment benefits of independent administrative adjudicators; and provide that an independent body shall periodically review scales of remuneration and other conditions of employment applicable to independent administrative adjudicators (Recommendations nos. 21, 22, and 23);
- confer on the chairperson of every agency composed of independent administrative adjudicators, in terms similar to those of the *Act respecting Administrative Justice*, the authority required to manage the agency's ad-

judicative activities and, subject to previous consultation of the vice-chairs and other members, authority to issue directives aimed at fostering consistency in adjudication (Recommendation no. 24);

- confer on every agency composed of independent administrative adjudicators, in terms similar to those of the *Act respecting Administrative Justice*, authority to establish rules of practice and procedure, subject to approval by the government (Recommendation no. 24);
- confer on the government or the responsible minister authority to issue, for any agency composed of independent administrative adjudicators, directives respecting the general policy and objectives of the agency (Recommendation no. 24);
- require the government, when exercising authority, under an agency's enabling statute, to determine the number of independent administrative adjudicators composing the agency, to take into account the agency's needs (Recommendation no. 26);
- list, in terms partly similar to those of the *Act respecting Administrative Justice*, the duties incumbent on the chairperson of an agency composed of independent administrative adjudicators, adding thereto an advisory function to the government prior to the appointment of an adjudicator, as well as authority to enable an adjudicator whose term of office has ended to continue hearing and adjudicate matters that he has already begun hearing (Recommendation no. 27).

Finally, the authors of the study further recommend:

- that the *Standing Orders of the National Assembly* provide a mechanism for parliamentary approval of appointments as an independent administrative adjudicator (Recommendation no. 9);
- that the government, after having carried out an assessment of presently available training, make available to all independent administrative adjudicators, newly-appointed ones having priority of access, basic training adapted to the requirements of their office and to their level of preparation (Recommendation no. 20);
- that the government examine the possibility that that the new framework legislation enable the responsible minister and the chairperson of an agency composed of independent administrative adjudicators to formulate jointly a memorandum of understanding about the management of the agency (Recommendation no. 25);
- and lastly, that the language of s. 56 of the *Charter of Human Rights and Freedoms* be harmonized with the *Act respecting Administrative Justice* and the present state of administrative law, through the substitution of "adjudicative" for "quasi judicial" (Recommendation no. 28).

Adjudication by independent administrative adjudicators contributes to the achievement of administrative justice in Québec. That system of justice is different in nature from the systems of civil or criminal justice. It follows that the safeguards provided to ensure the independence of administrative adjudication need not be the same as those required for the courts. Nevertheless, by its very nature, the adjudicative activity of these administrative agencies calls for a basic and uniform protec-

tion of their independence. This uniform threshold must be guaranteed by statute. What is at stake in this matter has a vast significance, since administrative justice is bound to expand in the future. With globalization and the increasing speed of communications and social intercourse, priority must be given to preserving sensitivity to change on the part of institutions involved in adjudicating on rights and interests. Government, in Québec as elsewhere, will need to adapt the parameters of its action to these new requirements. In this perspective, the need for the speedy, expert, and affordable determination of issues — traditionally the core business of administrative agencies engaging in adjudication — will exert ever stronger pressure on the justice system. Giving this part of the administrative justice system a sound statutory basis would not only assist in overcoming its present inadequacies but also prepare it for the upcoming societal challenges. Adopting such a framework legislation, striking the proper balance between the principle of independent adjudication and the principle of responsible government is the first and most important step in a reform initiative that has become necessary.