APPOINTMENTS & ADMINISTRATIVE JUSTICE OCTOBER 11, 2012

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Outline

- 1) A Question of Independence
- 2) A Question of Accountability
- 3) A Question of Discretion
- 4) A Question of Political Leadership
- 5) Future Developments & Further Reading

Independence

- Since *Matsqui* (1995) and Ocean *Port* (2001), the Court has recognized administrative independence – the extent of the relationship between independence and the appointment and reappointment process, however, remains unsettled.
- Does administrative independence require transparent, merit based and non-partisan guarantees in appointment process?
- Can administrative or constitutional law require a higher standard of independence in administrative appointments than judicial appointments?

Independence

- Appointments and termination are two sides of a similar coin
  - *Hewat* (1998) "There are many tribunals, agencies and boards in this province, each with different responsibilities, and it would be difficult to lay down any single rule or practice that would be suitable for all…it is difficult to imagine how any tribunal with quasi-judicial functions could maintain the appearance of integrity to those who appear before it, without some degree of independence. The image of independence is undermined when government commitments to fixed appointments are breached."

Independence

- *McKenzie* (2006) BC Supreme Court finds that a Ministerial Order rescinding the appointment of a residential tenancy arbitrator without reasons was invalid. On appeal, the matter was dismissed as moot as the legislative scheme had been changed.
  - "A tribunal, constituted to try issues of law as between private citizens that is equipped with none of the indicia of independence required to ensure impartiality or to engender public confidence or respect, must necessarily run afoul of the unwritten principle of independence identified in the... The work of residential tenancy arbitrators is a judicial function that "relates to the basis on which [that] principle is founded." (McEwan J.)

Accountability

- ATAAGA is an example of legislation which recognizes a statutory commitment to tribunal appointments:
- **14.** (1) The selection process for the appointment of members to an adjudicative tribunal shall be a competitive, merit-based process and the criteria to be applied in assessing candidates shall include the following:
- 1. Experience, knowledge or training in the subject matter and legal issues dealt with by the tribunal.
- 2. Aptitude for impartial adjudication.
- 3. Aptitude for applying alternative adjudicative practices and procedures that may be set out in the tribunal's rules. 2009, c. 33, Sched. 5, s. 14 (1).

Accountability

- Diversity – should Government appointments reflect a commitment to an inclusive and representative system of admin justice? Should data be made available on the demographic info of applicants, appointees, etc?

- Performance management – to what extent should reappointments flow from evaluation of performance? How should this be communicated to the affected individuals? To the public?

Discretion

- *CUPE v. Min of Labour* (2003) – The SCC held that the Minister's exercise of discretion in appointment retired judges to Chair arbitration panels was "patently unreasonable."
- The majority held that the Minister, as a matter of law, was required to exercise his power of appointment in a manner consistent with the purpose and objects of the statute that conferred the power. A fundamental purpose and object of the *HLDAA* was to provide an adequate substitute for strikes and lock-outs. To achieve the statutory purpose, "the parties must perceive the system as neutral and credible".

Discretion

- *CUPE* raises important questions for the future of discretionary appointments:
  - What are "relevant factors" and "irrelevant factors" in a Minister's discretionary appointment process?
  - What degree of transparency should/must accompany discretionary appointments?
  - What constitutes the "purpose and object" of statutory authority for discretionary appointments?

Political Leadership

- Patronage and partisanship can only be eliminated from appointments where Governments decide to take leadership.
  - *Keen v. Canada* (2009) The removal of a member from the Chair's position in the Canadian Nuclear Safety Commission appeared to be based on the fact that the Gov't disagreed with a decision of the Commission (which it had earlier recalled Parliament to overturn).
  - Modest reform initiatives in B.C., Nova Scotia and Ontario in the last decade all suggest progress is possible with sufficient motivation and leadership.

Possible Future Developments

- Statutory entrenchment of merit-based appointment process.
- Transparent data on applicants and appointments to all statutory bodies with regulatory and/or adjudicative functions.
- Clarifying performance based standards to govern reappointments.
- Developing an vetting committee or advisory body to serve at arm's length from government.

Further Reading

- Lorne Sossin, “The Uneasy Relationship between Independence and Appointments in Canadian Administrative Law” in G. Huscroft and M. Taggart (eds.), *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (Toronto: University of Toronto Press, 2006) pp.50-80

- Laverne Jacobs, "Caught between Judicial Paradigms and the Administrative State’s Pastiche: ‘Tribunal’ Independence, Impartiality, and Bias" in *Administrative Law in Context* , 2nd edition, Colleen M. Flood & Lorne Sossin eds. (Toronto: Emond Montgomery, 2012) 233-278.

- S. Ronald Ellis, “Appointment Policies in the Administrative Justice System: Lessons from Ontario Four Speeches” (1999) 11 Can. J. Admin. L. & Prac. 205

- Improving Administrative Justice in Manitoba: Starting with the Appointment Process (2009) Manitoba Law Reform Commission