



Improving Administrative Justice in Manitoba: Starting with the Appointments Process Executive Summary

A. Introduction

Manitoba has about 160 administrative agencies, boards and commissions (often referred to as “ABCs”) that operate outside the line departments of government. The government relies on administrative boards to regulate and adjudicate, to give advice, to administer substantial financial and other assets and to provide goods and services. Other administrative boards are appointed to take on roles that emerge as governments assume regulatory functions. In the last decade most Canadian provinces and the federal government have reviewed their board appointments processes and most have implemented changes to ensure that the processes are more open, transparent and accountable and less partisan and more merit-based. Manitoba is one of the few provinces not to have made some change to its appointments process. The first step towards ensuring quality performance of administrative boards in Manitoba is to examine the quality of the appointments process.

This report discusses the difficult issue of what role, if any, partisanship (in the sense of appointees’ known sympathies with the government’s political leanings) should play in the appointments process. This report outlines the formal mechanisms for making board appointments in Canadian common law jurisdictions and outlines the issues that arise with the less formal mechanisms. It examines how concerns with appointments have emerged in Canadian jurisdictions and how governments have changed their appointments processes in response to those concerns. This report describes publicly available information on the current appointments process in Manitoba, and reviews developments and reforms in appointments policies in Canada and other jurisdictions. The final part of this report examines more closely the elements of appointments policies and makes recommendations on a new appointments policy for Manitoba.

B. Partnership and the Appointments Process

Many administrative boards are expected to operate independently from the government. Some agencies are established to separate from political interference decisions that should be based on sound professional or technical knowledge. Administrative boards are often established to ensure that the very high technical requirements of policy making in the regulated areas can be determined in an atmosphere of expertise, flexibility, adaptability and freedom from partisanship. However, partisanship, in the sense of known sympathies with the government’s political philosophy, will always play a role in board appointments processes. For example, some administrative boards are appointed to give expert advice to the government with an important aspect of their expertise being that the political philosophies of appointees are in line with those of the government.

The nature of the function performed by a board makes a difference in some appointments policies regarding the permissible influence of partisan considerations; policies

across Canada differ significantly on their basic approach to this issue. In this report, the Commission suggests that merit should be the overriding consideration for any appointment to an administrative board, especially to those boards with complex and technical decision making obligations or where independence is important. For example, the primary criterion for appointment to adjudicative and some regulatory tribunals should be to ensure that the best person available is appointed, whereas a shared political philosophy may be an appropriate consideration for appointments to other types of boards such as those whose function is to make policy and give advice pursuant to a general statutory mandate. Ultimately, care should be taken to eliminate or, at least, monitor (depending on the type of board) the influence of partisan considerations during the process.

C. Overview of Formal and Informal Appointments Mechanisms

The formal mechanism for exercising an appointment power is set out in the legislation creating the board. Four formal appointing mechanisms are used in Canadian jurisdictions: (1) Order in Council appointments; (2) ministerial appointments; (3) internal agency appointments; and (4) constituency based or party choice appointments. Most board appointments are either Order in Council or ministerial appointments and these appointments are the focus of this report. Other than setting out the formal mechanisms for making appointments, there are few statutory provisions in Manitoba or most other Canadian jurisdictions concerning the board appointments process. In most cases, Manitoba legislation does not set out process provisions and legislation rarely says anything about how positions will be advertised, what application or screening processes need to be used or what are the required qualifications or experience (and if it does, the qualifications are often very general).

In the absence of formal statutory requirements, informal policies have been used to generate lists of potential board appointees. Little is known by the general public about the informal mechanisms used to make appointment decisions, including what positions are available, the criteria for filling them, what processes are used to screen names through to ministers or Cabinet or who is appointed to positions.

D. Board Appointments Policies in Other Jurisdictions

Most governments that have engaged in an appointments policy review have accepted in principle that the new process must be open, transparent and accountable and that appointments must be merit-based rather than based on political affiliation. Yet there are differences in the approaches taken by these governments.

The Nova Scotia Appointments policy is open and transparent as all positions are advertised, job descriptions and qualifications are established and the process used to make determinations is known. The policy clearly states that the purpose of the process is to appoint the “best candidate”. The adjudicative positions process is merit-based as qualifications are quite detailed and an advisory committee and short list of best qualified candidates are used. However the process used for non-adjudicative positions is less well designed to achieve the objective of merit-based, non-partisan appointments as qualifications are not as detailed, the minister has more influence over the screening panel and a list of all qualified candidates is sent to the appointing authority. Accountability measures are weak as names and biographies of administrative board members are not publicly available, no agency is charged with a general oversight function and the legislative review committee rarely reviews decisions.

The British Columbia appointments regime is open and transparent, merit-based and accountable. More than any other Canadian appointing regime, British Columbia attempts to make the process less influenced by partisanship by requiring board chair involvement, establishing specific and objective qualifications that are more detailed than the minimal qualifications set out in legislation, housing the unit supporting appointment outside the Executive Council Office and using a ranked short list. Information about the successful applicants is publicly available and the Board Resourcing and Development Office provides general oversight of the appointments process. As well, British Columbia initiated major reforms to the appointments process by enacting the *Administrative Tribunal Appointment and Administration Act* and the *Administrative Tribunals Act*.

The Ontario public appointments regime is open and accountable. While the government has made an important commitment to appointing the most qualified candidates, legislation in Ontario has been amended recently to lower qualification levels rather than raise them for some adjudicative boards. Its processes could be more transparent as to criteria used, the nature of the selection process and the form of the recommendation to the minister. In the absence of this information, it is difficult to assess the strength of the Ontario government's commitment to an appointments process that minimizes partisan considerations in favour of merit-based processes.

The process adopted in New Brunswick does allow for more openness and transparency about what positions are available and what qualifications are necessary, especially if the board's consultative role is properly used. While the *Appointments Policy*'s opening statement on guiding principles indicates that appointments are diverse and merit-based (meaning "the most competent individuals"), the *Appointments Policy* is silent on diversity considerations and speaks only of "qualified" or "possible" rather than "most competent" candidates. Given the absence of detail on the selection process and the significant potential for political involvement at the screening stage and the absence of an express "most competent" short list or rank order requirement, there is still significant room in the New Brunswick process for political preferences to play a significant role in the appointments process. The absence of effective accountability mechanisms exacerbates this potential.

The Alberta approach to board appointments is open and the clear thrust of the policy is the expectation that all appointments regardless of the type of board will be transparent, non-partisan and merit-based. In particular, the process is designed to ensure that the job qualifications are set out, that the posted position descriptions go beyond statutorily mandated qualifications and that the board chair plays a significant role in the appointments process. Importantly, a short list of only the "top candidates" is screened through for every appointment regardless of the function of the board. Having more information on successful applicants is necessary however to satisfy the expectation that the process is accountable.

The Yukon appointments process has some openness in the application process. In the absence of more information on selection criteria and the selection processes, it cannot be determined whether it is transparent or merit-based. There are some accountability mechanisms such as the availability of board members' names (but not qualifications) and standing committee review, but these are minimal especially since the Committee meets in camera.

The appointments process in Prince Edward Island meets some of the requirements for a good board appointments regime. It is open and is somewhat transparent. Because the qualifications set out are little more than the statutory minimums and there is no requirement for board involvement in the process, it cannot be said that there is a strong merit focus or that the board's needs have been taken into account. However, the department is responsible for screening so it is somewhat less likely to be swayed by partisanship.

Little information is publicly available concerning the appointments process in the Northwest Territories. In 2004, the Department of the Executive initiated a process to review all administrative boards in the Northwest Territories and in 2005 a new policy provided that a comprehensive governance framework should be developed for all boards; it appears that this review process is ongoing and the governance framework has not been published.

The appointments processes in Saskatchewan and Newfoundland and Labrador lack openness, transparency, accountability mechanisms and are not designed to ensure that the most qualified people are appointed to administrative boards. It appears that there are no legislative provisions or policy frameworks on general issues related to board appointments, no information is available on vacant positions (and therefore no information is available on the processes that will be used to fill these positions) and very little information is available on who has been appointed.

Little information is publicly available concerning the appointments process in Nunavut. There is no information on the Government of Nunavut website concerning the process used to make appointments to administrative boards other than the legislation creating the boards, which provides that appointments are made by the Executive Council. Most boards do not have websites and there is no information on required or desirable qualifications other than the minimal qualifications as set out in the enabling statutes.

Unlike many governments in Canada, no general policy framework or directive concerning appointments have been issued in Manitoba. There is almost no publicly available information on the government website or elsewhere about the board appointments process used in Manitoba either for specific positions or more generally. Standing Committees of the Manitoba Legislature do not have the power to review appointments. Very few board appointments are publicly announced and, even on the boards' own websites, very little information is available about the qualifications of those who have been appointed to Manitoba boards. Often the names of panel members are not even made public. The appointments process used in Manitoba lacks some openness, transparency and accountability and, in the absence of factors such as clear and public process requirements; position descriptions and selection criteria; a non-partisan selection process; and public announcements of appointments, the process cannot be confidently described as merit-based.

The appointments process to federal boards have become more open with the publication of a federal *Appointments Guide* and the posting of at least some of the open positions on the government's website. However, an open competition process is not used for most board appointments, no specific qualifications are set out for positions and no general appointments process guidelines have been made publicly available. Little information is available on the selection processes used for most federal boards. Therefore, it is difficult to assess whether merit rather than patronage or partisanship is the primary consideration for making appointments, whether partisan influences are minimized in the screening process or whether only the best qualified (in contrast to all qualified) candidates are presented to the minister or Cabinet for consideration. Accountability has improved, as at least the names of all appointees are available and the government seems to use press releases frequently to announce significant appointments.

The British government established the Commissioner of Public Appointments, an independent commission, whose office regulates the public appointments process, investigates complaints about appointments processes, monitors compliance with a *Code of Practice* and promotes fair selection procedures focused on merit. The British regime is quite extraordinary and takes unique steps to ensure that merit is the only consideration taken into account for all public appointments.

In those Canadian jurisdictions where improvements to the board appointments process have been made, they have proceeded by way of policy directive rather than legislative reform (with the notable exception of British Columbia). All of the governments across Canada that have made changes to their appointments regimes have improved the openness of their system. However, in most jurisdictions, there are still many weaknesses respecting transparency, accountability and with merit being an overriding consideration.

E. Elements of Good Appointments Policies

Having an open and transparent system is an essential requirement to a merit-based system. All of the governments across Canada that have made changes to their appointments regimes have, at the very least, improved the openness of their system. A system can be said to be open if those interested in an appointment can find out easily about vacancies, if the qualifications and remuneration are clearly set out at the application stage and if qualified people are invited to apply for the positions secure in the knowledge that their application will be given fair consideration (including the use of appropriate recruitment efforts to ensure that diversity is reflected on administrative boards). In an internet age, openness can be achieved without incurring significant costs. A transparent system will make the qualifications and remuneration for board membership publicly known. It will also make information available on the decision making process. Many of the reformed regimes are weak on transparency. In some jurisdictions the posted qualifications, as set out on their government websites, include only the minimally required statutory qualifications, whereas a transparent system should make the core and desirable qualifications, as well as remuneration, publicly known.

The Commission makes recommendations to ensure that administrative board appointments are open and transparent, such as requiring that a description of all appointments processes are widely made public and conducted in a fair, open and transparent manner; requiring that all openings for appointments are advertised, at a minimum, on a central government website; and requiring that advertisements contain detailed information respecting position descriptions, core and desirable qualifications, the remuneration range as well as the selection process. It is also recommended that active outreach should be made to solicit applications from those who are members of communities that have been historically under-represented on Manitoba boards.

A merit-based regime requires that the purpose of the appointments policy is to ensure that the best candidate is appointed and that the overriding principle of selection is merit. Those responsible for selection should decide, in advance, what the core and desirable qualifications for board membership are. Care should be taken to eliminate, or at least, monitor (depending upon the type of board) the influence of partisan considerations during the appointments process. The Commission makes recommendations to ensure that administrative board appointments are based on merit, such as the enactment of legislation requiring that all adjudicative and regulatory appointments be merit-based; that appointments reflect the diversity of Manitoba's population; and that comprehensive job descriptions, profiles of expectations and detailed core competencies be developed and be made publicly accessible on government and tribunal websites. The Commission also examines reappointments policies for existing board members and recommends that reappointments be based upon the good performance of board members and the needs of boards, and that board chairs play a key role in making those assessments. The Commission recognizes that there may be some circumstances where term limits are appropriate, but suggests this should be dealt with in an agency's enabling legislation or by Order-in-Council.

Creating open competitions, enhancing the transparency of the processes used and defining position descriptions and core qualifications will move governments towards merit-based appointments. However, to ensure that appointments are free from patronage and that partisan affiliation is minimized, this report examines how changes should be made to decision making structures. For example, if the appointments process continues to be managed by political staff without input from the board at the screening stage and there is an expectation that an unranked list of all qualified candidates be presented to the appointing authority, implementation of the other recommendations in this report will have minimal impacts. The Commission recommends that to ensure that the overriding consideration for all administrative board appointments is merit and not patronage or partisanship, the Government of Manitoba should: create a central appointments secretariat with both general oversight and monitoring of the appointments process, and house this body independently; develop processes for establishing screening committees to assess the merit of each application, and at a minimum, include the board chair as a member, and have all screening committee members affirm their impartiality in all aspects of the selection process; require that the screening committee prepare a short list in rank order of the most qualified candidates to be forwarded to the appointing authority; and require candidates to declare recent, significant involvement in partisan politics, which information will only be publicly disclosed when the name of the successful appointee is announced.

The Commission observes that most Canadian appointment regimes contain weak accountability mechanisms for individual appointments and, more generally, on the workings of appointments processes. The Commission recommends that to ensure that progress on the implementation and maintenance of a new appointments policy be monitored, the Government of Manitoba should publish the names of successful candidates, along with a short biographical sketch on the websites of the central appointments secretariat and the individual administrative board. The Commission also recommends that administrative boards and the central appointment secretariat report annually on the progress of appointment reform, such as appointments process improvements and diversification of board membership.

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