Tribunal Watch Ontario Commentary on *McAnsh v Ontario*

A recent decision of the Ontario Superior Court of Justice, *McAnsh v Ontario*, 2023 ONSC 3537 has found that governments are free to make decisions about whether an adjudicator appointed to an adjudicative tribunal should be reappointed based entirely on political motives.

This disturbing outcome arises from a proposed class proceeding. The putative members of the class were individuals who had been appointed for an initial term and recommended for reappointment by the Chair of their tribunal but whom the government decided (with no reasons provided), would not be reappointed. The government moved to have the case dismissed and Morgan J. concluded that the case could not succeed.

Scott McAnsh, the lead plaintiff, was a member of the Assessment Review Board (ARB). The ARB principally deals with appeals of property assessments used to determine property taxes. In 2017 Mr. McAnsh was appointed as a Vice-Chair of the Board with a standard two-year term. At the time, he was given to understand that the two-year term would be followed by a three-year, and then a final five-year term, for a total of 10 years, conditional only in each instance on the recommendation of the Board Chair. At the end of the two-year term, he was recommended for reappointment by the Chair, but the government declined to accept the recommendation.

Mr. McAnsh's understanding that he could reasonably count on continuing employment with the Board for ten years, conditional only on performing his job to the satisfaction of the Board Chair, was entirely consistent with the understanding of people appointed to adjudicative tribunals in Ontario, at least under the 14-year Liberal government regime. That government developed a Directive that provided for three-year and five-year reappointments following an initial two-year appointment, for a total of ten years. While the ultimate authority for making the reappointment decision rested with the government, the government rarely, if ever, refused to reappoint a person recommended for reappointment by the tribunal Chair.

That understanding came to a crashing end following the 2018 Ontario election. Suddenly recommendations for reappointment made by tribunal Chairs were no longer accepted. The terms of members who were reappointed were idiosyncratic, and reappointment terms could be one year, six-months, or some other period. No reasons for decisions to not re-appoint or to reappoint for short terms were ever provided.

This approach was devastating for the adjudicative tribunal system. By early 2020, the tribunals clustered under Tribunals Ontario had lost approximately half of their adjudicative complement because of the government's refusal to reappoint people, and because many others left the system to seek work with job security (see Tribunal Watch Ontario May 2020). The government then compounded the situation by not making new appointments. Only in 2022 were tribunals beginning to be fully staffed with adjudicators. All of this inevitably resulted in massive backlogs, compounded by the pandemic, which had to be managed by tribunals that had lost almost all of their experienced members and senior leaders. The resulting catastrophe at the Landlord and Tenant Board (LTB), one of these tribunals, was recently documented in detail by the Ontario

Ombudsman's report Administrative Justice Delayed, Fairness Denied. Much of the dysfunction chronicled by the Ombudsman about the LTB applies to the other major tribunals clustered under Tribunals Ontario: Tribunal Watch Statement May 2023.

McAnsh was brought as a breach of contract claim, relying on the understanding established under the previous government that reappointments would be subject only to the recommendation of the Chair. Because the case did not proceed, the court did not hear evidence to establish this long-standing understanding established by the previous government, finding instead that Mr. McAnsh's expectation of reappointments was "a surreptitious promise whispered in his ear by an unidentified official." The court noted that such a promise would be contrary to legislation and the Order in Council appointment which establish that it is the government that is ultimately empowered to make reappointment decisions.

Tribunal independence and impartiality

Leaving aside the merits of the breach of contract claim, the more disturbing aspect of the decision is the discussion of tribunal independence. According to the decision (at paragraph. 66), "factoring political considerations into an appointment or reappointment decision is not prohibited and, indeed, is considered neither inappropriate nor unprincipled." Moreover, there is no authority or "legally cognizable logic" for the proposition that reappointments are required to maintain the independence of adjudicative tribunals (paragraph 68).

To appreciate why this finding is problematic and why the issue of reappointments is inextricably tied to adjudicator independence and impartiality, consider the following scenario, variations of which are common at many adjudicative tribunals:

> *You are counsel for an applicant. The respondent is the government of Ontario, represented by the Attorney General. The case is important and challenges a government policy. The adjudicator is coming to the end of her initial two-year appointment and is hoping to receive a reappointment. The decision about whether she will be reappointed, and for how long, will be made by the government of Ontario, ultimately by Cabinet, but initially by the Ministry of the Attorney General.*

In this scenario, where the future of the decision-maker is in the hands of the opposing party, can you confidently advise your client that there is nothing to worry about? Even if the adjudicator is highly principled and makes her decision based only on the merits of the case and without regard to the potential impact on her future employment, will you and your client be confident that the decision-maker was truly independent if the decision goes against you? To apply the language of the test for bias, would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude that there was no reasonable prospect that the adjudicator's imminent hoped for reappointment would not be a factor influencing the outcome of the decision? Might you have to agree with Ron Ellis that the structural issues result in a system that is unjust by design?

There are many variations on this scenario which are routinely at play in front of adjudicative tribunals: the respondent (or their counsel) is a known friend of the Premier, or a major donor to the party in power; the case could have major cost implications for the government; it could require a reversal of an important government policy initiative that the government would not be happy about, and so on.

In *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36 , the Supreme Court of Canada found that adjudicative tribunals require a "high court-like degree of independence". Unfortunately, the Court has not articulated what that means in the context of appointment and reappointment decisions. In large part, this is because the cases that have come before the Court have involved tribunals that were entirely regulatory (as in Oceanport) or partially regulatory, as in *Bell Canada.* Tribunals that are regulatory are generally giving substance to government policy and can be seen as closer to the executive end of the spectrum than the judicial end. Adjudicative tribunals like the ARB and the other tribunals represented in the putative class action, are at the judicial end of the spectrum.

There is a suggestion in *McAnsh* that while independence might be of more concern for adjudicative tribunals like the Immigration and Refugee Board or the Human Rights Tribunal that adjudicate "issues involving security of the person" the Assessment Review Board "dealing with issues of property valuation and assessment, may be able to function with a somewhat lesser level of independence." However, it should be noted that the putative members of the class action include members of the Human Rights Tribunal of Ontario. It is also relevant that the parties appearing before the ARB include politically influential individuals and corporations as well as ordinary homeowners.

McAnsh can be seen as yet another failure on the part of the courts to appreciate and recognize the explicitly *judicial* function of adjudicative tribunals. Just as with the courts, adjudicative tribunals interpret legislation and decide rights and obligations. As with the courts, decisions of adjudicative tribunals can have a profound impact on the lives of the parties and society as a whole. In many instances, they perform functions that historically were performed by the regular courts or that otherwise would otherwise have been assigned to the regular courts.

> adjudicative tribunals cannot be treated like the government's many operational agencies, advisory boards or regulatory commissions. Until our governments – and sadly, also our courts – understand this fundamental distinction, the independence of tribunal adjudicators will continue to be at risk when appointments and reappointments are politicized, or when election cycles throw tribunals into turmoil.

One of Tribunal Watch Ontario's core messages is that
Tribunal Watch Ontario has proposed the creation of an Adjudicative Tribunal Justice Council, to regularize and depoliticize the adjudicative tribunal system by insulating the appointment and reappointment process through an arms-length, independent body. We will expand on this proposal in a future submission.

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