

Changing the way appointments are made

*An Appointment Policy for New Brunswick
Agencies, Boards and Commissions*

Preamble

In an era of increased public accountability, it is especially important that appointments to New Brunswick agencies, boards and commissions be made in a transparent, fair and equitable manner. To retain the trust and confidence of our citizens, the public must be assured that these appointments best reflect the needs and interests of all New Brunswickers.

That is why the *Charter for Change* made a specific commitment to “Improve the appointment process for agencies, boards and commissions (ABCs) and outline specific qualifications for certain ABCs, such as the New Brunswick Human Rights Commission” (page 32).

An Accountable and Responsible Government, the Government’s Response to the Commission on Legislative Democracy, reiterated this commitment by promising to establish a merit-based appointment process to key ABCs that would be open to all New Brunswickers, with a special effort being made to promote inclusiveness and diversity in appointments (page 22).

The appointments process to provincial agencies, boards, and commissions is a partnership between many individuals and groups. Like all partnerships, ultimate success depends on establishing relationships based on cooperation and open communication. Everyone involved should have a solid understanding of their own role and the roles of their respective partners.

In that spirit, the Government has created this Appointment Policy for New Brunswick agencies, boards, and commissions. What follows is a brief overview of the structure and function of ABCs, the roles and responsibilities of some of the key players, an outline of the new appointment process, and the guiding principles upon which it is based.

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1. Introduction

1.1 Agencies, Boards and Commissions (ABCs)

Governments in Canada have increasingly come to rely upon the creation of separate organizations that operate outside the core departmental structure of government to provide advice, deliver services, and regulate key sectors of the economy. It is difficult to describe a “typical” agency, board, or commission. ABCs come in a variety of forms, and carry out numerous functions.

1.1.1 Characteristics and Functions of ABCs

In the private sector, accountability for publicly-traded corporations is fairly straightforward, with a clear line of accountability understood by all involved. Typically, shareholders will elect members to a board of directors at their annual meeting. As the duly elected representatives of the shareholders, the board has a mandate to direct the corporation as they see fit (so long as it ultimately provides value to the shareholders).

A board in the private sector is usually given responsibility for electing its own chair, establishing whatever committees may be necessary, selecting the Chief Executive Officer, and setting the CEO’s level of compensation. While the governance structure of many public ABCs (Crown Corporations, especially) is similar in many respects to their private sector counterparts, there are important differences that must be understood.

To put it simply, ABCs are public sector bodies that are created by government in order to fulfill a public policy objective. Sometimes this may give the ABC a kind of “dual nature,” in that its directors may have to balance the need to maintain the commercial viability of the ABC with its mandated role in public policy. This is especially apparent in the case of certain Crown Corporations that are expected to perform much like their private sector counterparts (i.e. being largely self-sustaining, if not profit-generating), while at the same time serving their public policy function.

ABCs are usually established through legislation that specifically addresses how the leadership structure is to be organized. Enabling legislation will usually mandate the composition of the board, how its directors are to be appointed, how the Chair and Chief Executive Officer are both appointed, and often numerous other details, such as levels of remuneration, requirements for quorum, the number of meetings that must be held, and so on.

1.1.2 Accountability in the Public Sector

Enabling legislation for public ABCs tends to incorporate one additional feature that is entirely absent from their private sector counterparts: the Government retains responsibility for appointing the individual directors, the Chair, and the CEO. This makes the Minister responsible for the ABC accountable for its performance.

Ministers retain accountability for public ABCs for a very good reason. Even the most independent ABC plays an instrumental role in helping to carry out the broader public policy objectives of the elected government. For that reason, the central government must take active steps to ensure that the leadership of its agencies, boards and commissions understands the part they are expected to play in supporting the government's broader agenda.

For example, the "dual nature" of many arm-length ABCs can sometimes lead to confusion over their responsibilities to the elected government. To provide more clarity and promote better mutual understanding on this issue, the Government will encourage all ABCs to adopt certain good governance practices, such as the development of mandate letters, terms of reference, or memoranda of understanding (MOUs).

ABCs should expect to have their mandate reviewed on a regular basis, and should anticipate the need to adjust their operational plans according to significant changes in government priorities (especially if the elected government itself changes).

1.2 Overview of Provincial ABCs in New Brunswick

There are wide variations in the size, type, and mandate of ABCs in New Brunswick. Some have significant regulatory and adjudicative authority; some provide vital goods and services to the public; others play a large role in developing public policy and communicating these policies to New Brunswickers.

1.2.1 Categories of ABCs in New Brunswick

Provincial ABCs in New Brunswick can be roughly divided into four basic types: Crown Corporation, Tribunal, Administrative, and Advisory. Each of these types can be further divided in two subtypes, giving eight categories of ABCs in total.

Crown Corporation (A and B). Where the members of the Crown Corporation's board require professional credentials and/or specific expertise, or where the work is complex, the board is considered to be a "Crown Corporation A." Where such credentials or specific expertise are not required, or where the work has more limited scope, the board is considered to be a "Crown Corporation B."

Tribunal (A and B). A tribunal or regulatory body is required to perform licensing functions, hear appeals, adjudicate, judge or arbitrate. Where the members of the tribunal require professional credentials and/or specific expertise, or where the

decisions rendered are complex or have precedent-setting implications, the tribunal is considered to be a “Tribunal A.” Where such credentials or specific expertise are not required, or where the decisions have more limited scope, the tribunal is considered to be a “Tribunal B”.

Administrative (A and B). An administrative or decision-making body provides oversight of operational or managerial functions. They are usually responsible for making budgetary decisions. Where the members require professional credentials and/or specific expertise, or where there is potential to impact on far-reaching social or economic issues, the body is considered to be “Administrative A.” Where such credentials or specific expertise is not required or the work is less complex or more limited in scope, the body is considered to be “Administrative B.”

Advisory (A and B). Advisory bodies provide advice and recommendations to the Province. Where such advice/recommendations have the potential to impact on far-reaching social or economic issues, the body is considered to be “Advisory A.” Where the advice/recommendations are industry or sector-specific and more limited in scope, the body is considered to be “Advisory B.”

1.2.2 Traditional ABC Appointment Process

Although the vast majority of ABC appointments are open to the general public, it should be noted that the enabling legislation sometimes requires certain positions to be filled by public servants or representatives of particular professional bodies. Regardless of the qualifications needed for particular positions, all appointments to agencies, boards, and commissions in New Brunswick are made either through Order-in-Council or Ministerial Order.

Order-in-Council. According to their enabling legislation, some appointments can only be authorized by the Lieutenant Governor, following their approval by Cabinet. This authorization comes in the form of an order-in-council (these are also called Lieutenant Governor-in-Council appointments). For these types of appointments, names of potential candidates can be gathered in any number of ways; names can come from Ministers, MLAs, a sitting board, executive search agencies, professional associations, or members the general public. Candidates are screened by ad hoc selection committees before having their names go to the Office of the Premier, the Executive Council Office, and ultimately Cabinet for further consideration. Once Cabinet has given its approval, a record of the appointment is published in the *Royal Gazette*.

Ministerial Order. In New Brunswick, many appointments only require the authorization of the responsible Minister, rather than the full Cabinet. For these types of appointments, names of potential candidates are usually submitted to the Minister’s Office (as is the case with order-in-council appointments, referrals for Ministerial appointment can come from any number of sources). The Minister is responsible for vetting the candidates and making the final selection.

Unlike those made by the Lieutenant Governor-in-Council, appointments made through Ministerial Order generally garner limited public attention (only appointments made by the full Cabinet are required to be published in the *Royal Gazette*).

1.2.3 Rationale for an ABC Appointments Policy

In New Brunswick, the importance of having qualified board appointees is crucial, especially for those boards that have significant regulatory responsibilities. A regulatory board often encourages governments to introduce change or act on behalf of customers to protect them from rate shock and/or other major impacts on their lives.

Until quite recently, the Government of New Brunswick had no formal appointment policy in place when filling vacancies on its agencies, boards, or commissions. At times, this lack of a standard, government-wide ABC appointments policy may have led to certain inefficiencies in the system (some board vacancies may have remained unfilled for inordinate periods of time, for example).

In *An Accountable and Responsible Government*, the official response to the Final Report of the Commission on Legislative Democracy, it was argued that the creation of an economic environment that truly welcomes entrepreneurship and innovation requires building upon a solid foundation of public sector institutions that are open and trustworthy.

People need to have faith that the government and its agencies are accountable and responsible before they can be expected to dedicate significant long-term investments of time, effort, and capital towards improving the fortunes of the province. It is crucial, therefore, that the appointment process be as fair and objective as possible. That is why the Government will institute an appointment process guided by the following principles: transparency, openness, diversity, and merit.

2. Guiding Principles

2.1 Transparent

Transparency is one of the cornerstones of good governance in a democratic society. If citizens are to hold their elected officials accountable, then the public must know what their government is doing. This principle should extend to the appointments made by these elected officials. That is why information on new appointees to provincial agencies, boards, and commissions will be made available to the public in a timely fashion.

2.2 Open

Little would be gained from making the appointment process more transparent if most New Brunswickers still have difficulty offering their names for these positions. Therefore, as many vacant positions as possible will be open for any member of the public to express their interest (the only exceptions being those that are specifically reserved for certain professions through legislation). In an attempt to open the process even further, it will be possible to submit your resume through a number of different methods (including a new online process).

2.3 Diverse

A properly functioning board should have a diversity of perspectives. This diversity could be gained by having a board with a mixture of professional qualifications, or it could come from having a board with differing personal experiences (ideally, a board will have both). Therefore, special efforts will be made to appoint individuals from a diverse set of professional backgrounds, while being inclusive of New Brunswick's two official linguistic communities, women, First Nations, persons with disabilities, visible minority groups, and residents from all regions of the province.

2.4 Merit-Based

The advantage of having a diversity of perspectives is greatly enhanced if appointees also possess the skills required to succeed in what can often be a very demanding set of duties. That is why the Government will establish a merit-based appointment process that will ensure the selection of the most competent individuals. Selection criteria for future applicants will be developed by the ABCs, in cooperation with the responsible government department and central agencies.

3. Roles and Responsibilities

3.1 Organization (i.e. the ABC)

Not surprisingly, one of the most critical players in the appointment process is the agency, board, or commission itself. Within the organization, there are various groups and individuals who actively contribute to ensuring good governance. Foremost among these are the board of directors, individual directors, the board chair, and senior management (especially the Chief Executive Officer).

3.1.1 Board of Directors

The Government of New Brunswick relies upon the wisdom and due diligence of appointed Directors in providing high-level guidance to the Chief Executive Officer and other members of the senior management team in their responsibility for the day-to-day operations of the ABC.

Although largely independent of direct government influence, boards are still expected to make decisions that support the broader policy agenda of the elected government. The board of directors is responsible for:

- monitoring the financial affairs and fiscal planning of the ABC
- providing direction on managing whatever risks and challenges may face the ABC
- working with management to establish corporate values and ethics
- establishing best practices and governance strategies
- ensuring that all objectives and targets are met by management

Each decision made by the board is to be based on sound judgement, using the best information available, after having considered all relevant points of view. The board shall meet as required, and follow all aspects of its responsibilities as set out in whatever memorandum of understanding, shareholder agreement, or mandate letter had been developed by the board (in cooperation with the government) to provide strategic direction for the ABC.

As noted earlier, because the government is ultimately accountable for ABC performance, Ministers and the Cabinet retain the right to make all appointments to public sector boards. That being said, the Government appreciates the fact that sitting board members are often in the best position to judge the needs of the full board and to make recommendations on how any upcoming vacancies should be filled.

For this reason, boards will be encouraged to prepare board position profiles and any other selection criteria that will set out the specific qualifications (professional training and/or personal experience, for example) most desired in any potential candidates. This should be done in consultation with their government partners in the responsible department and central agencies.

3.1.2 Individual Directors

Directors are expected to conduct themselves in a professional manner, always keeping in mind their responsibility to make decisions that are in the best interests of their ABC and the province. Directors are expressly prohibited from interfering with the daily operations of their respective ABCs, and should never make decisions for personal or partisan gain.

Given their positions of authority, directors have a duty to be especially careful when handling confidential information. Matters pertaining to the business of the ABC should only be discussed publicly by individual directors if they have been expressly given permission to do so by the board. If this permission has not been granted, directors should convey any inquires from the media or the general public to the properly designated authority.

To ensure their most effective contribution to board deliberations, individual directors are expected to attend all regularly held meetings. Directors are also expected to accept and participate in any orientation or other professional training sessions that have been approved by the board.

3.1.3 Board Chair

The leadership skills of the Chair can be a critical factor in determining the overall effectiveness of the board. The Chair is primarily responsible for managing board affairs and ensuring effective board performance. Because this is a position of such responsibility, the Chair must be sure to maintain the highest levels of personal integrity.

In New Brunswick, the position of Board Chair is designated by government, rather than being a decision made collectively by the board itself, as is the case in the private sector. This is done in order to maximize the accountability of the board to the responsible Minister and to the elected government.

As the designated spokesperson for the board, the Chair is expected to regularly communicate with the responsible Minister and their department, as well as any other government representatives relevant to ensuring the proper functioning of their ABC.

As representative of the board, the Chair is also expected to develop of close working relationship with the Chief Executive Officer and other members of the senior management team. Despite the proximity of this working relationship, under most circumstances, the position of Chair and CEO should not be occupied by the same individual (as this could create a potential conflict of interest between the board and management).

The benefit of having a distinction between the role of the CEO and the Board Chair can be seen in one of the Province's most successful ABCs, Service New Brunswick. In this case, the CEO is responsible for the operations and financial management of the agency, while the Board Chair is responsible for planning the strategic direction of the ABC and then communicating these ideas to government. This appears to be one of the most effective types of organizational arrangement.

3.1.4 Board Committees

The use of board committees is another example of governance best practices. Although the use of committees is generally recommended for larger ABCs, it is important to remember that this approach may not be appropriate for their smaller counterparts. For that reason, ABCs will be encouraged to review their current governance requirements to determine if they would ultimately benefit from establishing a committee structure.

Boards will typically establish committees to provide more in-depth supervision on particular areas of interest. A board committee can be created to focus on any issue; however, two of the most useful types of committee for ensuring good governance in public sector organizations have been the Audit Committee and the Governance Committee.

The role of the audit committee is to assist the board fulfill its financial accountability and oversight responsibilities. Although it can be adapted to smaller organizations, the audit committee is generally found in larger ABCs, particularly those requiring careful review of financial expenditures in relation to the strategic objectives outlined in agreements with government.

Of more direct relevance to the appointments process is the governance committee. This type of committee is generally responsible for:

- reviewing the terms of reference for individual committees
- conducting performance evaluations of the board, its committees, individual directors, and the board chair
- developing board position profiles and communicating their particular requirements to the government
- arranging orientation for recent appointees and encouraging professional development for veteran directors
- providing oversight on issues of ethics and conflicts of interest

3.1.5 Chief Executive Officer

As the title suggests, the Chief Executive Officer is the most senior member of the management team within an organization. The CEO oversees all operational aspects of the ABC, making decisions on a daily basis in accordance with the broader strategic direction outlined by the board of directors.

The Government recognizes that ABCs function most effectively when directors and management have a strong relationship built on mutual trust and respect. In New Brunswick, the CEO (or President) of a Crown Agency can only be appointed by the government. While the Government will retain this right, boards can still play an important role in the process of appointing their CEO by communicating their recommendations to government.

3.2 Central Government

It is important that each ABC provide regular updates to the government on any issues pertinent to the successful functioning of the board. Keeping regular channels of communication open will allow more opportunities for both the government and the board to candidly express any concerns each may have with respect to either the direction of the ABC or decisions taken by the government that may affect the ABC or its operations.

3.2.1 Responsible Minister / Department

Every provincial agency, board, or commission in New Brunswick has a Minister responsible for providing the first line of government oversight. Responsibility is generally given to the Minister whose department most closely aligns to the business of a particular ABC. It is the Minister who is ultimately accountable to the Legislative Assembly for the performance of these ABCs.

The Minister is responsible for:

- administering the enabling legislation
- regularly reviewing and updating the mandate of the ABC
- providing broad policy direction to the ABC by communicating the Government's strategic priorities to the board and management

In cases where an ABC requires an Order-in-Council to conduct certain transactions or to authorize particular operational decisions, the board of directors must submit their request through the department of the responsible Minister. The outcome of this request will then be communicated to the ABC by the Minister responsible.

Both the Board Chair and the CEO are expected to communicate with their responsible Minister/department on a regular basis (who, in turn, will be in frequent contact with other relevant government departments and central agencies).

Each responsible department will be required to have one or more "departmental appointment coordinators" who will be responsible for notifying the ABC, the Minister's Office, and the Executive Council Office of any matters relating to current or upcoming appointments.

3.2.2 Executive Council Office

The Executive Council Office is a central government agency that provides secretariat and administrative services to the Executive Council (i.e. the Cabinet), the Policy and Priorities Committee, and to Ministers carrying policy coordination responsibilities.

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The Executive Council Office will be responsible for monitoring all appointments to provincial agencies, boards, and commissions. This will include:

- working with ABCs and responsible departments to develop material appropriate to ensuring good governance in all public sector organizations
- setting general appointment guidelines, and evaluating their implementation and effectiveness
- maintaining a database of information relevant to ABC appointments (and sharing this information with other government departments and ABCs at appropriate stages in the appointment process)
- ensuring the public release of any information relevant to both Lieutenant Governor-in-Council and Ministerial appointments

As it has in the past, the Cabinet will also continue to play an active role in the ABC appointment process by ensuring that all individuals who are appointed to provincial agencies, boards, and commissions will be able to provide the most effective contribution to the strategic objectives outlined by Government.

3.3 Candidate for Appointment

Sitting on a board of directors can be a very challenging experience. Anyone interested in expressing an interest for a position on the board of a provincial ABC should first decide whether or not they are prepared to make the kind of commitment that would be required to most effectively contribute to board deliberations, as well as any other responsibilities that come with the appointment.

3.3.1 Qualifications

Under the new policy, anyone will be able to express their interest for an appointment to a provincial agency, board, or commission in New Brunswick. Of course, this does not mean that most expressions of interest will be accepted. Some ABCs may need candidates who are members of particular professional associations or have specialized training; while for others, such as District Education Councils, prospective appointees must first be elected (please note: some of the ABCs that regulate professional organizations also have their own appointment processes).

The Government of New Brunswick relies on directors of provincial ABCs to provide the best advice and guidance possible. While having some previous knowledge of the particular issues or industry related to an ABC would undoubtedly be helpful (assuming, of course, that candidates remain free from any conflict of interest), the most absolutely essential requirement for prospective directors is a combination of creativity, interpersonal skills, diligence, and good judgment.

3.3.2 Eligibility

Many appointed positions are established by enabling legislation. This legislation often determines the criteria required for eligibility. For example, legislation explicitly may state that a candidate must be of the age of majority in order to sit as a member; while other legislation may specify that the appointee must be a citizen of good standing, who has demonstrated a certain level of involvement within their community.

Although anyone who has a desire to serve on a provincial ABC should feel encouraged to express their interest, recruitment efforts will focus primarily on the citizens of New Brunswick, if for no other reason than current residents are arguably better informed about local and regional issues that might have an impact on the governance of provincial ABCs.

4. Appointment Process

4.1 Review and Consultation

The board and senior management of the ABC should work with the responsible government department and central agencies to:

- review the role and mandate of the ABC on an ongoing basis
- identify the ABC's strategic objectives, key initiatives, and potential challenges
- prepare a 'board profile' that best defines the desired combination of skills, experience, qualifications, and diversity
- identify any statutory requirements for the composition of the board
- review current board composition to identify upcoming vacancies

Keeping track of all this information will be made easier by the development of a central database that will contain all information relevant to making both Ministerial and Lieutenant Governor-in-Council appointments.

Departmental appointment coordinators will be updating the information in this database as it is received from their ABCs. This database will be maintained by the Executive Council Office, which will be in regular contact with the departmental appointment coordinators.

4.2 Identifying Vacancies

All ABCs must designate a representative who will be responsible for notifying the relevant departmental appointment coordinator 180 days before an appointed position is to be vacated (this notification must be done both electronically and in writing).

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The departmental appointment coordinator, in cooperation with the Minister's Office and the Executive Council Office, will determine whether or not the upcoming vacancy will be filled by reappointment (some positions do not allow for reappointment to consecutive terms).

If it is determined that the upcoming vacancy will not be filled by reappointment, the departmental appointment coordinator will then seek advice from relevant members of their department (ideally consisting of specialists in policy analysis and human resource management).

It will be the responsibility of the government department, working in cooperation with representatives of the ABC, to develop relevant position descriptions and any other informational materials necessary for the next step of the process.

4.3 Publicizing Vacancies

To increase the openness and transparency of the appointment process, a new web link will be created on the Government of New Brunswick's homepage that will be devoted exclusively to ABC appointments.

All upcoming vacancies will be posted on this new dedicated webpage, and will include information such as the kinds of duties involved, qualifications needed, levels of remuneration to be expected, time commitment required, and details on how interested persons should apply.

4.4 Submitting Expression of Interest

Potential candidates will have a number of different options on how they can submit their names for appointment. As in the past, referrals will still be accepted from Ministers, MLAs, professional associations, executive search consultants, or other members of the general public.

In addition to this traditional process, the government will be developing a new online system. This online system will be similar to the one currently used to accept applications for civil service positions.

4.5 Selection Process

The responsible department, in consultation with relevant representatives from the ABC and government central agencies, will review all expressions of interest and carry out a preliminary screening.

Individuals who meet the criteria set out in the position description will be selected for further consideration. This next step will include a due diligence check of references, and possible interviews of the candidates.

Potential appointees should also be prepared to undergo a security check whenever one is requested (this check may occur before, during, or after an interview has been conducted).

The responsible department will then prepare a list of possible candidates, which is forwarded to either the Office of the responsible Minister (for appointments requiring a Ministerial Order), or to the Executive Council Office (for appointments requiring an Order-in-Council).

4.6 Final Approval

If the appointment requires a Ministerial Order, the responsible Minister will make the appointment from a list of qualified candidates. Where the appointment requires an Order-in-Council, the Executive Council Office will forward a list of possible candidates to Cabinet for final selection and approval. In both cases, the department responsible for the ABC will be expected to develop and provide any material relevant to the appointment process.

4.7 Publication of Results

In addition to publicizing upcoming vacancies, the government webpage dedicated to ABC appointments will also be used to announce all successful Ministerial and Lieutenant Governor-in-Council appointments (the latter will also continue to be published in the *Royal Gazette*).

Details available online will include the name of the appointee, the name of the ABC to which they have been appointed, their position, a brief biographical sketch, the term of their appointment, and their level of remuneration.

For appointments requiring a Ministerial Order, the Minister's Office will contact the successful individual to confirm the appointment and arrange to provide additional information. For appointments requiring an Order-in-Council, the successful candidate will be contacted by the Executive Council Office to confirm the appointment and arrange to provide additional information.

4.8 Orientation for Appointees

Unlike their counterparts in the private sector, directors of government ABCs have to take into account the broader public policy objectives of the elected government, while still retaining their status as an arms-length organization. Even eminently qualified appointees (many of whom may have been highly successful in the private sector) often require some additional guidance when assuming their role as member of a board in the public sector.

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To facilitate the transition, each new member of a board of directors should be provided with some form of orientation. At the very least, this should include a general briefing on the ABC and its operations. Ideally, it would also include the distribution of more detailed material, such as mandate letters, memoranda of understanding, terms of reference, conflict of interest guidelines, and any other information that could be useful in familiarizing recent appointees with their new duties.

ABCs and their responsible departments will be responsible for providing more in-depth orientation programs for their new appointees whenever possible. All such training will be arranged and paid for by the ABC.