

TRIBUNAL WATCH ONTARIO

The Independent, Expert, and Competent Tribunal

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Tribunal Watch Ontario has produced a [Statement of Principles](#) which sets out the values that should guide the development of a modern adjudicative tribunal system. In this paper, which complements the Statement, we elaborate on what must be done to ensure that the adjudicative tribunal system has the necessary independence, expertise, and competence to ensure fairness and justice for all those who access the system. We present this document as a call for reform and the creation of a modern, independent, expert, and competent tribunal justice system.

Adjudicative tribunals in Ontario deal with a vast range of legal issues and disputes. People of Ontario are far more likely to have a legal issue dealt with by an adjudicative tribunal than a court. A brief list of such issues includes:

- landlord and tenant cases
- disputes about compensation for work and motor vehicle injuries
- human rights cases
- involuntary committal to a psychiatric hospital
- entitlement to social services and benefits
- disputes between employers, employees, and unions
- regulation of businesses and professionals, such as health care providers, teachers, police, etc.,
- disputes related to land use and the environment.

One advantage of the tribunal system is that cases can be dealt with by adjudicators with expertise in the subject matter and law relevant to those disputes. Specialization also enables tribunals to develop dispute-resolution techniques uniquely adapted to the needs of the parties and the types of cases that come before the tribunal.

However, the system as currently structured lacks important safeguards. The first of these is independence. Tribunals are created by government and are accountable to government. However, if tribunals are seen to be controlled by government, they will not be seen as independent. And if they are not seen as independent, the tribunal's adjudicators will not be seen as impartial. This is particularly obvious when the government itself is a party before the tribunal as is often the case. Secondly, if tribunals

and their adjudicators are not fully competent and lack subject matter expertise or expertise in dispute resolution techniques, the advantages of the system are significantly reduced. If tribunals are not demonstrably independent, expert, and competent, the parties that appear before them and the public at large will lose confidence in the tribunal which in turn can contribute to the undermining of the legal system as a whole.

We consider these issues from the perspective of the system, the adjudicative tribunals that make up the system, and the individual adjudicators who do the work of the tribunal.

A. An independent adjudicative tribunal system

To establish an independent, expert, and competent adjudicative tribunal system, Tribunal Watch Ontario proposes the creation by statute of an independent non-partisan body to oversee the administration of the system, including appointment and re-appointment processes that are fair, timely, transparent, and free of partisan or patronage influences. Tribunal Watch Ontario has proposed the creation of an [Adjudicative Tribunal Justice Council](#) for this purpose.

The length of appointment and re-appointment terms should be established based on the needs of the tribunal. Term limits of 10 years or less allow for change in the adjudicator roster but also mean that the tribunal is constantly losing its most experienced and knowledgeable adjudicators. To attract the best candidates for adjudication positions, the length of terms must be clear and predictable. Candidates must have confidence that they will be eligible for re-appointment conditional only on performance of their duties to the satisfaction of the tribunal chair. Succession, institutional memory, consistency in decision-making, and the ability to attract the best candidates all dictate that the length of tenure should be transparent and fixed, and varied only in exceptional circumstances.

A legislated transparent mechanism for setting and reviewing remuneration for chairs and members must be established to ensure that compensation is competitive and adequate to attract qualified people. The mechanism should ensure that compensation increases are not subject to political interference or influence.

B. The independent, expert, and competent tribunal

The independent, expert, and competent tribunal requires sufficient resources and a relationship with government that respects the need for the tribunal to act independently and with autonomy.

Accountability and autonomy

Accountability for the delivery of competent and expert adjudication by tribunals can be established through a requirement for a Memorandum of Understanding or similar document between the tribunal and the responsible government ministry. This can set out the rules for communicating, reporting and budget requirements. The Memorandum should be subject to approval by the Adjudicative Tribunal Justice Council to ensure that the tribunal's independence and autonomy are respected.

Once a budget is set, tribunals must have the ability to operate free of influence or interference in respect of the allocation of resources.

At an administrative level, some integration between the tribunal and the broader public service is necessary and desirable, for example, union membership and the ability to contribute to pension plans. However, the administrative staff of the tribunal should report to the tribunal chair and not to a government ministry.

The Tribunal Chair

An expert and competent tribunal requires an expert and competent chair. The chair is responsible for the overall operation of the tribunal, recruitment of new adjudicators, performance assessment of the adjudicators and making re-appointment recommendations or decisions. An expert and competent chair provides leadership in adjudication and mentorship. It follows that chairs must have superior subject matter and adjudication knowledge and experience, as well as strong management and leadership experience.

Efficiency

An expert and competent tribunal has a case management system that allows it to keep track of cases and produce data about how cases are processed. The tribunal should also be able to triage and stream cases depending on their complexity, the issues, and the parties. The tribunal should have the ability to use the full range of dispute resolution

techniques that are appropriate for the cases that come before it. Adjudicators should be trained in active adjudication to ensure that hearings are conducted efficiently.

Accessibility

The expert and competent tribunal is accessible to the parties, representatives, witnesses, staff, and adjudicators. This includes its physical facilities and digital environments, as well as its processes and procedures. Tribunals must have the capacity and commitment to accommodate all human rights related needs and be fully compliant with the Accessibility for Ontarians with Disability Act (AODA).

Tribunals should develop and make public a robust Accessibility and Accommodation Policy, which should include a protocol for addressing accommodation requests, with an identified and trained staff person who can coordinate specific or complex needs. Ongoing review of the Policy's effectiveness is critical. All staff and adjudicators should be trained and aware of the Policy, how to actively address accommodation needs, and must share the tribunal's commitment to accessibility.

The tribunal must have a sufficient complement of bilingual staff and adjudicators to deliver services in both official languages. Where possible, information about the tribunal and its services should be available in multiple languages. The tribunal website should be designed so that it is fully accessible, easy to understand and navigate. It should include information about what people can expect when they are involved in a proceeding, and what resources are available to help them.

Digital platforms can greatly increase accessibility. They can make it easier to file cases as well as improve case management and the flow of information. Online hearings and dispute resolution systems can make it easier, less expensive, and more comfortable for people to participate.

However, these advantages are only available to those with secure and reliable internet access, and those who have the required technological and language skills. For those without adequate technology, as is the case for many of the marginalized members of society and people in some remote locations, required participation in an online process can be very stressful, result in unfair hearings, or even mean that people are unable to access their own proceeding.

Tribunals must have resources available to ensure that people without access to reliable and secure internet can fully and fairly participate. This can include regional centres across the province and easy access to tribunal staff to help navigate the

tribunal's systems and access resources. For many people, an in-person hearing may be the only option that will result in a fair adjudication of their matter. An in-person hearing should not be available only as an accommodation.

Equity, inclusion and diversity

An expert and competent tribunal will have a comprehensive strategy to develop and promote the principles of equity, diversity and inclusion. This will include anti-racism and anti-discrimination strategies, and recruitment and retention of adjudicators from diverse backgrounds, with diverse experiences. The tribunal must also work actively to enhance access to justice for all users and potential users, including those from communities that may historically mistrust the justice system. An inclusive tribunal that understands and engages with diverse communities will promote confidence in the public and parties, and such inclusiveness will lead to an empathetic, knowledgeable, and equitable approach to the users and the issues that come before the tribunal.

Tribunals must demonstrate a commitment to recognizing the systemic economic, social, and cultural barriers that may affect equitable access to justice before the tribunal and how procedures and policies may create or perpetuate disadvantage for marginalized individuals and communities.

Tribunals also need to provide training in sensitivity and cultural fluency for its staff and adjudicators. Adjudicators must recognize the ways in which their own cultural perspective, power, and privilege may affect their decision-making. They must receive on-going training and support for increased self-awareness.

Reconciliation

Tribunals should actively commit to reconciliation with Indigenous peoples and First Nations.

In consultation with Indigenous communities, tribunals should reflect upon how the *Truth and Reconciliation Commission Calls to Action* and the *Report of the National Enquiry into Missing and Murdered Indigenous Women and Girls Calls for Justice* may inform their work and treat these as obligations in the effort to work towards reconciliation. Tribunals should find ways to engage in meaningful consultation with Indigenous communities to build capacity and knowledge to ensure the tribunal can serve Indigenous individuals and communities with respect. This must address the accessibility of the tribunal's processes, relevance of its public facing materials, and its awareness of the lived experiences of Indigenous people.

To demonstrate a meaningful strategy for moving towards reconciliation, tribunals must be willing to commit resources and time, and to challenge assumptions about whether and how Indigenous experience, values and legal traditions may be relevant to the tribunal's practices, procedures, and substantive jurisdiction.

Training

For most tribunals, it is not realistic to expect newly appointed adjudicators to come to the position with fully developed competence and expertise. Typically, new appointees may have either subject matter expertise or adjudicative experience, but not both. The tribunal must therefore have the capacity to provide effective training. While peer to peer training and mentorship is very effective, the competent and expert tribunal will have staff resources to lead and support intensive training for new members and on-going training for all adjudicators. Programs such as the Adjudicator Training Courses offered by the Society of Ontario Adjudicators and Regulators (SOAR) and Osgoode Hall Law School Professional Development provide new adjudicators with a good foundation in general principles and practical information for running a fair hearing. The SOAR annual conference and other programs provide opportunities for sharing knowledge and skills among adjudicators from different tribunals. Training needs to be fully integrated into the operation of the tribunal and reflected in budgets and caseload allocations.

Retention of adjudicators

A tribunal cannot be optimally competent and expert with a constantly changing roster of adjudicators. Short term limits mean that the tribunal is constantly losing its most experienced and knowledgeable adjudicators. Terms that are variable and inconsistent make it very difficult for the chair and tribunal staff to manage the workload and schedule cases and are inconsistent with the requirement of adjudicator independence.

To attract the most qualified adjudicators and to retain them once they are appointed requires compensation that is competitive. A positive and respectful work environment and a reappointment process that is predictable and timely will encourage people to stay committed to their profession of adjudication.

Tribunals with full-time members may benefit from retaining some of them at the end of their maximum term by appointing them as part-time members. This retention of its most experienced and knowledgeable members can help the tribunal to retain institutional memory.

Collegiality

An expert and competent tribunal encourages a high level of collegiality among its adjudicators. This can be fostered through regular meetings to discuss emerging issues and by a work environment in which colleague-to-colleague discussions are encouraged, subject, of course, to the rules and limitations for such deliberation as dictated by the courts.

In general, collegiality will be stronger among full-time adjudicators, especially if there is a physical office space where people do their work. When there are part-time adjudicators, strategies should be developed to encourage and support their ability to interact with colleagues. Collegiality helps to promote consistency and predictability in approaches and outcomes.

C. The independent, competent, and expert adjudicator

Adjudicators must have the right to conduct hearings and make decisions free from improper influence while also recognizing that they are members of a tribunal that has an interest in the coherence and legitimacy of its adjudication. The competent and expert adjudicator has a command of the subject matter of cases and an ability to conduct a fair and expeditious proceeding.

Adjudicator Independence

An important requirement to ensure adjudicative independence and impartiality is adherence to the legal principle that the person who hears a case must decide the case. While it is appropriate for draft decisions to be reviewed by colleagues or legal staff or the tribunal chair, the adjudicator must be free to make the decision based on the adjudicator's view of the evidence and the applicable legal principles. At the same time, adjudicators must respect the tribunal's jurisprudence and not depart from established law without good reason.

Job security and re-appointment decisions

Independence and impartiality can be significantly undermined if the adjudicator's re-appointment is conditional on the government's agreement with the adjudicator's decisions, or if there is any perception that this may be the case. To guard against this possibility, decisions about re-appointment must be the exclusive responsibility of the tribunal chair or a non-political authority. Adjudicators must be confident that the

security of their tenure is free from partisan review and conditional only on their continuing to meet the tribunal's performance standards and the operational needs of the tribunal.

A person who has not been recommended for renewal should have a right to have the re-appointment decision reviewed by the Adjudicative Tribunal Justice Council.

Adjudicators who are not re-appointed or reach the end of their term should be eligible for a separation package comparable to packages available to senior members of the Public Service.

Performance assessment

Tribunal adjudicators should be subject to a fully transparent but rigorous performance assessment. The system should be designed to assess competencies (as discussed below) without infringing on adjudicative independence. Ideally, the performance assessment system will involve review of decisions by colleagues in an anonymized process, and post-hearing comments from hearing participants. The results of the performance assessment can inform training needs and can also provide an objective basis for a decision to not re-appoint the adjudicator.

Expertise and competence

Members of an adjudicative tribunal should have an understanding of the legal landscape of the tribunal. This includes knowledge of the applicable legislation, the case law of the tribunal and its rules, and relevant decisions of the courts. For most tribunals, it is also necessary to understand how other areas of law, including the *Human Rights Code* and the *Canadian Charter of Rights and Freedoms*, apply to the work of the tribunal. An expert adjudicator has a solid understanding of the rules of procedural fairness and how to apply those rules to ensure a fair hearing for participants. Adjudicators must also have strong communication skills to actively and fairly manage the hearing and write a timely and readily understandable decision based on the evidence, the relevant law, and the submissions of the parties.

The competent and expert adjudicator can adapt the dispute resolution process to make it as fully accessible as possible for everyone who engages in the process. This includes the ability to listen empathetically and interact with people of all backgrounds, free from assumptions and stereotypes and to ensure that the hearing room or virtual equivalent is suitable for the participants. It also requires an ability to recognize and deal with power imbalance.

The skills and attributes of the expert and competent adjudicator will be supplemented by an ability to deal effectively and fairly with allegations of bias, as well as the capacity to maintain personal and tribunal independence, integrity, and reputation, and to be ethical, patient, honest, tolerant, responsible, collegial, and considerate within and outside the parameters of the tribunal's responsibilities.

Conclusion

The principles discussed in this paper are not overly idealistic or entirely aspirational. The adjudicative tribunal system includes many tribunals that place a high value on excellence and competence and demonstrate a commitment to equity, inclusion, diversity, and reconciliation. The system as a whole has the capacity to develop and share best practices, and we hope that this paper may contribute to that endeavour.

Some of the elements that are necessary to have a modern, just, and fully functioning adjudicative tribunal system are beyond the control of tribunals and will require a new structural relationship between government and tribunals based on tribunal and adjudicator independence and impartiality.

The debate about the need for an independent and impartial adjudicative tribunal system has been complicated by the diversity of tribunals and their differing functions. Some tribunals have a regulatory or policy role and these tribunals necessarily have an attachment to government. It is recognized that government has a direct interest and responsibility for the work of these tribunals.

However, the fact that some tribunals have a necessary attachment to government should not obscure the fact that many other tribunals are adjudicative tribunals that determine the rights, obligations, and entitlements of citizens. The citizens of a democracy are entitled to expect that legal disputes affecting their rights, obligations, and entitlements will be resolved by adjudicators who are independent, impartial, and competent. To meet that expectation, the relationship between government and adjudicative tribunals must be changed to ensure the development of an excellent adjudicative tribunal system that is independent, expert, and competent.