FEATURE

The Inaccessibility of Justice in Ontario's Adjudicative Tribunals: Symptoms and Diagnosis

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Abstract: Why did four of Ontario's highest-volume adjudicative tribunals became so seriously dysfunctional starting in late 2018? Systemic delays of months or years arose, basic procedural rights were abandoned, and substantive miscarriages of justice became common in the fields of residential tenancy, human rights, and entitlement to benefits. This feature describes these symptoms, before seeking to diagnose the underlying problem. The proximate cause of the dysfunction was the approach to tribunal appointments taken by the executive branch of Ontario's government. Members appointed by the previous government were "de-appointed" en masse, and meritorious replacements were not found promptly. Some of these problems began prior to 2018. Shortcomings in the other two branches of Ontario's government also contributed to the dysfunctionality. The Ontario statute governing adjudicative tribunals, and the legislative committee overseeing appointments, lacked the powers and resources necessary to safeguard them from executive de-appointment. Meanwhile, Ontario's courts are not an accessible and proportionate forum to backstop adjudicative tribunals. Moreover, a review of the case law shows that they lack doctrinal tools to hold the Government responsible for systemic delay and counterproductive appointment practices.

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Introduction

The human body has 79 organs. If one is dysfunctional, there are two possible causes. There might be something wrong with the organ itself. Often, however, the problem is that it is not receiving the sustenance and support it needs from *other* organs or systems. The same is true of the state, which is like the human body insofar as it contains numerous organs and systems that interact in complex ways.

When healthy, the state's organs ought to produce good government, which can, in turn, improve people's lives. To contribute to the shared goal of good government, each entity within the state requires support from the others. In addition to funding, public sector entities require powerful people in other parts of the state to take supportive actions and refrain from counterproductive ones. When an organ of the state is starved by the others it depends on, it quickly becomes dysfunctional. This feature argues that, since 2018, four of Ontario's highest-volume adjudicative tribunals—the Landlord and Tenant Board (LTB), the Human Rights Tribunal of Ontario (HRTO), the Licence Appeal Tribunal's Automobile Accident Benefits Service (LAT-AABS), and the Social Benefits Tribunal (SBT)—have become dysfunctional due to a lack of support from other parts of the state.

Part I describes the symptoms of the problem. In particular, systemic delay makes people wait years for resolutions that previously came in weeks to months. Procedural fairness—the right to be heard by an impartial decision-maker—has been undermined both by delay itself and by the tribunals' efforts to address delays. Substantive justice—the ability of tribunals to identify and implement outcomes in line with the law—is suffering because delay prevents efficient fact-finding, and because people increasingly abandon their rights instead of asserting them in these tribunals.

Part II identifies the roots of this malady in Ontario's adjudicative tribunals, which involves failures in all three branches of the provincial government. The executive branch's appointment practices are the immediate cause. Too many competent tribunal members and Chairs were "de-appointed" (denied reappointment) between 2018 and 2020, and competent replacements were not identified and appointed quickly enough.[1] Recruitment and retention have become increasingly difficult, and leadership and culture have been gravely undermined.[2] The Ontario legislature, which is responsible for ensuring that delegated executive powers are used in the public interest, has created a helpful statute and an oversight committee meant to structure and guide the executive branch's appointments to adjudicative tribunals.[3] Still, these measures have proved insufficient to safeguard adjudicative tribunal function. Finally, the judicial branch has been unable to offer much assistance to tribunal users due to its inaccessibility, logical deference to tribunal decisions, and unwillingness (thus far) to hold the executive branch directly responsible for its problematic appointment and de-appointment practices. This feature concludes by showing how the atrophy in adjudicative tribunals is attributable to a lack of support from the executive, legislative, and judicial branches.

1. Adjudicative Tribunals

An adjudicative tribunal can be defined as any public sector entity, other than a court, whose primary or sole task is to resolve disputes according to the law, under jurisdiction conferred by a statute.[4] Adjudicative tribunals exist at the federal, provincial, and municipal levels. Multiple spheres of modern life have generated enough disputes to require specialized areas of law and dedicated decision-making bodies to resolve the inevitable disputes.

A regulation to Ontario's *Adjudicative Tribunals Accountability, Governance, and Appointments Act* (*ATAGAA*) identifies 27 adjudicative tribunals.[5] Each has authority, conferred by one or more provincial statutes, to resolve disputes arising from those statutes. Adjudicative tribunal members are appointed by Cabinet to adjudicate and sometimes mediate cases. Members designated as Chairs

1 Tribunal Watch Ontario, "Statement of Concern About Tribunals Ontario" (May 14, 2020), online: <tribunalwatch.ca/2020/statement-of-concern-about-tribunals-ontario/> [Tribunal Watch Ontario, "Statement of Concern, 2020"]; Tribunal Watch Ontario, "LTB Statement of Concern: The Numbers Speak for Themselves" (February 16, 2024), online: <tribunalwatch.ca/2024/ltb-statement-of-concern-the-numbers-speak-for-themselves/>.

2 Tribunal Watch Ontario, "Inexcusable: The Absence of Permanent, Competent Associate Chairs at Tribunals Ontario" (June 14, 2024), online: <tribunalwatch.ca/2024/inexcusable-the-absence-of-permanent-competent-associate-chairs-at-tribunals-ontario/>.

3 See Part II(2), below.

4 Ron Ellis, "An Administrative Justice Fix: A Model Act" (2022) 35:1 Can J Admin L & Prac 53 at 54; Lorne Sossin, "Access to Administrative Justice and Other Worries" in Colleen M Flood & Lorne Sossin, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery Publications, 2013) at 41–42.

5 *Adjudicative Tribunals Accountability, Governance and Appointments Act*, SO 2009, c 33, Schedule 5, s 23(a) [*ATAGAA*]; O Reg 126/10, Schedule 1. Other provincial bodies essentially function as adjudicative tribunals even though they are not named in this schedule (e.g., the Capital Markets Tribunal, which hears disputes about financial securities and investor protection).

provide management in addition to handling a caseload.[6] Adjudicative tribunals are supported by permanent staff who are employed by the province.

Legislators and scholars look to adjudicative tribunals to provide procedurally and substantively just dispute resolution while being quicker, cheaper, and more accessible to self-represented litigants than courts.[7] Many Canadian adjudicative tribunals, including some in Ontario today, have delivered on this promise. Some hear only a handful of matters per year and apparently do so unproblematically. For example, the *Farming and Food Production Protection Act* established the Normal Farm Practices Protection Board to resolve disputes about agricultural operations.[8] It issues approximately one decision per month.[9] Some adjudicative tribunals, such as the Civilian Police Commission or the Capital Markets Tribunal, deal almost exclusively with parties represented by lawyers. Many of Ontario's low-volume tribunals, and those whose parties are generally represented by lawyers, appear to be functioning relatively well.

Unfortunately, the situation is very different at the high-volume adjudicative tribunals in Ontario dealing with residential tenancies, individual entitlement to monetary benefits, and claims under human rights statutes. Every year, over 100,000 disputes are lodged with these four tribunals, including roughly 80,000 at the LTB alone.[10] Many of these disputes involve at least one self-represented litigant.[11] The collective caseload of these four tribunals exceeds the number of civil actions commenced in the province's Superior Court of Justice (SCJ), and is comparable to the combined total of family law cases in the SCJ and the Ontario Court of Justice.[12] The stakes are high in terms of the number of people affected by adjudicative tribunal dysfunction, and also—as we

6 There are multiple ranks of Chairs, including Associate Chairs, Vice Chairs, and one Executive Chair for all the tribunals clustered in Tribunals Ontario.

7 See Noel Semple, "Tribunals for Access to Justice in Canada", Can Bar Rev [forthcoming in 2024].

8 *Farming and Food Production Protection Act*, SO 1998, c 1, ss 1, 3(1), 4(2).

9 CanLII, "Decisions of Normal Farm Practices Protection Board - Ontario" (last modified August 5, 2024), online: <canlii.org/en/on/onnfppb>.

10 Tribunals Ontario, *Tribunals Ontario 2021-22 Annual Report* (Queen's Printer for Ontario, 2022), online: <tribunalsontario.ca/documents/TO/Tribunals_Ontario_2021-2022_Annual_Report.html> [Tribunals Ontario, *2021-22 Annual Report*].

11 For example, around 80 per cent of applicants to the HRTO are self-represented: Tribunals Ontario "HRTO - Intake report: Applications Received - Applicant representation", online: <tribunalsontario.ca/en/open/data-inventory-reports/?x=0&n=7>; Annabel Oromoni, "Tribunal Watch Ontario Raises Concerns About the Operation of the Human Rights Tribunal", *Law Times News* (23 May 2022), online: <lawtimesnews.com/practice-areas/human-rights/tribunal-watch-ontario-raises-concerns-about-the-operation-of-the-human-rights-tribunal/366854>.

12 In 2023, the Superior Court of Justice received 38,137 family proceedings as well as 66,212 civil proceedings; the Ontario Court of Justice received 8,308 family law cases: Ontario Courts, "Ontario Superior Court of Justice: Modernizing the Justice System 2019 – 2023 Report", online <ontariocourts.ca/scj/files/annualreport/2019-2023-EN.pdf > at 65; Ontario Courts, "Court Statistics", online: <ontariocourts.ca/ocj/statistics/>.

will see—regarding the implications of tribunal decisions for people's lives. Tribunal Watch Ontario, a non-profit group, has undertaken essential and timely research on Ontario's adjudicative tribunals. Their findings are relied upon extensively in this feature, along with other sources.[13]

I. Symptoms: Delay and Injustice

1. Systemic Delay

The most readily apparent problem in Ontario's adjudicative tribunals is systemic delay. The LTB has jurisdiction over all disputes arising from residential tenancies in the province, and its 80,000 applications in a typical year (involving over 160,000 parties) make it the highest-volume tribunal in the province.[14] The LTB's service standard aims to schedule matters for a first hearing within 25 to 30 days.[15] There are good reasons why these disputes should be heard and resolved within days or weeks. A breach of the *Residential Tenancies Act*[16] (which the LTB administers) often means that a tenant is going without a safe and habitable home, or a small landlord is going without income upon which they depend to make mortgage payments.

Yet, as of 2023, it took an average of six to nine months to get a first hearing at the LTB.[17] The LTB's service standard for timeliness in scheduling hearings was met in just over two per cent of its cases.[18] In early 2024, landlords waited an average of 342 days to get eviction orders based on unpaid rent, and tenants waited an average of 427 days to get LTB orders for maintenance and other legal rights.[19] Its performance was only slightly better before the COVID-19 pandemic, with 16 percent success in meeting the target in 2019–20.[20] For people with legal problems arising from residential tenancies, there is no alternative to the LTB. The *Residential Tenancies Act* prevents recourse to the

13 Tribunal Watch Ontario, "About Us", online: <tribunalwatch.ca/about_us/>.

14 Tribunals Ontario, *2021-22 Annual Report, supra* note 10.

15 Tribunals Ontario, "New LTB Service Standards Give People a Better Idea of How Long it Will Take to Resolve their Case" (19 January 2018), online: <tribunalsontario.ca/ltb-january-19-2018-new-ltb-service-standards-give-people-better-idea-long-will-take-resolve-case/>.

16 SO 2006, c 17 [*RTA*].

17 Paul Dubé, *Administrative Justice Delayed, Fairness Denied: Investigation into Whether the Ministry of the Attorney General, Tribunals Ontario and the Landlord and Tenant Board are Taking Adequate Steps to Address Delays and Case Backlogs at the Landlord and Tenant Board* (Toronto: Office of the Ombudsman of Ontario, 2023) at para 6, online (pdf): <ombudsman.on.ca/Media/ombudsman/ombudsman/resources/Reports-on-Investigations/Ombudsman-Ontario-Administrative-Justice-Delayed-May-2023-report-accessible.pdf>.

18 Tribunals Ontario, *2021-22 Annual Report, supra* note 10. This statistic excludes landlord applications to above-guideline rent increases, and applications to vary the amount of a rent reduction.

19 Kathy Laird & Voy Stelmaszynski, "Ontario Landlord and Tenant Board Numbers Speak for Themselves", *Law360 Canada* (February 20, 2024), online: <law360.ca/ca/articles/1804409/ontario-landlord-and-tenant-board-numbers-speak-for-themselves-kathy-laird-and-voy-stelmaszynski>.

20 *Ibid.*

courts.[21] Engaging in "self-help" activities such as evicting or withholding rent is illegal without an LTB order.[22] In 2023, following a three-year investigation, the Ombudsman of Ontario's conclusion was that the LTB was "fundamentally failing".[23]

The LAT-AABS hears disputes about motor vehicle accident benefits, typically involving an accident victim on one side and an insurance company on the other. The LAT-AABS scheduled first hearings within its target period only four per cent of the time in 2021–22.[24] The average time application and decision was 854 days in late 2023.[25] During that time, a claimant might receive nothing in the way of rehabilitation or income replacement benefits, despite an eventual finding that they were entitled to them from the outset.

The HRTO, which has jurisdiction over all disputes arising under Ontario's *Human Rights Code* (the *Code*), did not meet its timeliness target for scheduling first hearings in any of its cases during 2021.[26] The release of HRTO decisions was also seriously delayed after hearings. In some cases, parties waited between three and seven years to get a final decision on the merits of their matter.[27] Matters have gone unscheduled because no members were available to hear them, or because scheduled dates were cancelled.[28] At other times, hearings proceeded but months or years passed before decisions were released. For example, *Cybulsky v Hamilton Health Sciences* began with an application to the HRTO in 2016; the final decision was released in March 2023.[29] The member responsible for the matter changed three times. After the hearing to determine whether the respondents were liable, it took 16 months for the decision on that question to be released.[30] It took another 19 months to commence the hearing to determine the appropriate remedy, after which it took five months for the decision on remedies to be released.

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21 *RTA, supra* note 16, s 168(2) (setting out that the LTB "has exclusive jurisdiction to determine all applications under this Act and with respect to all matters in which jurisdiction is conferred on it by this Act").

22 *Ibid*, s 39.

23 Dubé, *supra* note 17 at para 306.

24 Tribunals Ontario, *2021-22 Annual Report, supra* note 10.

25 Duncan Macgillivray, "Another Year of the LAT: Is Time Standing Still?" (November 30, 2023), online (blog): Ontario Trial Lawyers Association Blog <otlablog.com/another-year-of-the-lat-is-time-standing-still/>.

26 *Human Rights Code*, RSO 1990, c H19 [*Code*]; Tribunal Watch Ontario, "Justice Denied: The Access to Justice Crisis at *Tribunals Ontario*" (December 14, 2022) at 5, online (pdf): <tribunalwatch.ca/wp-content/uploads/2022/12/Dec-14-2022-Statement-PDF.pdf> [Tribunal Watch Ontario, "Justice Denied"].

27 Tribunal Watch Ontario, "Statement of Concern: The Human Rights Tribunal of Ontario" (May 25, 2022), online <tribunalwatch.ca/2022/the-human-rights-tribunal-of-ontario/>.

28 Tribunal Watch Ontario, "Access to Justice in Crisis: Tribunals Ontario in 2022" (March 10, 2022), online <tribunalwatch.ca/2022/access-to-justice-in-crisis-tribunals-ontario-in-2022/>.

29 *Cybulsky v Hamilton Health Sciences*, 2023 HRTO 346 [*Cybulsky*].

30 *Cybulsky v Hamilton Health Sciences*, 2021 HRTO 213.

Finally, there is the SBT, which hears disputes about eligibility for Ontario Disability Support Program (ODSP) benefits. In 2021, the SBT reported 18-month wait times, which increased to up to two years in 2022.[31] During the up to two-year waiting period, ODSP claimants had to live on the baseline Ontario Works rate of $733 per month, even though—in the majority of the cases before it—the SBT found that the government was wrong to deny ODSP benefits and ordered retroactive payments.[32]

Consider, for example, *Re 2205-01974*, an SBT decision issued in December 2022.[33] In 2012, the appellant was found to be entitled to ODSP benefits due to degenerative disc disease and fibromyalgia. A decade later, in March of 2022, ODSP program staff concluded that she was no longer eligible because her condition had improved. She immediately appealed to the SBT, which heard the matter nine months later on December 1, 2022, and issued its decision on December 11 that year. The SBT granted the appeal and restored the appellant's ODSP eligibility, finding that she "had not experienced any clinically significant improvement in the impairments and restrictions which were found to be 'substantial' in 2012."[34] The appellant would have received back payments for the ODSP benefits she missed during the nine months before her matter was heard. The psychological toll imposed by a nine month wait should be clearly understood. During this time, the appellant's income likely fell from $1,228 (the ODSP rate) to $733 per month (the Ontario Works rate). Losing 40 per cent of one's income would be a stressful ordeal for anyone. It would be much worse for a person whose income—on either ODSP or Ontario Works—is already well below the poverty line. Added to this indignity is the feeling of having one's medical condition officially rejected. Stress is inevitable when the legitimate need of people with disabilities for income comes into conflict with the legitimate need of the government to ensure that social assistance programs are not abused. However, delay compounds this problem unnecessarily and unjustly, especially when the ultimate legal conclusion is that the government was mistaken to deny the benefits.

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31 Brendan Kennedy, "Delays at the Social Benefits Tribunal Have Tripled, Leaving ODSP Claimants in Extended Limbo", *The Toronto Star* (February 16, 2021), online: <thestar.com/news/gta/delays-at-the-social-benefits-tribunal-have-tripled-leaving-odsp-claimants-in-extended-limbo/article_e68a5593-c583-50e2-90d3-3afc041dc4c9.html>; Tribunal Watch Ontario, "Justice Denied", *supra* note 26. See also Laura Hunter & Michael Ollier, Letter from the Hamilton Community Legal Clinic, "Alarmed For the Future of the Social Benefits Tribunal and Appeals Process" (December 8, 2020), online: <hamiltonjustice.ca/en/2020/12/10/alarmed-for-the-future-of-the-social-benefits-tribunal-and-appeals-process/>. The letter, addressed to The Honourable Doug Downey, Attorney General of Ontario, and The Honourable Todd Smith, Minister of Children, Community & Social Services, advocated for better resourcing of adjudicators at the SBT. It stated that, at the time of writing the letter in late 2020, some of the Hamilton Community Legal Clinic's clients faced wait times into 2022 to have their appeals heard.

32 Regarding OW and ODSP rates, see Income Security Advocacy Centre, "OW & ODSP Rates and the Ontario Child Benefit" (July 2023), online (pdf): <incomesecurity.org/wp-content/uploads/2023/07/July-2023-ODSP-and-OW-rates-and-OCB.pdf>. Regarding the proportion of cases in which the SBT reverses the denial of benefits, see Tribunal Watch Ontario, "Justice Denied", *supra* note 26 at 8.

33 *Re 2205-01974*, 2022 ONSBT 4349.

34 *Ibid* at para 20.

2. Procedural Injustice

Procedural justice is the idea that everyone is entitled to a fair hearing by a neutral decision-maker before their rights are adjudicated.[35] Procedural justice helps adjudicators reach substantively just outcomes and manifests respect for the inherent human dignity of disputants. Canadian law requires adjudicative tribunals to treat parties in a procedurally fair manner, although the thoroughness of the required hearing and the rigorousness of institutional protections for the decision-maker's impartiality depend on the context and the statute.[36] Unfortunately, systemic delay and tribunals' efforts to address it have generated grave procedural injustices in Ontario's high-volume tribunals.

The first principle of procedural justice is *audi alteram partem*—the decision-maker must hear both sides.[37] This principle requires, among other things, that parties have sufficient time to present their cases. The LTB, for example, is required by statute to "affor[d] to all persons directly affected by the proceeding an adequate opportunity to know the issues and be heard on the matter."[38] Unfortunately, as criticism of systemic delays has mounted, the government's efforts to address that criticism undermined the right to be heard. For example, to clear its backlog in 2022 and 2023, the SBT was scheduling most matters for 90 minutes, even when the appellant would almost certainly need longer to present their evidence.[39] The SBT and the LTB also sought to tackle their backlogs by scheduling matters on very short notice and without regard to the availability of the parties' counsel.[40]

a. Dismissal without Hearings at the HRTO

The *Code* requires that the HRTO uphold the principle of *audi alteram partem*. Section 43 of the *Code* states that applications within the HRTO's jurisdiction are not to be finally disposed of unless the parties have had an opportunity to make oral submissions.[41] This is important because human rights applicants are usually self-represented, and their matters involve sensitive allegations of

35 *Duke v The Queen*, 1972 CanLII 16 at 923 (SCC). Procedural justice is also known as "procedural fairness" and "natural justice". In some cases, it includes the right to reasons from the decision-maker: *Baker v Canada* (*Minister of Citizenship and Immigration*), 1999 CanLII 699 (SCC) [*Baker*]. See also David J Mullan, *Administrative Law*, 3rd ed (Toronto: Carswell, 1996) at para 104.

36 *Baker, supra* note 35; *Canada* (*Minister of Citizenship and Immigration*) *v Vavilov*, 2019 SCC 65 at para 77 [*Vavilov*].

37 *Kane v Bd of Governors of UBC*, 1980 CanLII 10 at 1113–14 (SCC).

38 RTA, *supra* note 16, s 183.

39 The same is true of the LTB: Dubé, *supra* note 17 at para 149.

40 Advocacy Centre for Tenants Ontario, "Ontario Legal Clinics' Concerns: Landlord and Tenant Board's Operations During the COVID-19 Pandemic" (October 13, 2020) at 7, online (pdf): <acto.ca/production/wp-content/uploads/2020/10/REPORT-ON-Legal-Clinics-Concerns-LTB-Operations-During-Pandemic.pdf> [ACTO, "Ontario Legal Clinics' Concerns"]; Tribunal Watch Ontario, "Justice Denied", *supra* note 26.

41 *Code, supra* note 26, s 43(2)1.

discrimination based on disability, race, or other prohibited grounds.[42] The principle behind section 43 is that an applicant with a plausible case should have the opportunity to tell their story and make their case orally in a supportive environment.[43] However, when a matter appears to be outside the Tribunal's jurisdiction, Rule 13 in the HRTO's Rules of Procedure allows the Tribunal to seek dismissal of the application by sending a written Notice of Intent to Dismiss (NOID) to the applicant, without providing the application to the respondent.[44] This may be a necessary alternative to oral hearings when applications are obviously unconnected to the HRTO's mandate, but it can also create serious procedural injustice if abused. In the ten years before 2018, the number of NOIDs issued never exceeded 8.4 per cent of the total number of applications to the HRTO.[45] In 2021, a full quarter of the applications were subject to NOIDs.[46] While the HRTO formerly conducted over 110 full merits hearings in an average year, it held only 16 in 2021–22.[47]

When opening a NOID letter, a self-represented applicant will see a legal argument written in complex language, with case law and statute citations, and arguments for why that person should never have a chance to state their case.[48] The person is given 30 days to respond in writing.[49] This is a much less meaningful opportunity to be heard than the oral hearing contemplated by the legislation. Matters can be dismissed on the basis of boilerplate, generic reasons stated in the NOID, contrary to the spirit of the *Code*'s requirement that applications not be finally disposed of without written reasons.[50] The giving of reasons is itself an aspect of procedural fairness.[51] Although reasons need not be given for all administrative decisions, where the legislature has clearly indicated that they should be—as in the *Code*—the denial of them is a breach of procedural fairness.

b. "Digital First" and Access to Justice Second

Serious *audi alteram* problems have also been created by Tribunals Ontario's "digital first" policy. Almost all hearings at the four high-volume tribunals must now occur via videoconference or phone

42 Amira Elghawaby, "Ontarians' Human Rights Are at Risk Because the System Designed to Protect Them is Broken", *The Toronto Star* (January 11, 2023), online: <thestar.com/opinion/contributors/ontarians-human-rights-are-at-risk-because-the-system-designed-to-protect-them-is-broken/article_53dbd20a-efc6-5272-a21b-80feb9748of4.html>.

43 Tribunal Watch Ontario, "Justice Denied", *supra* note 26.

44 After reviewing the applicant's reply to the Notice of Intent to Dismiss (if any), the Tribunal can decide whether to dismiss or allow the matter to continue: see Human Rights Tribunal of Ontario, *Rules of Procedure*, r 13 [HRTO Rules].

45 Frank Nasca, "Jurisdiction and Access to Justice: An Analysis of Human Rights Tribunal of Ontario-Issued Notices of Intent to Dismiss" (2022) 35:3 Can J Admin L & Prac 253 at 267.

46 *Ibid*.

47 Tribunal Watch Ontario, "Justice Denied", *supra* note 26.

48 Nasca, *supra* note 45 at 255.

49 HRTO Rules, *supra* note 44, r 13.2(c).

50 Tribunal Watch Ontario, "Justice Denied", *supra* note 26 at 7; *Code, supra* note 26, s 43(2)2.

51 *Vavilov, supra* note 36 at para 77.

call, rather than in person.[52] In some cases, video or phone calls offer superior procedural justice, insofar as parties who are comfortable with and have access to the requisite technology can easily participate from their homes.[53] Unfortunately, many Ontarians are simply unable to do so and have no one to help them.[54]

Lorraine Peever, for example, is a 78-year-old tenant in North Bay, Ontario whose treatment by the LTB was the subject of an application to the HRTO.[55] Peever's apartment building had persistent bedbug problems, leading to the loss of her personal property after unsuccessful efforts to control the pests. Assisted by the Advocacy Centre for Tenants Ontario (ACTO), Peever brought an application under the *Residential Tenancies Act* for compensation from the landlord. It took nearly three years for her matter to be scheduled for a substantive hearing. Peever, who had no experience with computers or mobile phones, asked to be heard face-to-face and in person. The request was denied, as are 90 per cent of requests for in-person hearings at the LTB.[56] Tribunals Ontario's practice direction states that "[a] party's unfamiliarity with a new technology ... is not sufficient, in and of itself, to necessitate an in-person hearing."[57] In-person hearings are allowed only if the party can demonstrate that it is an accommodation required for a *Code*-related need, or that proceeding online and/or in writing would result in an unfair hearing.[58] This approach contrasts with that adopted by tribunals in other jurisdictions, such as the Social Security Tribunal of Canada, which allow applicants to tick a box to select an in-person hearing if they prefer.

52 Tribunals Ontario, "Operational Updates" (last modified June 28, 2024), online: <tribunalsontario.ca/en/operational-updates/>.

53 Jennifer Leitch, Dayna Cornwall & David Lundgren, *Virtual Justice: A Complex Portrait of Canadian Self-represented Litigant Experiences with Virtual Hearings* (Windsor: National Self-Represented Litigants Project, 2024), online (pdf): <representingyourselfcanada.com/wp-content/uploads/2024/05/Virtual-Hearings-Report-2024.pdf>.

54 Patricia Hughes, "Advancing Access to Justice through Generic Solutions: The Risk of Perpetuating Exclusion" (2013) 31:1 Windsor YB Access Just 1, DOI: <10.22329/wyaj.v31i1.4308>.

55 Shane Dingman, "Group takes Landlord and Tenant board to Human Rights Tribunal over 'digital first' system", *The Globe and Mail* (June 28, 2022), online: <theglobeandmail.com/real-estate/article-group-takes-landlord-and-tenant-board-to-human-rights-tribunal-over/>; *Lorraine Peever v The Landlord and Tenant Board and Tribunals Ontario* (*Schedule "A"*) [on file with the author].

56 Dubé, *supra* note 17 at para 195. A survey of the legal aid clinics representing clinics identified only *one* in-person hearing at the LTB between March 2020 and December of 2022: Martin Regg Cohn, "Doug Ford Appointed Unqualified Party Loyalists to Fill Key Tribunal Spots. Now Ontarians Are Paying the Price as Wait Lists Swell", *The Toronto Star* (December 14, 2022), online: <thestar.com/politics/political-opinion/doug-ford-appointed-unqualified-party-loyalists-to-fill-key-tribunal-spots-now-ontarians-are-paying/article_84bb3116-e38c-5f67-aa5b-bf29e99dd0e8.html>. See also Tribunal Watch Ontario, "Justice Denied", *supra* note 26 at 3.

57 Tribunals Ontario, "Updated Practice Direction on Hearing Formats" (November 30, 2020), online: <tribunalsontario.ca/documents/TO/Practice-Direction-on-Hearing-Formats-EN.html>.

58 *Ibid.*

Online hearings can easily place parties with weaker devices, weaker data plans, or weaker technological skills at a grave disadvantage relative to their adversaries. Many tribunal litigants—especially tenants at the LTB, and ODSP claimants at the SBT—have low incomes, and technology and data are expensive.[59] Legal aid clinics can provide technology and a private space to some of their clients, but capacity does not allow them to meet the needs of all tribunal litigants who need these services. A person phoning into a "Zoom room" that others are attending via videoconference will generally be less able to understand what is going on, especially if the stressful and high-stakes experience of a legal hearing is being undertaken for the first time in one's life. The submissions of an audio-only party may be less persuasive than their adversary's,[60] and an audio-only party will not be able to present visual evidence such as a document or a photograph of a maintenance problem.[61] A recent ACTO report provides an example:

> [A] tenant who called in by phone struggled to understand what was happening during the hearing, and unlike his landlord who appeared by videoconference, could not respond to the member's cues or see that the member was becoming visibly frustrated with him. He was left apologizing repeatedly for having a difficult time in hearing instructions and following the proceeding. In those circumstances, how could a tenant be expected to focus on understanding the landlord's evidence and presenting their own case in response?[62]

These issues are compounded for the tribunal users who do not speak English or French as their first language and must therefore rely on translators.

As a matter of procedural justice, a party with counsel has the right to have that individual appear on their behalf. For landlord-tenant matters, in the pre-2020 system of in-person hearings, publicly-funded duty counsel from the ACTO were available to everyone on their hearing day.[63] Duty counsel would be physically present in or outside the hearing rooms and litigants could meet them there (usually for the first time).[64] They were often able to multi-task in order to help many tenants quickly. As Kathy Laird explained, the switch to online hearings was not accompanied by any

59 Advocacy Centre for Tenants Ontario, "Landlord and Tenant Board: Frequently Asked Questions" (February 2023) at 4, online (pdf): <acto.ca/production/wp-content/uploads/2023/02/LTBFAQ_2023_ACTO_FINAL.pdf> [ACTO, "LTB FAQ"].

60 ACTO, "Ontario Legal Clinics' Concerns", *supra* note 40 at 8.

61 *Ibid*.

62 *Ibid*. In another example from the report, the ACTO stated that they "have overheard a tenant struggling to take part in a hearing from a payphone in the rain on a cold day before ultimately giving up and dropping the call": *ibid* at 7.

63 ACTO, "LTB FAQ", *supra* note 59.

64 Emily Paradis, *Access to Justice: The Case for Ontario Tenants - Final Report of the Tenant Duty Counsel Review* (Toronto: Advocacy Centre for Tenants Ontario, 2016), online (pdf): <acto.ca/production/wp-content/uploads/2017/07/TDCP_Report_2016.pdf>; David Wiseman, "Paralegals and Access to Justice for Tenants: A Case Study" in Trevor CW Farrow & Lesley A Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) 173 at 186.

practical alternative to let duty counsel effectively connect with tenants.[65] Tenants who phone in to "block" hearings, where multiple parties queue to have their matters heard, have difficulty finding and speaking privately with the lawyer there to help them.

At the same time, LTB hearings have also been moved to pan-provincial "superblocks" instead of regional hearings. LTB members no longer benefit from tacit and informal knowledge about the regions whose matters they hear. The result, as Ontario Ombudsman Paul Dubé found, is an exacerbation of systemic delay.[66] The backlog of unresolved LTB cases started growing in 2018, increasing from 14,726 cases in March 2019 to 32,800 cases in March 2022.[67]

c. Reasonable Apprehension of Bias

Procedural justice also requires that there be no reasonable apprehension that the decision-maker is biased or partial to either side.[68] While the author is unaware of any evidence that members at Tribunals Ontario are biased or partial, their highly insecure conditions of employment are problematic in this regard.[69] As explained below, every time the government has a completely discretionary opportunity to decide whether or not a certain member will keep their job—and the Ontario government has many such opportunities—that member's ability to impartially decide cases in which the interests of the government or its allies are affected comes under threat. While tribunal members are appointed for fixed terms, there is no minimum term length, and they have in some cases been as short as six months.[70] Regardless of performance, tribunal members appointed prior to 2018 (before the new Progressive Conservative government took office) were "de-appointed" *en masse* at the end of their terms.[71]

To see why short appointment terms and discretionary, non-meritocratic reappointment practices can create a reasonable apprehension of bias, it is important to understand why governments would care about the substantive outcomes of matters before these tribunals. This is most obvious at

65 Kathy Laird, "The 'Digital Transformation' at Tribunals Ontario: The Impact on Access to Justice" (2021) 34:2 Can J Admin L & Prac 141 at 150–51, n 36.

66 Dubé, *supra* note 17.

67 ACTO, "LTB FAQ", *supra* note 59 at 3.

68 *Bell Canada v Canadian Telephone Employees Association*, 2003 SCC 36 at para 17.

69 Regarding the potential for the insecurity of adjudicator employment to give rise to bias or the reasonable apprehension thereof, see *R v Lippé*, 1990 CanLII 18 (SCC).

70 Brian Cook, "Tribunal Watch Ontario Commentary on McAnsh v. Ontario", *Law360 Canada* (22 June 2023), online: <law360.ca/articles/48010/tribunal-watch-ontario-commentary-on-mcansh-v-ontario-brian-cook>. Regarding the trend to short-term appointments at the HRTO, see Stephen Flaherty, "Does the Ontario Human Rights Tribunal have a Reasonable Prospect of Success?" (2022) 35:2 Can J Admin L & Prac 231 at 247.

71 Raj Anand, Kathy Laird & Ron Ellis, "Opinion: Justice Delayed: The Decline of the Ontario Human Rights Tribunal Under the Ford Government," *The Globe and Mail* (January 29, 2021), online: <theglobeandmail.com/opinion/article-justice-delayed-the-decline-of-the-ontario-human-rights-tribunal-under/>.

tribunals with responsibility for disputes over government benefits. The state is a party and must pay benefits or pensions to the applicants who succeed, and so its pecuniary interests are served if adjudicators deny appeals.[72] The government is also often a party at the HRTO, either as an employer or as the originator of regulations or rules being challenged on human rights grounds.

The government is not usually a party at residential tenancy or insurance benefits tribunals (e.g., the LTB and LAT-AABS). Still, governments are often sympathetic to a constituency that appears repeatedly in these tribunals, whether for ideological, political, or policy reasons. At the LTB, tenants confront landlords; at the HRTO, employees confront employers; and at the LAT-AABS, motor vehicle accident victims confront insurance companies. Governments, meanwhile, have often been elected on platform commitments to help tenants, reduce burdens on employers, or reduce auto insurance premiums (which are connected to the level of insurers' liability for benefits). Governments, in short, have reasons to care about tribunal outcomes. Meanwhile, the current constitutional arrangement gives them absolute power to deny the renewal of terms, and to appoint members for very short terms.[73] This creates at least a reasonable apprehension of bias, if not actual bias, contrary to the requirements of procedural justice.[74]

Judith McCormack, former Chair of the Ontario Labour Relations Board, eloquently explains how the fear of losing one's job can be reasonably apprehended to affect one's impartiality. McCormack wrote:

> The prospect of job loss, the Board has said, can mean an employee is contemplating a loss of economic security, the loss of the social milieu of the workplace, a concomitant loss of self-esteem, identity or social standing, the uncertainty of finding another job and the possibility of a slide on to social benefits. The mere possibility of this bleak picture coming to pass may exert a powerful impact on employee choices. As a result, an employee is 'peculiarly vulnerable' to the influences of the employer. ... it is reasonable to think that the prospect of job loss as an adjudicator approaches the end of his term will probably create a good deal of concern. In most cases, it is likely to generate at least the passing thought of what might be done to secure reappointment.[75]

In other words, there is a "chill factor" at play.[76] When a competent member's appointment goes unrenewed, their colleagues will likely wonder "what can be done to prevent the same thing from

72 Administrative Justice Working Group, "Future of Administrative Justice Symposium Report" (2008) 21 Can J Admin L & Prac 193 at 216.

73 Cook, *supra* note 70.

74 Katrina Miriam Wyman, "Appointments to Adjudicative Tribunals: Politics and the Courts" (1999) 57:2 UT Fac L Rev 101 at 104.

75 Judith McCormack, "The Price of Administrative Justice" (1998) 6 CLELJ 1 at 2223. McCormack's article references, as an example, the decision in *Roytec Vinyl Co*, [1990] OLRB Rep 727.

76 See generally Brian Cook & Gary Yee, "Case Comment: *McAnsh v. Ontario*, 2023 ONSC 3537. Another Misstep on the Road of Tribunal Independence" (2023) 36:3 Can J Admin L & Prac 221 at 226 (advocating for the establishment of an independent oversight body for the tribunal justice system to better protect the independence of tribunal adjudicators).

happening to them?"[77] After Tribunals Ontario adjudicators started to notice in 2018 that their colleagues were being systematically de-appointed, it is not hard to imagine that those still employed asked themselves what they might do to prove their loyalty to the new government and keep their jobs.

Finally, it might be reasonable to apprehend that, in some tribunals, systemic delay is intentionally created or tolerated by the government to help respondents. If a respondent is eventually required to compensate an applicant, systemic delay allows them to keep their money longer. More importantly, systemic delay in benefits tribunals (e.g. the LAT-AABS) puts low-income claimants under financial pressure to "sell" their claims for much less than they are worth by settling for an immediate cheque.[78] Suppose a government is more sympathetic to employers and insurers than it is to employees and motor vehicle benefit claimants. In that case, it is not unreasonable to suspect that systemic delay in those tribunals would not be overly concerning for the government.

3. Substantive Injustice

Adjudicative tribunals should generate substantively just outcomes, in addition to affording procedural justice to their users. When adjudicating, tribunals should identify the correct applicable law, find the true facts of the case, and make orders that align with the law's promises.[79] When mediating, tribunals should try to achieve resolutions that reflect the parties' legal rights, and not just the balance of power between them. And yet, substantive justice is suffering greatly in the high-volume parts of Tribunals Ontario due to delay and procedural injustice.

a. Delay and Substantive Injustice

When months or years pass after the events giving rise to a dispute, determining what happened often becomes much more difficult. The unavailability of witnesses, the disappearance of documents, and the fading of memories mean that more facts will go unfound.[80] In the SBT, adjudicators have the unenviable task of assessing the credibility of appellants' testimony regarding alleged disabilities from up to two years before the date of the hearing.[81]

Substantive injustice results when parties with clear legal rights abandon them because of delay or procedural injustice. A tenant's legal right to a pest-free home becomes meaningless if they walk

77 McCormack, *supra* note 75.

78 Regarding the pressure on shallower-pocketed litigants to settle for less than they are owed to end proceedings quickly, see Robert H Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88:5 Yale LJ 950 at 966–73.

79 Noel Semple, "Better Access to Better Justice: The Potential of Procedural Reform" (2022) 100:2 Can Bar Rev 124 [Semple, "Better Access"].

80 Tribunal Watch Ontario, "The Human Rights Tribunal of Ontario: What Needs to Happen" (January 2023), online (pdf): <tribunalwatch.ca/wp-content/uploads/2023/01/The-Human-Rights-Tribunal-What-Needs-to-Happpen.pdf> [Tribunal Watch Ontario, "HRTO"].

81 Tribunal Watch Ontario, "Justice Denied", *supra* note 26 at 7–8.

away from an infested apartment while spending years waiting for an LTB order to fix it.[82] Their right to reasonably enjoy the unit they are paying for is also meaningless if they are wrongfully evicted and cannot get to the LTB to restore their access.[83] Likewise, a landlord's right to evict a non-paying tenant becomes meaningless if they are forced to sell the property because they cannot afford to carry the mortgage payments while waiting for the LTB. In 2021–22, parties withdrew some 12,000 applications to that tribunal, amounting to one in every five applications.[84] Although some of these were settled by the parties on a mutually acceptable basis, the 12,000 applications in this category do not include the ones resolved through LTB-sponsored mediation. Likely, many of these 12,000 were simply abandoned because people could not wait any longer.

The SBT rules in favour of people with disabilities almost 60 per cent of the time. In many other SBT cases, filing an appeal causes the Ministry to reverse the denial of benefits before a hearing date.[85] Yet, Tribunal Watch reports that in 2021–22, the number of appeals to the SBT fell to 6,022 from an average of 9,334 per year over the previous five years.[86] While increasing delay may not have caused this entire decline, it was likely a contributing factor. Meanwhile, plaintiff-side employment lawyers representing terminated employees, who previously filed human rights complaints on behalf of their clients at the HRTO, now avoid it due to the lack of reasonable prospect of a timely hearing.[87]

Adjudicative tribunals that award monetary remedies can, in principle, do so even if months or years have passed due to systemic delay. But they can only do so in cases where the applicant has persisted, even though giving up one's legal rights and getting on with life may be a more logical and psychologically healthy response after years of waiting. The *Code* provides for non-monetary remedies, such as a letter of reference for an applicant or remedial efforts within an employer organization to improve practices going forward.[88] Such remedies are unlikely to be valuable to parties or contribute to substantive justice after months or years have passed.

b. From Procedural Injustice to Substantive Injustice

As previously noted, Ontario's tribunals have started cutting procedural justice corners to catch up on their backlogs. This, in turn, undermines their substantive justice performance. A substantively just outcome is most likely to be reached after a full hearing on the merits, but these are increasingly

82 Marion Overholt, "Tribunal Independence and Impartiality - Tribunal Users' Perspective" (May 25, 2021), online (blog): Law, Disability & Social Change <lawdisabilitysocialchange.com/tribunal-independence-and-impartiality>.

83 Regarding wrongful evictions, see ACTO, "Ontario Legal Clinics' Concerns", *supra* note 40.

84 Tribunals Ontario, 2021-22 *Annual Report, supra* note 10.

85 Tribunal Watch Ontario, "Justice Denied", *supra* note 26 at 8.

86 *Ibid*.

87 "Lawyers Frustrated by Vacancies at Human Rights Tribunal", *Law Times* (14 May 2019), online: <lawtimesnews.com/practice-areas/human-rights/lawyers-frustrated-by-vacancies-at-human-rights-tribunal/263549>.

88 *Code, supra* note 26, ss 45.2–45.3.

rare at the HRTO.[89] Thus, it seems very probable that more substantive mistakes are now being made. Frank Nasca evaluated a random sample of 50 HRTO applicants who had received a written NOID from the tribunal.[90] In Nasca's view, 14 of these cases presented a clear prima facie case, which under applicable law means they should not have been dismissed with a NOID letter.[91] Studies from several jurisdictions, cited by Kathy Laird in a recent paper, demonstrate that oral hearings tend to produce different results than written or online alternatives.[92] A person like Lorraine Peever, the 78-year-old bedbug-afflicted tenant in North Bay, is more readily able to bring photographic evidence of maintenance problems to an in-person hearing. Without help, she may struggle greatly to do so in an online format.

c. Adjudicator Competence

A final threat to substantive justice arises from issues of member competence and expertise. There is no hard evidence regarding the quality (as opposed to the quantity) of the substantive decisions emerging from Tribunals Ontario. However, current appointment practices leave the government free to refuse reappointment to experienced members, regardless of merit, because they were originally appointed by a different government. In recent years, the Ontario government has availed itself of this opportunity.[93] Meanwhile, according to veterans in this field, most new appointees lack prior experience either in adjudication or in the subject matter of the tribunals to which they are being appointed. Given the legal complexity of the underlying law, it is unlikely that mass terminations of experienced people, and their replacement by others who have not previously worked in the area, favours substantively correct rulings.[94]

d. The Consequences of Dysfunction

It is not hyperbole to say that tribunal dysfunction can ruin people's lives. Elsie Kalu, operator of a small immigration consultancy, purchased a modest Ottawa townhouse in April 2022. She intended to move in with her five-year-old daughter, who has autism spectrum disorder. Unfortunately, the tenant of the previous owner refused to leave or pay rent, according to Kalu's statement of claim. Kalu brought an eviction application to the LTB on May 10, 2022, but her matter was not heard by late December 2022. During that time, Kalu had to pay the mortgage on her uninhabitable house as well as rent for herself and her daughter in a different home. The claim in Kalu's civil action against

89 Semple, "Better Access", *supra* note 79 at 146.

90 Nasca, *supra* note 45 at 269.

91 *Ibid* at 276.

92 Laird, *supra* note 65 at 144, n 7.

93 Kathy Laird & Voy Stelmaszynski, "Factors Contributing to the LTB Crisis at Tribunals Ontario", *Law360 Canada* (February 22, 2024), online: <law360.ca/ca/articles/1805219/factors-contributing-to-the-ltb-crisis-at-tribunals-ontario-kathy-laird-and-voy-stelmaszynski>.

94 Tribunal Watch Ontario, "HRTO", *supra* note 80 at 1–2.

the Government of Ontario states that the resulting personal debt led to her failing a credit check, which, in turn, led to the loss of a job she had been offered as a financial advisor with a major firm.[95]

In housing matters, there is a mounting temptation to "self-help". Tenants are tempted to withhold rent when they cannot get enforceable maintenance orders, and landlords are tempted to evict illegally when they cannot access the LTB to do so legally. This opens the door to violence, illegality, and an erosion of the rule of law. LTB dysfunction also discourages people from becoming tenants or landlords at all. Tenants are always at risk of living with maintenance problems that the landlord will not fix, and/or having violent or disruptive neighbours, whom the landlord should evict but cannot or will not. Tenants are given reason to believe that piling into Ontario's highly unaffordable homeownership market is the only way to have a secure home.

The supply of long-term rental units may also suffer when residential tenancy agreements cannot be enforced. Homeowners who could make basement or laneway suites available to tenants may well be deterred by the risk of being stuck with a non-paying or law-breaking tenant for 11 months or more, and no legal ability to evict.[96] Short-term rental through platforms such as AirBnb, which are exempt from the *Residential Tenancies Act*, is a much less risky alternative.[97] There is a serious shortage of affordable purpose-built rental housing in Ontario, but multi-unit developers always have the option to sell new units as condominiums instead.[98] The risk of having to carry non-paying or law-flouting tenants for many months due to LTB delays encourages developers to take the condo route, because once condo units are sold, the developer faces no further risks of that nature. Additionally, to evict for non-payment also encourages landlords to more aggressively screen out prospective tenants based on factors thought to increase the risk of non-payment, such as low income or poor credit history. In sum, the rule of law means, among other things, that people can make bargains, and hold each other to them. We all pay a price when this fails, as it has at the LTB.[99]

95 *Kalu v Ontario* (*Attorney General*), Sup Ct J, No CV-22-00000074-00CP (Statement of Claim, Plaintiff, issued December 22, 2022). This statement of claim was struck without leave to amend: *Kalu v His Majesty the King*, 2023 ONSC 6623.

96 On the hardship imposed on small landlords by LTB delays, see Tribunal Watch Ontario, "Justice Denied", *supra* note 26.

97 *RTA, supra* note 16, s 5(a).

98 Matti Siemiatycki & Karen Chapple, *Perspective on the Rental Housing Roundtable*, Attachment 2 (March 2023), online: <toronto.ca/legdocs/mmis/2023/ex/bgrd/backgroundfile-234818.pdf>.

99 Lisa Moore & Trevor CW Farrow, *Investing in Justice: A Literature Review in Support of the Case for Improved Access* (Toronto: Canadian Forum on Civil Justice, 2019), online (pdf): <cfcj-fcjc.org/wp-content/uploads/Investing-in-Justice-A-Literature-Review-in-Support-of-the-Case-for-Improved-Access-by-Lisa-Moore-and-Trevor-C-W-Farrow.pdf>.

II. Diagnosis: Lack of Support From the Three Branches of Government

Casual observers might suspect that underfunding and the COVID-19 pandemic are to blame for the dysfunction in Ontario's highest-volume adjudicative tribunals in the period between 2018 and 2022. Tribunals certainly are not the only parts of the state that fall below expectations: delays, waiting lists, and other shortcomings are found in public services of all kinds. Yet, funding for Ontario's adjudicative tribunals has not been cut; indeed, additional funding was provided to the LTB in 2021 and 2022.[100] As the ACTO observed in early 2023, the LTB had more adjudicators than it did in 2011 and received *fewer* applications than before. Somehow, though, it resolved fewer applications yearly, and each one took longer.[101] This trend toward the LTB doing less work with more resources has continued into 2024.[102]

Moreover, the symptoms of tribunal dysfunction predated the arrival of COVID-19, and persisted long after most other public services have shaken off the pandemic's effects.[103] In many adjudicative tribunals, COVID-19 caused a significant reduction in caseload, but the backlogs and delays continued to climb.[104] As this Part explains, the immediate cause of the dysfunction was the approach of the executive branch of government to appointments, though weaknesses in the legislation and jurisprudence have also contributed to making adjudicative tribunals vulnerable to executive neglect.

1. The Executive Branch: Dysfunctional Appointment Practices

Ontario statutes establish that the "Lieutenant Governor in Council" shall appoint members to adjudicative tribunals. By constitutional convention, the Lieutenant Governor acts on the advice of Cabinet, which is led by the Premier and elected Ministers, but also has a staff of permanent civil servants and political appointees.[105] The Public Appointments Secretariat (PAS) is the part of the Cabinet Office meant to take the lead in keeping tribunals appropriately staffed. However, as noted below, PAS's work is only one small part of a complex chain of events that must transpire before a new member can be appointed.

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100 Attorney General of Ontario, News Release, "Ontario Providing More Support to the Landlord and Tenant Board" (November 24, 2022), online: <news.ontario.ca/en/release/1002515/ontario-providing-more-support-to-the-landlord-and-tenant-board>; Attorney General of Ontario, News Release, "Ontario Invests $19M to Help Tackle Housing Crisis" (April 1, 2022), online: <news.ontario.ca/en/release/1001918/ontario-invests-19m-to-help-tackle-housing-crisis>.

101 ACTO, "LTB FAQ", *supra* note 59 at 3.

102 See Laird & Stelmaszynski, *supra* note 19.

103 Muriel Draaisma, "Backlogged Tribunals Creating 'Distress' for Ontarians Waiting Months or Years to be Heard", *CBC News* (March 11, 2023), online: <cbc.ca/news/canada/toronto/tribunal-backlogs-ontario-justice-1.6766594>.

104 ACTO, "LTB FAQ", *supra* note 59 at 6.

105 Patrick F Baud, "The Crown's Prerogatives and the Constitution of Canada" (2021) 3 J Commonwealth L 219.

The four high-volume adjudicative tribunals first became dysfunctional because they were short of members, and especially short of experienced leaders and adjudicators. The LTB, SBT, and HRTO collectively had 148 members in March 2018, but only 83 by spring 2020.[106] Losing 25 per cent of the complement of members generated large backlogs and drove up systemic delay at the LTB.[107] Similarly, the HRTO previously released an average of over 100 full decisions per year, but due to a lack of competent adjudicators, it rendered only 16 in the 2021–22 year. Of these, 12 were the result of applications that were filed before 2018, meaning they had been in the system for at least three years.[108]

Although the short-staffing problem worsened after 2018, it did not begin that year. Between 2012 and 2016, it took an average of over 15 months to fill tribunal vacancies in Ontario, which caused 33 agencies to drop below their minimum number of members.[109] Staffing levels have recovered somewhat since early 2022, but the period of short-staffing generated a backlog that has continued to cause systemic delay. Even though the LTB had more funding and members than it did in 2018 by early 2024,[110] issues related to culture and competence have made it impossible to reduce the backlog and begin meeting service standards again.[111]

Two shortcomings in the executive branch, in turn, caused the shortage of members. First, since 2018, the Ontario government has systematically refused to reappoint those initially appointed by the previous government, regardless of merit. Second, neither the current government nor previous ones have managed to quickly replace tribunal adjudicators who left.

De-Appointment

Decision-makers in Ontario's adjudicative tribunals are appointed for fixed terms, and not dismissed during those terms except in cases of serious misconduct.[112] Fixed term appointments support adjudicator impartiality because the government cannot *immediately* punish a member by firing them (although, as noted above, the protection is flimsy if the term is short and reappointment is completely discretionary). At the same time, fixed terms mean that once a member's term ends, if the executive takes no action, that individual leaves the public service.

106 Tribunal Watch Ontario, "Statement of Concern, 2020", *supra* note 1.

107 *Ibid*; Dubé, *supra* note 17 at para 47.

108 Tribunal Watch Ontario, "Justice Denied", *supra* note 26 at 5.

109 Mark P Mancini, "The Political Problem with the Administrative State" (2020) 2:1 J Commonwealth L 55 at 96. See also Ian Mackenzie, "Delay in Adjudicator Appointments: Crisis, What Crisis?", Slaw (December 27, 2016), online: <slaw.ca/2016/12/27/delay-in-adjudicator-appointments-crisis-what-crisis/>.

110 Laird & Stelmaczynski, *supra* note 19.

111 Dubé, *supra* note 17 at para 66.

112 See e.g. Government of Ontario, "Agencies and Appointments Directive" (last modified October 2024), online: <ontario.ca/page/agencies-and-appointments-directive>; Tribunals Ontario, "2022/23 – 2024/25 Tribunals Ontario Business Plan", online: <tribunalsontario.ca/documents/TO/TO_2022.23%20%E2%80%93%202024.25_Business_Plan_EN.html>.

Most members are willing to be reappointed after their terms end. Typically, the Chair or Vice-Chair in charge of a tribunal, who has the best opportunity to observe and evaluate the work of the members, will make a recommendation to the executive about whether the individual should be reappointed.[113] In the past, such recommendations were routinely followed by the executive—but not in the years after 2018. Reappointments of holdover appointees were generally denied with no reasons given and no concerns stated regarding performance or merit.[114] To borrow Ron Ellis's phrase, experienced members were "de-appointed", *en masse*.[115]

Self-Inflicted Recruitment Woes

Mass de-appointment is highly problematic, as adjudication requires a combination of advanced and relatively rare legal and interpersonal skills. Consider, for example, the LAT-AABS, which resolves disputes between motor vehicle insurance companies and injured people about entitlement to accident benefits. The cases often involve complex medical and actuarial evidence from competing experts. There are six different Ontario statutes, and numerous regulations, that must be applied in resolving disputes arising in this context.[116]

It takes skill and experience to conduct hearings in a manner that is procedurally fair, likely to produce substantively just outcomes, and expeditious. Less skilled and experienced members are likely to make sacrifices in one or more of these three areas. For example, parties sometimes unexpectedly put forward new documents that they wish to have considered in hearings. A new member might choose to immediately include such a document (depriving the other side of the right to challenge its admissibility), choose to exclude it (risking an erroneous outcome if the document was relevant), or decide to adjourn the hearing to consider and receive submissions about the document's admissibility (causing months of delay). An experienced and skilled member will be aware of other options, such as reserving judgment on the admissibility of the document, to see if the dispute can be resolved without having to refer to it.[117] Because most cases at the high-volume tribunals involve at least one self-represented litigant, mastering the techniques of active adjudication (instead of the more passive adversarial model of adjudication) is often very valuable.[118] Experienced members in many tribunals can also bring about fair, consensual resolutions, either in formal mediation sessions or informally during hearings.

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113 Cook, *supra* note 70.

114 *Ibid*.

115 Ron Ellis, "Judicial Tribunals - Ontario's Appointment and Reappointment Policies - Drilling Down" (July 25, 2020), online (blog): <administrativejusticereform.ca/judicial-tribunals-ontarios-appointment-and-reappointment-policies-drilling-down/> [Ellis, "Judicial Tribunals"].

116 Tribunals Ontario, "AABS: Legislation and Rules" (last visited 6 May 2024), online: <tribunalsontario.ca/lat/automobile-accident-benefits-service/legislation-and-rules/>.

117 Knowing when and how to ask questions of witnesses (active adjudication) or curtail repetitive questioning are other hearing-management skills that require experience and self-confidence.

118 Michelle A Alton, "Rethinking Fairness in Tribunal Adjudication to Best Promote Access to Justice" (2019) 32:3 Can J Admin L & Prac 151 at 161.

As Ellis has explained, current appointment practices in Ontario make it difficult to attract the people who can do this work well.[119] While a member has security during their term, the average term length is slightly over two years, and recently some terms in Ontario have been as short as six months.[120] The prospect of being de-appointed (effectively, fired) for reasons unrelated to one's job performance or demand for one's work makes any job much less appealing than it would otherwise be.

Short-staffing and politicization led to demoralization, which led to resignations and thus more short-staffing, in a vicious circle. They also contributed to high turnover among the Tribunals' permanent staff, making members' work less appealing. The people with the skills and attributes to be strong adjudicators generally have other career opportunities, especially in a tight labour market like Ontario's during the period in question.[121] The executive considers de-appointees to be ineligible for appointment to any other provincial adjudicative tribunal.[122] They have few opportunities to continue their careers in a way that uses their experience.

The unattractiveness of Ontario tribunal adjudicator positions is exacerbated by the fact that, under current law, they are not employees, but rather appointees pursuant to an exercise of Crown prerogative authorized by statute.[123] The practical consequence is that de-appointees, unlike most employees fired without just cause, receive no pay in lieu of notice.[124] De-appointment is likely to be perceived by a subsequent reader of one's resumé as a red flag, unless that reader happens to understand the idiosyncratic world of Ontario tribunal human resource practices. Most public sector jobs offer strong job security, and so people who have been let go from a public sector job may be falsely presumed to have done something seriously bad.

The problems created by de-appointment are exacerbated by how it has been done in Ontario in recent years. The end date of each adjudicator's term is known from its outset. Nonetheless, decisions about reappointment are often made very close to the last minute.[125] The policy of Ontario's Public Appointments Secretariat is that no term can be renewed more than six months before it is to end, and in recent Ontario practice the recommendation to reappoint or de-appoint is not made until three or four months before the termination date.[126] A prudent person of modest means, who thinks they might lose their job without notice in a few months, starts looking for another job. If they find one, they are unlikely to stick around to see if they were going to be fired after all. *Cybulsky*,

119 Ellis, "Judicial Tribunals", *supra* note 115.

120 Cook, *supra* note 70.

121 Financial Accountability Office of Ontario, *Ontario's Labour Market in 2020* (Ontario: Financial Accountability Office of Ontario, 2021).

122 Ellis, "Judicial Tribunals", *supra* note 115.

123 *McAnsh v Ontario*, 2023 ONSC 3537 at para 27 [*McAnsh*].

124 Ellis, "Judicial Tribunals", *supra* note 115; Ron Ellis, "Appointments Policies in the Administrative Justice System Lessons From Ontario Four Speeches" (1998) 11 Can J Admin L & Prac 205 at 210.

125 Dubé, *supra* note 17 at para 76.

126 *Ibid* at para 75.

described above, took seven years to reach a final decision at the HRTO.[127] Many months of delay in this matter were caused by the resignation of the first adjudicator, who anticipated de-appointment and therefore found another job, and then by the de-appointment of the second adjudicator assigned to the case.

Adjudicators are assigned new cases in the hope that they will be able to complete the hearing and issue decisions. When this proves not to be the case, because of systemic delay and/or an unexpected de-appointment, serious problems result.[128] If the decision is not rendered very quickly after the end of the member's term, then the work done in the hearing is thrown away and the parties must go through the expense and inconvenience of preparing for and holding another hearing.[129] The new hearing will often be many months in the future, due to systemic delay.[130]

Getting Up to Speed

There is a clear disjunction between, on the one hand, short appointment terms and the possibility of de-appointment for no good reason, and on the other, a demanding job that takes time and training to master. As of July 2023, the average term length of all appointees in the four high-volume tribunals is only two years and three months, although some of these were serving their second or third term.[131] Yet, one experienced tribunal chair wrote that it often takes one or two years for a new adjudicator to "fully hit their stride in terms of adjudication skills".[132] Because the work is complex, significant on-the-job training is required. Ombudsman Dubé noted that there were 72 LTB adjudicators in August 2021, but 20 of these were still being trained and not hearing any matters, while another 20 were trained to hear some but not all matters, leaving only 32 who were fully trained and deemed fully capable.[133] The HRTO had 22 adjudicators when the government changed in 2018, but only three of these remained by February 2021.[134]

Experience is the best teacher in any type of work. Full-time employees acquire mastery more quickly than part-timers, because they have more experience from which to learn. Yet, perhaps because the prospect of switching to such an insecure career on a full-time basis is not appealing,

127 *Cybulsky, supra* note 29 and accompanying text.

128 An adjudicator's appointment is deemed to continue beyond its end date for the purpose of issuing decisions in matters which the adjudicator has heard (see *Statutory Powers Procedure Act*, RSO 1990, c S.22, s 4.3); however, in the case of the LTB, this extension only lasts for four weeks: see *RTA, supra* note 16, s 173.

129 See e.g. *Faruk v The Landlord and Tenant Board*, 2023 ONSC 2191.

130 Dubé, *supra* note 17 at paras 69–70, and the case study examples at paras 37, 267.

131 This is based on the author's analysis of Public Appointments Secretariat records, online: <pas.gov.on.ca/Home/Agencies-list?SelectedMinistryId=&q=tribunal>.

132 McCormack, *supra* note 75 at 28–29.

133 Dubé, *supra* note 17 at para 100.

134 Anand, Laird, & Ellis, *supra* note 71.

the adjudicative tribunals have increasingly had to rely on part-timers. In 2011, the LTB had more than four full-time adjudicators for every part-timer; in 2022, it had more part-timers than full-time employees.[135]

a. Long-Standing Problems

While Ontario's executive appointment practices went downhill after 2018, problems were visible before that point. One structural problem in the executive branch, predating the current government, is the highly complex appointments process, which contributes to delays. Ombudsman Dubé's report counted five major government entities, 11 high-level stages, and 122 distinct steps involved in appointing an adjudicator.[136] Two longstanding policies are particularly problematic for tribunal function: the caretaker convention, and the ten-year rule.

i. The Caretaker Convention

The "caretaker convention" holds that, during an election period and potentially for some months beforehand, appointments to some government agencies are either not made at all or are made with terms set to end shortly after the election.[137] The idea is to allow incoming governments to establish a new policy direction, including through appointments to policy-making agencies. However, the application of the caretaker convention to Ontario's adjudicative tribunals has contributed to short-staffing, job insecurity, and therefore dysfunction.[138] The actual work of these four high-volume adjudicative tribunals is almost entirely dispute resolution and not the creation of new substantive law or the implementation of extralegal government "policy".[139] Thus, the author's view is that they should not be subjected to the caretaker convention. They should instead be treated like hospitals, schools, and police stations—permanent and essentially apolitical parts of the state that should benefit from the human resources policies most likely to foster their healthy function.

ii. The 10 Year Rule

Since 2006, Ontario's executive branch has had a rule stating that the cumulative total time that an adjudicator can spend at a certain tribunal is ten years, unless exceptional circumstances are demonstrated.[140] Although it might be possible to continue thereafter with a promotion (e.g., from

135 ACTO, "LTB FAQ", *supra* note 59.

136 Dubé, *supra* note 17 at para 69.

137 John Wilson, "The Status of the Caretaker Convention in Canada" (1995) 18:4 Can Parl Rev 12 at 14.

138 Dubé, *supra* note 17 at paras 85–88.

139 For an argument that dispute-resolving tribunals should be clearly distinguished from administrative decision-makers doing other kinds of work, and given fundamentally different relationships to the elected branches of government, see Noel Semple, "Tribunals in Canada: A Coming of Age", Can J Admin L & Prac [forthcoming in 2024] [Semple, "Tribunals in Canada"].

140 Ontario Treasury Board Secretariat, "Agencies and Appointments Directive" (December 13, 2022), online: <ontario.ca/page/agencies-and-appointments-directive>, s 3.2.2; Ron Ellis, *Unjust By Design: Canada's Administrative Justice System* (Vancouver: UBC Press, 2013) at 11 [Ellis, *Unjust by Design*].

member to Vice-Chair), or a transfer to a different tribunal, this rule undoubtedly leads to the departure of experienced members. Ellis reports that, at least under the current government, those who have served for ten years would be considered ineligible for appointment to any other tribunal in Ontario.[141]

Most employers seek to retain good people, so it is striking to see one taking the view that they should leave after a time regardless of performance. Some Tribunal Chairs do support the ten-year rule, or something like it, on the basis that it promotes "renewal" or facilitates the departure of underperforming members.[142] However, given that such career caps are basically unprecedented in any other organization, it seems likely that there are better ways to obtain a meritorious, innovative, high-performing workforce. In the federal tribunals, there has been nothing akin to a ten-year-rule in place since 2015—if not earlier.[143]

b. Leadership and Culture

Recruitment and termination practices do not only determine who is doing the tasks in a workplace. They also determine leadership and culture, which in turn have profound effects on collective performance. An adjudicative tribunal is more than just a collection of individuals handling cases that have been assigned to them. With the right leadership and culture, it can outperform the sum of its individual members' efforts. Unfortunately, appointment and de-appointment practices in the adjudicative tribunals make pro-functional leadership and culture very difficult to achieve.

i. Adjudicative Tribunal Leadership

Tribunals are led by members who have been appointed as Vice-Chairs, Associate Chairs, or full Chairs.[144] In Ontario, there is a single Executive Chair for all 13 tribunals clustered under the aegis of Tribunals Ontario, including the four that are the focus of this feature.[145] Chairs are responsible for the performance of their tribunals, including the assignment of adjudicators to hearings, and for the design of its procedure and interface with the public.[146] There are dozens of systemic and procedural decisions to be made in this role, about everything from the design of the website to the

141 Ellis, "Judicial Tribunals", *supra* note 115.

142 SOAR Advocacy and Innovation Committee, "Study of the Impact of the Government Directive on Term Limits for OIC Appointments" (February 2015) at 5–6, online (pdf): <soar.on.ca/sites/default/files/article/SOAR%20Report%20on%20the%20Study%20of%20the%20impact%20of%20the%20Government%20Directive%20on%20Term%20Limits%20for%20OIC%20Appointments_0.pdf>. See also Ian Mackenzie, "Adjudicators and Term Limits", *Slaw* (August 27, 2015), online: <slaw.ca/2015/08/27/adjudicators-and-term-limits/>.

143 Private personal communication (July 24, 2023) via email [communicated to author].

144 *ATAGAA*, supra note 5, ss 16(2), (4).

145 *Ibid*, s 16(1).

146 *Ibid*, s 20(1).

process for a party seeking to postpone a hearing.[147] The cumulative effect of such decisions on the tribunal's accessibility and performance is large. Chairs are also responsible for consultations with stakeholders, including repeat parties and their representatives (such as legal clinics and automobile insurers). This role is essential, especially when new circumstances such as a pandemic arise, or major changes are contemplated for the tribunal's work.

The collaborative nature of adjudicative tribunal decision-making arguably makes leadership and internal culture even more important than they would be in a court. Each adjudicative tribunal is responsible *as an entity* for delivering timely and accessible justice within its sphere.[148] In order to treat like cases alike, and to apply the collective experience of the tribunal, members are permitted to have internal consultations about the law applicable to a case involving adjudicators who did not hear it. This allows a level of internal collaboration that, in a court, would impinge upon the independence of the adjudicator(s) assigned to the case.[149] Another difference from courts is that many tribunals have adjudicators with diverse professional backgrounds (e.g., in health and social work in addition to law), and they can learn from each other through internal consultations. Over time, they can each develop expertise in all fields of knowledge required by the caseload.[150]

Current appointment and de-appointment practices in Ontario's adjudicative tribunals are not at all favourable to leadership and culture. The Executive Chair of Tribunals Ontario and at least two other senior leaders appointed since 2018 are individuals with strong connections to the governing party, but no apparent prior experience in adjudicative tribunals.[151] They are expected to lead adjudicators afflicted by arbitrary de-appointments, precarious working conditions, and a lack of experienced veterans.

Crises like the COVID-19 pandemic are crucibles that reveal the strength of organizations. An adjudicative tribunal with strong leadership and culture can adjust and innovate. It might call on its people to do a bit more than they would normally do, or work in different ways, to continue functioning at or near normal levels. Instead, pandemic response was in the hands of tribunals that had lost almost all their leaders and most experienced members, with results that were predictable in hindsight.[152]

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147 Emily Farrimond & Paul Aterman, "Five Steps to User-centred Tribunal Design" (2023) 36:1 Can J Admin L & Prac 5; Lorne Sossin & Jamie Baxter, "Ontario's Administrative Tribunal Clusters: A Glass Half-Full or Half-Empty for Administrative Justice" (2012) 12:1 OUCLJ 157 at 162, DOI: <10.5235/147293412803188829>.

148 Ellis, *Unjust by Design, supra* note 140 at 201.

149 *Iwa v Consolidated-Bathurst Packaging Ltd*, 1990 CanLII 132 (SCC); *Shuttleworth v Ontario (Safety, Licensing Appeals and Standards Tribunals*), 2019 ONCA 518.

150 Ellis, *Unjust by Design, supra* note 140 at 199.

151 Regg Cohn, *supra* note 56.

152 Cook, *supra* note 70; Tribunal Watch Ontario, "Statement on the Ombudsman's Report on the Landlord and Tenant Board" (May 2023), online (pdf): <tribunalwatch.ca/wp-content/uploads/2023/05/Statement-on-the-Ombudsmans-investigation-of-the-Landlord-and-Tenant-Board.pdf>.

ii. Digital First: Shortcomings of Leadership and Design

The Digital First policy at Tribunals Ontario is an object lesson in what happens when leadership and culture fail. As noted in Part I, forcing almost all matters online has been the source of major procedural and substantive injustices. How did it come about? What is known is that Tribunals Ontario imposed its Digital First strategy on September 17, 2020,[153] a moment when an improving public health situation had allowed the provincial courts to move in the other direction, resuming in-person proceedings.[154] No stakeholder input was solicited beforehand.[155]

One cannot know with certainty where the idea of Digital First came from, but an educated guess is possible. During the first pandemic lock-down in the spring of 2020, members of the managerial and professional classes generally found that videoconferencing worked well for meetings among themselves. It is an easy and convenient way to stay in one's home and avoid arduous commutes to downtown offices. Why not, someone probably said, move all the adjudicative tribunals onto Zoom? This perhaps seemed a chance to extend the convenience benefits to everyone involved, while also saving the government some money. The case was bolstered by the apparent success of British Columbia's (BC's) Civil Resolution Tribunal (CRT), which was dealing with thousands of condominium disputes at the time, almost all online, with few apparent problems.[156]

The new leaders of Tribunals Ontario lacked experience, and apparently made no effort to inform themselves of crucial facts about the context in which the technology was to be deployed. First, tribunal hearings are adversarial in nature, which greatly exacerbates the consequences if a party has no internet connection, a weak connection, or no camera on their device. The adversary will not assist, and the adjudicator might not do so either given the time pressure they are experiencing and the danger of being seen to assist a party. Second, the high-volume tribunals serve tens of thousands of people who lack access to technology, and/or data, and/or command of either official language of Canada. It is simply not the same population of more affluent condo owners and boards that was using the CRT in BC.

153 Tribunals Ontario, News Release, "Tribunals Ontario Implementing Digital-First Services for Ontarians" (September 17, 2020), online: <tribunalsontario.ca/2020/09/17/to-september-17-2020-tribunals-ontario-implementing-digital-first-services-for-ontarians/>; see also Tribunals Ontario, News Release, "Tribunals Ontario Launches 'Tribunals Ontario Portal'" (December 8, 2021), online: <tribunalsontario.ca/2021/12/08/to-december-8-2021-tribunals-ontario-launches-tribunals-ontario-portal/>.

154 Attorney General of Ontario, News Release, "Ontario Courts Gradually Resuming In-Person Proceedings" (June 30, 2020), online: <news.ontario.ca/en/release/57443/ontario-courts-gradually-resuming-in-person-proceedings>.

155 Laird, *supra* note 65 at 15.

156 Suzanne E Chiodo, "Ontario Civil Justice Reform in the Wake of COVID-19: Inspired or Institutionalized?" (2021) 57:3 Osgoode Hall LJ 801.

Successful adjudicative tribunal function depends on quick but effective human connections being formed between parties (for settlement discussions, for instance), duty counsel, translators, and tribunal counter staff. The bricks-and-mortar tribunal building is a technology that allows all these connections to be formed—at the service desk, in the hall, and in hearing rooms where people can see each other face to face. Videoconference platforms have not yet developed functional equivalents.

This is not to deny the access to justice advantages of videoconferences, or that a primarily digital adjudicative tribunal can succeed. The federal Social Security Tribunal, and BC's CRT, seem to be succeeding with video- and teleconference as the primary modality for hearings.[157] The devil is in the details, though, and the system must be designed and supported for success in its own context.[158]

There might have been a way to make Digital First a success for Tribunals Ontario. For example, legal clinics could have been funded to provide private spaces in their offices for their clients, with computers and reliable internet connections, along with legal advice and representation. This was in fact the SBT's practice in northern Ontario prior to Digital First. Clinics could have been funded to send lawyers or paralegals, with laptop computers and strong mobile internet plans, to the homes of clients prior to their hearing times where necessary. This might even have reduced the number of tenants who abandon their legal rights because they do not appear for their hearings.

There might have been other ways to make Digital First a success. Tribunals Ontario has started to offer public access terminals and "loaner" cell phones, upon application, to some users who lack the necessary technology to connect.[159] But to avoid the serious dysfunction described above, someone who knew the context and was genuinely interested in helping adjudicative tribunals create access to justice would have had to turn their mind to the question. A crucial source of knowledge about whether and how to go digital could have been adjudicators who had worked in-person and then online. Regrettably, mass de-appointment eliminated this source of institutional knowledge. Delivering access to justice, within the complex context in which a certain class of disputes arises, requires experienced and consultative leadership as well as a strong internal culture. Current appointment and de-appointment practices make their emergence just as unlikely as it would be in a school, or a police station, where everyone is fired and replaced by inexperienced newcomers every time there is a change in government.

157 Importantly, both tribunals offer participants the choice of having an in-person hearing if they prefer.

158 Hughes, *supra* note 54 at 21–22. On the importance of design principles in justice systems, see Nicole Aylwin, "Human-Centered Design and the Justice System: Lessons from the Field", *Slaw* (June 6, 2016), online: <slaw.ca/2016/06/06/human-centered-design-and-the-justice-system-lessons-from-the-field/>; Lorne Sossin, "Designing Administrative Justice" (2017) 34:1 Windsor YB of Access J 87.

159 Tribunals Ontario, "Common Requests for Accommodation", online: <tribunalsontario.ca/en/request-an-accommodation/#sec4>.

2. The Legislative Branch: A Good Start but not Good Enough

Ontario's largest adjudicative tribunals have proved highly vulnerable to executive branch neglect. This may be surprising because Ontario, compared to other Canadian jurisdictions, has a relatively strong legislative foundation for tribunal justice. The *ATAGAA*[160] clearly sets out the legislature's intention that adjudicative tribunals be efficient and accountable, with members and leaders selected based on merit. The *ATAGAA*, unlike legislation in most other provinces or at the federal level, establishes a distinct class of *adjudicative* tribunals that are listed in a regulation, setting them apart from the hundreds of provincial agencies that implement policy, make rules, or manage public assets. The *ATAGAA*'s stated purpose is to "ensure that adjudicative tribunals are accountable, transparent and efficient in their operations while remaining independent in their decision-making."[161] To this end, it mandates them to develop service standards and performance measures for timely and accessible service.[162]

The *ATAGAA* also creates rules for adjudicative tribunal appointments. These must be made through a "competitive, merit-based process".[163] Candidates must be assessed on whether they have "experience, knowledge, or training in the subject matter" of the tribunal, and whether they have aptitude for impartial adjudication.[164] Recognizing the importance of leadership, Chairs of the adjudicative tribunals have key roles under the *ATAGAA*. No one can be appointed to a tribunal without the Chair's recommendation.[165] Chairs are made "responsible for ensuring that the tribunal performs the duties and functions required of it."[166]

Reading the *ATAGAA* and comparing it to analogous statutes in other common law provinces and at the federal level, one might think that Ontario's adjudicative tribunals have a secure foundation to do their essential work. However, its good intentions have been foiled due to certain shortcomings. First, while adjudicative tribunal Chairs must approve of appointments, the *ATAGAA* does not require them to approve of *de-appointments*, and so they cannot prevent adjudicators in their tribunals from being removed no matter how meritorious they are or how urgently their services are needed.[167]

Second, while the *ATAGAA* arguably equips the executive branch to prevent and correct internal problems within the adjudicative tribunals, it does not equip the legislative branch (or anyone else) to correct tribunal dysfunction caused by executive branch neglect.[168] A likely candidate for this

160 *Supra* note 5.

161 *Ibid*, s 1.

162 *Ibid*, ss 5, 7(2); O Reg 89/11.

163 *ATAGAA*, *supra* note 5, s 14.

164 *Ibid*, s 14(1).

165 *Ibid*, s 14(4).

166 *Ibid*, s 20.

167 *McAnsh, supra* note 123.

168 Each tribunal is given a responsible minister who is to oversee and review the tribunal's accountability documents and enter into a memorandum of understanding with it regarding operational responsibilities: see e.g. *ATAGAA, supra* note 5, s 3(3).

role would be the Ontario Legislature's Standing Committee on Government Agencies, which is mandated to review the operation of adjudicative tribunals, among other provincial agencies.[169] Committee members review the credentials of proposed appointees, and call a small sample of them as witnesses. Opposition members of this Committee have the opportunity to question approximately 20 of the Government's proposed appointees per year, and ask questions designed to expose potential shortcomings.[170] Members can also ask critical questions of intended appointees selected by the government to appear before the Committee.

However, the *ATAGAA* does not give the Committee, or the legislature as a whole, any formal role or the resources to discharge such a role when it comes to identifying meritorious appointees or holding the executive branch accountable for doing so. The Committee cannot veto any proposed appointments, nor can it compel the appearance of the Chairs who are responsible for the overall management of the adjudicative tribunals. The Executive Chair responsible for all of Tribunals Ontario was initially appointed for less than one year and was then reappointed, which exempted him from Committee oversight.[171] Under the current government, prospective appointees who are called to the committee are allowed to decline the invitation on the basis that they are unavailable, without any need to give reasons, to find an alternative date, or even to answer the Committee's questions in writing.[172] It cannot therefore ensure that the government undertakes the competitive appointment process required by section 14 of the *ATAGAA*. In the words of Professor Paul Daly, this has rendered this promising legislative commitment to competitive and merit-based appointments little more than a "paper tiger".[173] When the government lost interest in giving adjudicative tribunals what they need to function, the *ATAGAA* was of no assistance.

169 Legislative Assembly of Ontario, "Mandate of the Standing Committee on Government Agencies (Legislative Assembly of Ontario)" (last visited March 17, 2024), online: <ola.org/en/legislative-business/committees/government-agencies/parliament-43/mandate> [Legislative Assembly of Ontario, "Mandate"].

170 Legislative Assembly of Ontario, "Standing Committee on Government Agencies - Transcripts" (last visited July 17, 2024), online: <ola.org/en/legislative-business/committees/government-agencies/parliament-43/transcripts>.

171 See Legislative Assembly of Ontario, "Mandate", *supra* note 169, Preamble.

172 Tribunal Watch Ontario, "Submission to the Standing Committee on Government Agencies" (2023) [on file with author].

173 Paul Daly, "Administrative Tribunals: Structural Variability" (July 12, 2023), online (blog): <administrativelawmatters.com/blog/2023/07/12/administrative-tribunals-structural-variability/>.

3. The Judicial Branch: Little Help

People who have fallen victim to tribunal dysfunction often look to the courts for relief. In our system of government, courts are responsible for overseeing the use of powers granted by the legislature to the executive branch, including the work of the adjudicative tribunals.[174] To this end, there are statutory rights of appeal from the decisions of most adjudicative tribunals; these are heard in Ontario by the Divisional Court.[175] Even when statutory appeal is unavailable, courts may conduct judicial review of tribunal action, tribunal *inaction*, appointments, and de-appointments.

From a functional point of view, appeal and judicial review might improve the system's operation by correcting executive agents who have erred. They might work like one of the human body's many backup systems, which can ensure the necessary work gets done even if the frontline system fails.[176] If courts were to consistently remedy and correct defects in the adjudicative tribunals' work, and in the executive's appointment practices, then the symptoms identified in Part I would clear up. This has not happened, at least not in Ontario. Thus, our effort at diagnosis must ask why not. This section will review judicial responses to three specific forms of adjudicative tribunal dysfunction discussed in this feature: procedural injustice, systemic delay, and de-appointment of meritorious adjudicators and chairs.

a. Correcting Procedural Injustice

In a few cases, Ontario's Divisional Court has corrected procedural injustice in the four high-volume tribunals. In *Abara v Hall and Lee*,[177] the Divisional Court overturned an LTB decision in which an oral hearing was scheduled for 15 minutes, and actually lasted only three to five minutes. The landlord was given no reasonable chance to be heard on a legally significant point and was repeatedly interrupted by the adjudicator.[178] The decision was overturned.[179]

In *Manikam v Toronto Community Housing Corporation*,[180] the respondent landlord alleged that the appellant tenant, Manikam, had thrown a rabbit to its death from her balcony. An illegal act of this nature would have justified evicting her under the terms of the lease. Manikam claimed that the animal had jumped of its own volition. A key piece of evidence, relied upon by the landlord and then by the

174 Mary Liston, "Bringing the Mixed Constitution Back In" (2021) 30:4 Const Forum Const 9 at 23, DOI: <10.21991/cf29426>. Adjudicative tribunals are considered to be part of the executive branch of government: see *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, at para 32 [*Ocean Port*].

175 An exception is the HRTO, whose governing statute states that its decisions are not subject to appeal (*Code, supra* note 26, ss 45.7, 45.8).

176 For example, in collateral circulation, small arteries will deploy to permit blood to flow around a blockage in a larger artery.

177 *Abara v Hall and Lee*, 2022 ONSC 7093 [*Abara*].

178 *Ibid* at paras 33–37.

179 For a similar example from Saskatchewan, see *Fiddler v Provost*, 2022 SKKB 263.

180 *Manikam v Toronto Community Housing Corporation*, 2019 ONSC 2083 [*Manikam*].

LTB in granting the eviction, was a statement taken by a police officer who arrived after the rabbit's plunge. Manikam's boyfriend at the time—who owned the rabbit—stated that Manikam had told him she had thrown it. He signed a statement in the police officer's notebook to that effect. However, the boyfriend was not called as a witness at the LTB hearing, making his evidence hearsay and depriving Manikam of the opportunity to cross-examine him. The Divisional Court overturned the eviction on the basis that relying on hearsay evidence was unacceptable given the serious interests at stake (i.e., the loss of the tenant's rent-subsidized home, with no reasonable prospect that she would find another at a comparable rate).

The Divisional Court's ability to correct procedural injustice is sharply limited by the inaccessibility and disproportionality of litigation for most users of the LTB, SBT, HRTO, and LAT-AABS. Very few individuals are willing and able to self-represent in the Divisional Court. Thus, retaining counsel is a practical necessity for most who wish to take this path. Legal Aid Ontario-funded clinics can take on a small amount of Divisional Court work and, in so doing, have established important precedents in the fields of landlord-tenant disputes, human rights, and social benefits law. However, clinics' resources are almost entirely consumed by helping people before the tribunals themselves, leaving little for appeal or judicial review work. For the typical victim of procedural injustice, getting before the Divisional Court therefore means finding a cash retainer of $5,000 or more to retain a private lawyer, and assuming the risk of losing and being ordered to pay costs to the respondent.

A very small proportion of Ontarians can afford to go this route. Even if one has the money, spending $5,000 in this way is often unadvisable. Going to the Divisional Court might be feasible and sensible for those who have lost their livelihoods as a result of tribunal decisions—for example, those deprived of business licenses, or professional certifications.[181] However, the nature of the decisions made by LTB, SBT, HRTO, and LAT-AABS is such that few victims of their dysfunction find it feasible or sensible to take this path. Their cases are not worth much in monetary terms (which is also the reason why few if any lawyers will accept these matters on a contingency basis). They are often better advised to just pick up the pieces and move on with life, especially when factoring in the psychological and temporal costs of litigation along with the monetary ones.[182] The court system is not generally proportionate or practical for the resolution of residential tenancy matters or entitlement to financial benefits, even as a backup to adjudicative tribunals.

Judicial deference is another reason why courts are of limited help in correcting instances of alleged procedural injustice. Reviewing courts are required to defer to administrative decision-makers, both because the legislature chose to empower the latter to make these decisions and also because tribunals are presumed to have greater expertise in both the procedure and the law that

181 See e.g. *Connor Homes v Director*, 2021 ONSC 3195; *Kastner v Health Professions Appeal and Review Board*, 2023 ONSC 629.

182 Noel Semple, "The Cost of Seeking Civil Justice in Canada" (2016) 93:3 Can Bar Rev 639. There are extensive systemic and party-generated delays in the court system: see Chiodo, *supra* note 156. In both *Abara*, *supra* note 177, and *Manikam, supra* note 180, the Divisional Court decisions were released over a year after the original LTB decision.

they deploy.[183] Although the standard of review for breaches of procedural fairness is correctness, finding that a tribunal adjudicator violated the principles of procedural justice often means second-guessing a decision made by a person with contextual knowledge superior to that of the judge.[184] Reviewing courts are well aware that most Ontario tribunal adjudicators are doing the best they can in a difficult situation. If a procedural corner is cut in a way that speeds up the process and lets the tribunal get to the other urgent cases piling up in the queue, judges will be understandably reluctant to interfere, except in the most clear-cut cases.

b. Correcting Systemic Delay

As Part I demonstrated, systemic delay is the most obvious and damaging manifestation of adjudicative tribunal dysfunction in Ontario today, and a prime cause of the other miscarriages of procedural and substantive justice. How helpful are courts for people like small landlord Elsie Kalu, who was stuck with a non-paying tenant during eight months of LTB delay that consumed almost all her financial resources?[185] A victim of systemic delay confronts the same practical impediments to Divisional Court litigation that a victim of procedural justice does. Here, however, there is an additional hurdle in that the substantive law is also unhelpful.

A lawyer representing Kalu might first consider an application for mandamus. Such an order can compel an administrative tribunal to expedite the hearing of a particular matter, or to hear it within a certain time frame.[186] However, mandamus is very difficult to obtain in Canadian law, for understandable reasons.[187] It requires a bold judge to second-guess the tribunal's choice of how to allocate its scarce resources among the many cases demanding its attention. Mandamus means compelling an adjudicative tribunal to move one person to the front of the line, which will increase delay for all the others, who might differ from the applicant only in their lack of funds to get to the Divisional Court. There is no evidence that a mandamus order for expedited hearing has *ever* been granted for the LTB, SBT, HRTO, or LTB-AABS.

What about other possible judge-made remedies for systemic delay in adjudicative tribunals? The Supreme Court of Canada's (SCC's) 2016 decision in *R v Jordan* required the Crown to bring most criminal matters to trial within 18 months, or else they would be dismissed.[188] *Jordan* was an

183 *Vavilov, supra* note 36 at paras 26–27. There is an even stronger legal basis for deference to Human Rights Tribunal decisions, which are subject to a privative clause: see *Code, supra* note 26, ss 45.7, 45.8.

184 *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 129 [*Abrametz*]. See also France Houle, "Constructing the Fourth Branch of Government for Administrative Tribunals" (2007) 37 SCLR 1 at 39.

185 See Part I(3)(d), above.

186 See e.g. *Liang v Canada* (*Citizenship and Immigration*), 2012 FC 758.

187 Paul Daly, "Remedies for Delay After Law Society of Saskatchewan v. Abrametz, 2022 SCC 29" (7 September 2022), online (blog): <administrativelawmatters.com/blog/2022/09/07/remedies-for-delay-after-law-society-of-saskatchewan-v-abrametz-2022-scc-29/>.

188 *R v Jordan*, 2016 SCC 27.

application under section 11(b) of the *Canadian Charter of Rights and Freedoms*,[189] which protects the right to trial within a reasonable time. The result in *Jordan* created hope in some quarters that appellate courts were about to start cracking down on systemic delay in other parts of the justice system, but this has not yet happened.

Abuse of process is a common law doctrine that has provided remedies for some Canadians subjected to lengthy delays within administrative procedures. Courts will correct behaviour that abuses legal process by delaying its progress unreasonably. However, abuse of process is a remedy for party-caused delay, not systemic delay. The typical remedy, when a plaintiff or applicant is found to have abused process, is for their matter to be dismissed or stayed.[190] When the defendant/responding party is at fault, or when the abuse is less severe, the courts can use cost awards or reduce the penalty as remedies for abuse of process.[191] None of this is useful for the type of systemic delay found at Ontario's high-volume provincial tribunals. The government is not usually a party in these tribunals (except at the SBT where it is the respondent), and dismissing matters would only punish innocent applicants.

The SCC's recent decision in *Abrametz v Law Society of Saskatchewan*,[192] which restated the law of abuse of process, did show an understanding of how devastating extensive delay can be for parties and for the system. In addition to rendering a hearing unfair for evidentiary reasons, the SCC noted that delay can cause psychological harm and bring the administration of justice into disrepute. The fact that delay is systemic rather than party-generated does not make it any less devastating, but it does require the law to find a remedy other than abuse of process.

c. Correcting Arbitrary and Political De-Appointments

Courts have so far been unable or unwilling to consistently remedy procedural injustice and systemic delay in cases brought by tribunal users. However, these are merely the *symptoms* of adjudicative tribunal dysfunction. Perhaps courts could treat its *cause?* To reiterate, the most important cause of the dysfunction of Ontario's adjudicative tribunals is that experienced and meritorious adjudicators were shown the door *en masse*. What have the courts had to say about de-appointment of meritorious adjudicators?

If an appointment specifies a fixed term, courts will not allow the government to terminate it before the specified end date, in the absence of clear statutory authority to do so or serious misconduct by the appointee. This has been clear since *Hewat v Ontario*,[193] a 1996 decision of the

189 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 11(b).

190 Daly, *supra* note 187 citing Gerald P Heckman, "Remedies for Delay in Administrative Decision-Making: Where Are We After *Blencoe*?" (2011) 24:2 Can J Admin L & Prac 177 at 199.

191 *Abrametz, supra* note 184 at para 100.

192 *Ibid* at paras 43, 69.

193 *Hewat v Ontario*, 1998 CanLII 3393 (ONCA).

Ontario Court of Appeal. A newly elected Ontario government terminated three Vice-Chairs of the Ontario Labour Relations Board, all three of whom had been appointed to fixed terms that had not yet ended. The Court found that when the government included a fixed end date in the original appointment, it "exhausted" its power to dismiss the adjudicator prior to that date.[194]

The current problems in Ontario arise not from mid-term terminations, though, but rather from arbitrary de-appointments after terms end. The *ATAGAA* does not explicitly constrain the government's power to de-appoint adjudicators. The legality of de-appointment regardless of merit seems to have been established by the 2023 decision in *McAnsh v Ontario*.[195] Scott McAnsh was a member of the Assessment Review Board, an adjudicative tribunal that hears appeals of property valuations for taxation purposes. He was appointed in 2013, reappointed twice, but then received no offer of reappointment after his final term ended in June 2019. He alleged that he had been informally promised continuing reappointments based on merit, and that the government's refusal to do so in 2019 constituted a breach of contract. The practice until 2018 was for adjudicators endorsed by tribunal chairs, like McAnsh, to be routinely reappointed for a total of ten years.[196] The SCJ dismissed McAnsh's claim, finding that there was no continuing contract between the parties after the end of the term. The Court found that appointees like McAnsh are not employees of the government, but rather "entirely independent of government in both form and function".[197] No weight could be given to whatever informal assurances had been provided to the plaintiff by previous Chairs of this tribunal.

A lawsuit filed in 2020 by a non-profit group Democracy Watch alleged that de-appointment absent merit concerns is inconsistent with the *ATAGAA*'s requirement for a "competitive, merit-based" approach to appointments.[198] It was also alleged, in both the *McAnsh* and Democracy Watch statements of claim, that the independence of adjudicative tribunals is a common law or constitutional principle, which the current appointment practices contravene in an impermissible way. Although there might be scope for such an argument, the SCC's 2001 decision in *Ocean Port* remains a serious impediment. There, the SCC found that, in tribunals that do not deal with constitutional rights, guarantees of procedural justice and adjudicator independence are to be determined by statute.[199]

194 See also *McKenzie v Minister of Public Safety and Solicitor General et al*, 2006 BCSC 1372, appeal dismissed for mootness, 2007 BCCA 507.

195 *McAnsh*, *supra* note 123.

196 *Ibid*; Cook, *supra* note 70.

197 McAnsh, supra note 123 at para 32.

198 Democracy Watch, "Final Notice of Application - CV-20-00643637000" (8 July 2020), online (pdf): <democracywatch.ca/wp-content/uploads/FinalNoticeOfApplicOntTribunalConstCaseJuly082020.pdf>. This lawsuit appears to have been abandoned.

199 *Ocean Port*, *supra* note 174.

Conclusion

Access to justice has become little more than a mirage for tens of thousands of Ontarians whose legal rights are within the jurisdiction of the province's adjudicative tribunals. The LTB, the SBT, the HRTO, and the LAT-AABS are afflicted by egregious delays, breaches of basic procedural rights, and miscarriages of substantive justice. The proximate cause of this debacle was the mass de-appointment of competent and experienced adjudicators, with no functioning system to replace them. However, the fact that adjudicative tribunal functioning was left dependent on the goodwill of the executive branch highlights shortcomings in the legislative branch. Meanwhile, the courts are insufficiently accessible to act as robust backups for adjudicative tribunals; even if this were not the case, Canadian administrative law does not yet offer suitable tools to deal with systemic delay and dysfunctional appointment practices.

Laying out a course of treatment to address this malady, in any detail, is beyond the scope of this piece.[200] One prescription, relying on the appellate courts, would be to establish an enforceable duty on the government to make appointments and reappointments in a manner conducive to tribunal excellence and true access to true justice. An alternative remedy, working through the legislature, would be to amend the *ATAGAA* and strengthen legislative oversight, to ensure that tribunal appointees are selected and consistently reappointed based on merit.[201]

Public sector entities such as tribunals, cabinets, and legislatures do not exist for their own sakes. Unlike individual human beings, they do not have interests that are inherently worth protecting. They only exist because people need them to exist, to make human lives better than they would otherwise be. Human needs are complex, and so the modern state has developed organs and systems that are almost as variegated and complex as those of the human body itself. And yet they cannot do their work unless they support each other. As Professor Adam Dodek put it, the key question is "how do we do great things together?"[202] A more permanent and stable legal order surrounding adjudicative tribunals is essential, if they are to return to doing great things for the people of Ontario.

200 Semple, "Tribunals in Canada", *supra* note 140.

201 This is the goal of a Private Member's Bill introduced by MPP Ted Hsu in the Ontario Legislative Assembly in April 2024: Bill 179, *Fewer Backlogs and Less Partisan Tribunals Act*, 1st Sess, 43rd Leg, Ontario, 2024 (first reading 25 March 2024).

202 Administrative Justice Working Group, *supra* note 72.