

TRIBUNAL WATCH ONTARIO
THE ADJUDICATIVE TRIBUNAL JUSTICE SYSTEM
STATEMENT OF PRINCIPLES and COMMENTARY

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Introduction

The Ontario adjudicative tribunal justice system consists of specialized, expert bodies that take the place of the courts in resolving all disputes in narrow fields of law. The advantage of this system is that disputes are resolved by tribunals with expertise in the specific subject matter and law pertinent to those fields. They are also able to develop dispute-resolution techniques uniquely adapted to the needs of the parties and to the legislative mandate of the Tribunal.

The adjudicative tribunal justice system resolves significantly more disputes than the court justice system. Like court decisions, tribunal decisions often have life altering significance for the parties. Sometimes these decisions have an impact on society as a whole.

Adjudicators must be, and be seen to be, independent and impartial. The public and the parties appearing before these tribunals must have confidence that the tribunal and its adjudicators are expert in their specialized field and optimally competent in the performance of their adjudicative duties. This includes a demonstrable commitment to the principles of equity, diversity, inclusion, and accessibility. Administrative processes and dispute resolution systems must be constantly reviewed to ensure that they are open to all who need them.

Public confidence in the administration of justice requires that adjudicative tribunals and their adjudicators always have, and always be seen to have, these four principal attributes: independence, impartiality, expertise, and competence.

Since experience shows that these attributes are not always fully respected by the governments charged with adjudicative tribunal design and administration, Tribunal Watch Ontario has concluded that it is time to seek a consensus concerning the nature of the principles to which a valid system of adjudicative tribunals should conform.

This Statement of Principles has been developed with the hope that all stakeholders in the adjudicative tribunal community – the government, the tribunals themselves, and the public – will accept these principles as the starting point of a discussion about how to improve and reform the adjudicative tribunal justice system.

FOUNDATIONAL PRINCIPLES OF THE ADJUDICATIVE TRIBUNAL JUSTICE SYSTEM

1. Independence and Impartiality

The adjudicator and the tribunal must be, and must be seen to be, independent and impartial.

Commentary

Independence is a foundational requirement of a just adjudication system because without independence, tribunals, chairs, and members cannot be seen to be impartial. It is the impartiality of tribunals and their adjudicators that is the primary requirement for a just system.

A person who appears before an adjudicative tribunal must have confidence that the adjudicator will decide the case based on the law and evidence, and that the outcome will not be affected by overt or covert interference or influence. Public acceptance of the value and integrity of the legal system also requires public confidence in the institutional independence of the tribunals themselves.

As the Supreme Court has explained:

Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. (Valente v. The Queen, [1985] 2 SCR 673)

Adjudicative tribunals must have the ability to operate at arm's length from government, because government interests are typically directly or indirectly at issue in the matters that come before them and the government is often a party in the proceedings. The tribunal must have responsible independent leadership, with overall control of its functions and day-to-day operations, including adequate funding, to meet its administrative needs and to provide competitive remuneration for adjudicators and staff.

Tribunal members should order their personal affairs and conduct themselves at hearings in a manner that dispels any reasonable apprehension of bias by reason of self-interest, relationships, or political affiliation.

Tribunal Chairs should in their interactions with tribunal members respect the principles of decision-making autonomy and, in particular, not create an environment in which tribunal members could be seen to be subject to the will or perceived will of the Chair when performing their adjudicative functions.

2. Accountability

The adjudicator is accountable to the parties before them and to the tribunal. The tribunal, through the Chair, is accountable to government for its performance and for the conduct of its adjudicators and staff.

Commentary

While individual adjudicators must have the independence necessary to make decisions based on the law and evidence, this does not mean that each adjudicator is a standalone decision maker. Adjudicators must respect their tribunal's hearing and decision-making protocols and previous decisions of the tribunal and only depart from established case law with a clear explanation for doing so. Tribunals should have a code of conduct to provide clear guidance to the expectations for all adjudicators.

Tribunals, through their Chair, are accountable to the government and the public for the tribunal's performance of its statutory duties in a proper and fiscally responsible manner.

Adjudicative tribunals should be accountable to their respective user communities and their representatives by facilitating transparent and timely consultations about policies and procedures and the early identification of issues of concern to those communities.

Even where not subject to the provisions of the *Statutory Powers Procedure Act*, adjudicative tribunals in both their procedural rules and their rulings should be guided by the spirit of the SPPA and the common law principles of procedural fairness.

3. Appointments and Reappointments

The appointment and reappointment of Tribunal Chairs and adjudicators require fair, timely and transparent processes, free of partisan or patronage influences. The terms of appointments must be fixed and based on the needs of the Tribunal.

Commentary

There must be a fair, transparent, and neutral process for the recruitment and appointment of a Tribunal Chair. This requires an independent body that will be responsible for ensuring a merit-based recruitment process and making recommendations for the appointment and reappointment of Chairs.

Although there are advantages to a system of appointment for life or until retirement age, as is the case for some tribunals in Quebec, the UK and the USA, fixed and merit-based renewable terms can enhance accountability, build a tribunal culture of collegiality and excellence, and provide more opportunities for innovation, diversity and flexibility.

The recruitment of new adjudicators must be based on a competitive, merit-based process designed to attract the best available candidates. The Tribunal Chair should have overall responsibility for this process and the making of appointment recommendations to the government. If the government rejects a recommendation, it must provide written reasons.

Expertise, collegiality and collaboration cannot be maintained with a constantly changing roster of adjudicators. The length of terms, and whether there should be a cap on the years of appointment, should be determined based on the requirements of each tribunal.

Reappointment decisions must follow a robust, transparent, comprehensive, and credible performance review process and should be made solely on merit and the needs of the tribunal.

Reappointment decisions must be made in a timely fashion, both in fairness to the individual and to allow the tribunal to make long-range plans and to facilitate the orderly scheduling of cases. Adjudicators should receive adequate notice of a non-renewal and, where appropriate, a separation package.

The appointment and reappointment process should not be suspended prior to elections.

4. Competence and Expertise

Adjudicators must be optimally competent and the tribunal equally competent in the exercise of its mandate. Adjudicators must have dispute resolution skills, subject matter expertise, and experience in decision writing.

Commentary

An important reason for having specialist adjudicative tribunals in place of generalist courts is that disputes in designated areas of law are resolved by adjudicators with competence and expertise in that area of law, together with expert knowledge of the context and legal landscape.

Candidates for appointment to the tribunal must be able to demonstrate either relevant subject-matter expertise or dispute-resolution expertise, and, ideally, both. Tribunals are obliged to commit to ongoing training and professional development, and their budgets must reflect this.

While it is expected that adjudicators will have a commitment to public service, it must be recognized that adjudication is a profession. To attract the most competent adjudicators, compensation must be competitive, training must be comprehensive, and reappointment decisions must be predictable and merit-based. To build an enduring community of professional adjudicators, the tribunals and the tribunal justice system must have the resources, reputation and inclusiveness to be an attractive part-time or full-time option for professionals at all stages of their careers.

5. Accessibility, Inclusion, Diversity, and Equity

Tribunals must develop and continually review strategies to enhance accessibility, inclusion, diversity and equity in their make-up, operations and decision-making.

Commentary

Adjudicative tribunals must ensure a systemic and integrated approach to the maintenance of diversity and inclusion in their staff, adjudicator roster, policies and practices. An inclusive tribunal that understands and engages with diverse communities will promote confidence in the public and parties, and such inclusiveness will lead to an empathetic, knowledgeable and equitable approach to the users and the issues that come before the tribunal.

Tribunals must demonstrate a commitment to recognizing the uniqueness of parties appearing before them, and establish sensitivity and cultural fluency in processes, procedures and outcomes. Adjudicators must recognize the ways in which their own cultural perspective and privilege affects their decision-making; they must receive on-going training and support for increased self-awareness. Tribunals must ensure that their administrative and dispute resolution processes conform with or exceed pertinent accessibility guidelines.

Tribunals should, in consultation with user communities, establish anti-racism and anti-discrimination strategies, and commit to an evidence-based approach and ongoing reviews, to ensure the, relevance and effectiveness of these strategies.

6. Access to Justice and the Right to Be Heard

Tribunal processes must be designed to ensure that they are appropriate for the parties who appear before the tribunal, including self-represented parties.

Commentary

Tribunal processes must be transparent and flexible enough to meet the needs of the users, and proportionate to the issues and what is at stake in a particular case.

A self-represented party should not be disadvantaged, and adjudicators should be trained to use active adjudication techniques when appropriate. Tribunals must have plain language guides and information about the tribunal's processes and rules, the relevant legislation, and previous decisions. These should be readily and easily available on user friendly tribunal websites and other appropriate means of communication. Where appropriate, staff should be assigned to assist parties to navigate the system (without providing legal advice or representation).

Strategies must be developed to ensure that those who do not have reliable internet or adequate technology can access the tribunal and fully participate in hearings and dispute resolution processes.

Applicability of these principles

The principles in this Statement are intended to apply to adjudicative tribunals to which the government appoints adjudicators. There are, however, a broad range of adjudicative tribunals that are established by organizations that appoint their own adjudicators. While this document is primarily concerned with adjudicative tribunals whose members are government-appointed, the principles discussed here are also generally relevant to in-house adjudicative tribunals whose members are appointed and re-appointed by the organization of which they are a part.

Adjudicative tribunals to which these principles apply must be differentiated from a broad range of other government agencies commonly called regulatory agencies that may be similar in structure to adjudicative tribunals but whose mandates are not adjudicative in nature.

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