

TRIBUNAL WATCH ONTARIO

Justice Denied: The Access to Justice Crisis at *Tribunals Ontario*

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tribunalwatch.ca

The crisis continues in some of Ontario's most important adjudicative tribunals. Tribunals Ontario posted its 2021/22 Annual Report on its website in September 2022, documenting the state of its 14 tribunals as of March 31, 2022, the end of its fiscal year. This latest Annual Report demonstrates that several key Ontario adjudicative tribunals are failing to deliver timely and accessible justice in accordance with their statutory mandates.

The Annual Report indicates that the four largest tribunals within Tribunals Ontario have a collective backlog of over 67,000 cases. This has resulted in unprecedented delays in processing and resolving cases in a timely and accessible way. Increasingly, the people who must rely on adjudicative tribunals to resolve legal disputes are discovering that justice delayed is indeed justice denied.

The backlogs at four key tribunals:

Landlord and Tenant Board	Human Rights Tribunal*	Auto Accident Benefits - LAT	Social Benefits Tribunal	TOTAL
32,800	8,979	16,204	9,753	67,736

*This number was omitted from the Annual Report. A Freedom of Information request reported this number as of December 31, 2021

The massive delays and failure to provide accessible dispute resolution have real and often life changing consequences. For example:

- Small landlords are losing their life savings because of an inability to obtain an eviction order from the Landlord and Tenant Board.
- Tenants are unable to have their disputes resolved in a timely and accessible way, including disputes resulting in unsafe living conditions or homelessness, or involving unreasonable conduct by landlords.
- People who have experienced discrimination in employment, services, or housing, as well as people such as employers and business owners seeking to respond to these allegations, are unable to obtain a resolution at the Human Rights Tribunal of Ontario.
- People who are disabled and unable to work are unable to obtain their benefits under the Ontario Disability Support Program, and must instead subsist on general welfare because of backlogs at the Social Benefits Tribunal
- People who have been severely injured in a motor vehicle accident and have been unfairly denied insurance benefits cannot obtain resolution because of backlogs at the Automobile Accident Benefits Service of the Licence Appeal Tribunal.

While the Annual Report indicates that Tribunals Ontario is aware of its backlog problem, the solutions identified are not sufficient to deal with the backlogs in any meaningful way.

In addition to the impact on the individuals whose case are delayed, the backlogs, delays and lack of accessible justice are demoralizing for the many staff and adjudicators within the system who are doing their best in very difficult circumstances.

Tribunal Watch Ontario calls on all parties to commit to ensuring timely and meaningful access to justice at Tribunals Ontario, including its four largest tribunals – the Landlord and Tenant Board, the Human Rights Tribunal of Ontario, the Social Benefits Tribunal and the Licence Appeal Tribunal (which hears automobile accident benefit claims).

As Tribunal Watch Ontario has reported in the [past](#), the Ontario Government has, since first elected in 2018, failed to re-appoint or retain most of the experienced adjudicators who had been first appointed to provincial tribunals by the previous Liberal government. The Government then failed for several years to appoint a sufficient number of new adjudicators to fill the vacancies. This has resulted in unprecedented delays for members of the public who need the services provided by these tribunals. Although in the past two years, the Government has moved to fill these positions, the high turnover of adjudicators has meant a loss of expertise and experience that continues to affect the quality and timeliness of justice that is delivered to the public. The crisis persists.

Tribunal Watch Ontario has issued a series of Statements of Concern highlighting the deteriorating quality of justice now being delivered at Tribunals Ontario. In 2021, Tribunal Watch Ontario conducted a survey of tribunal users. The results, although limited, were overwhelmingly negative in terms of confidence in the timeliness and fairness of tribunal processes, as well as in the expertise and independence of tribunal adjudicators.

One issue raised repeatedly by tribunal users is the decision by Tribunals Ontario to remove in-person hearings as an option in all but exceptional cases. After introducing electronic hearings as a pandemic measure, Tribunals Ontario announced, in November 2020, that electronic hearings would be the standard hearing format going forward for all its tribunals. Tribunals Ontario has created an onerous process for requesting an in-person hearing that can be contrasted with that of the federal Social Security Tribunal (SST) which serves a similar population. The SST allows appellants to select an in-person hearing as an option on the initial Notice of Appeal form.¹

¹ See [Type of hearing – still your choice \(sst-tss.gc.ca\)](#). The Social Security Tribunal of Canada states on its website that: “Offering various hearing options is part of our commitment to access to justice”.

Although electronic hearings are an important option to offer parties, both the Ontario Bar Association (OBA) and the Canadian Bar Association ² have separately cautioned about the potential negative impact of an almost-mandatory digital format for people living in poverty or facing other barriers to electronic participation. ³ Legal clinics are reporting that, since March 2020, they are only aware of a single in-person hearing at the Landlord and Tenant Board, suggesting that there is little flexibility in Tribunals Ontario “digital first” policy. Thousands of electronic hearings take place monthly at the LTB.

Here are some indicators of the growing crisis at the Landlord and Tenant Board, the Human Rights Tribunal of Ontario, the Social Benefits Tribunal, and the Licence Appeal Tribunal, four tribunals that together serve the needs of hundreds of thousands of Ontarians:

At the **LANDLORD AND TENANT BOARD** (LTB or the Board), the backlog of applications has grown from 12,944 as of March 31, 2018 to 32,800 on March 31, 2022. This backlog has developed even though the overall number of new applications filed has fallen by almost 20,000 in 2021/22, as compared to the 10-year period before the pandemic. Recently the Board began informing users through an automated message that the delay is now 7 months for a landlord application to be heard and 8 months for a tenant application to be heard. The actual delays in many cases are much longer.

In the face of enormous delays and the permanent closing of regional offices across the province at the start of the pandemic, landlords and tenants have increasingly turned away from using the LTB to resolve their disputes.⁴ Before the Board permanently closed all its regional office, counter staff were available across Ontario to assist landlords and tenants in completing and filing forms properly, reducing delays and unnecessary dismissals when improperly completed forms are thrown out by an adjudicator months later.

Legal clinics report an uptick in the use of “self-help” methods by frustrated landlords and tenants, including illegally changing the locks or refusing to pay rent. These are exactly the kinds of situations the legislation was enacted to prevent.

² See: OBA Submission to Tribunals Ontario on Hearing Formats and the Tribunals Ontario Portal, submitted to Tribunals Ontario by the Ontario Bar Association, August 31, 2022; and “No Turning Back: CBA Task Force Report on Justice Issues Arising from COVID-19,” and https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Publications%20And%20Resources/2021/CBATaskForce.pdf (February 2021), p.16-17.

³ At page 5, the OBA paper stated: “A hearing format that deepens the disadvantage that vulnerable parties already face in relation to better resourced opposing parties raises serious procedural fairness concerns for tribunals serving some of Ontario’s poorest and most vulnerable residents”.

⁴ Some owners of rented condominium units have turned to the courts to obtain vacant possession of their units in the face of the delays at the LTB.

Significantly, people appearing before the LTB now report a myriad of problems as a result of Tribunal Ontario's decision to remove access to in-person hearings for almost all parties.⁵ Landlord representatives cite videoconference hearings as a "major hurdle" to getting a resolution at the LTB.⁶ Tenant representatives report that many tenants in low-income households or in rural or remote communities lack the means to connect to LTB video conference hearings and must participate by telephone, at a disadvantage, while the landlord and adjudicator participate by video conference.⁷ This digital divide is compounded for those who have language or literacy barriers, mental health challenges, or who simply lack computer and videoconferencing skills.⁸

As noted above, legal clinics are reporting that, to date, the LTB appears to have only held one in-person hearing since March 2020. Instead, the Board has introduced a free phone program to give parties without smart phones a means to connect to their hearings, and has introduced computer terminals in five cities; parties in Hamilton, Toronto, London, Ottawa and Sudbury who do not have their own computers or internet access can use a computer terminal on request. There is no information publicly available on the uptake by parties.

At the same time as moving to telephone and video hearings, the Board ended its long-standing practice of scheduling hearings on a regional basis. This has further interfered with the ability of tenants to access legal assistance through Legal Aid Ontario's Tenant Duty Counsel Program and financial assistance through municipal homelessness prevention programs (such as rent banks). Chaos has regularly occurred during electronic LTB hearings, particularly as tenants participating by phone try to figure out which voice is their landlord, who is the adjudicator, who is the mediator. The resulting delays mean that landlords are unable to evict tenants who are breaching their responsibilities under the law and tenants are unable to obtain repair orders or relief from rent hikes.

⁵ Although Tribunals Ontario defends its restricted access to in-person hearings on the basis that it gets few requests, it has not highlighted for parties that an in-person hearing is an option and it has made the process of applying for an in-person hearing onerous. We acknowledge that the information on how to request an in-person hearing has recently become more accessible on the Tribunals Ontario website, but the standard communication to LTB parties includes this statement in bold: "To protect the health and safety of all Ontarians, Tribunals Ontario will be holding video hearings to resolve applications with an option to participate by telephone if you do not have access to the internet". This message has continued to be a standard communication to parties, notwithstanding the fact that all mandatory public health measures have been removed in Ontario for months.

⁶ See: <https://www.ottawalawyers.com/blog/attorney-michael-thieles-interviewed-on-ctv-about-the-ltb-backlog/>

⁷ See: <https://www.acto.ca/documents/digital-divide-at-the-landlord-and-tenant-board/>

⁸ <https://www.thestar.com/opinion/contributors/2022/04/11/the-landlord-and-tenant-board-must-resume-in-person-hearings.html?rf>

The Ombudsman commenced an investigation into delays in January 2020 when delays were 7 weeks for landlord applications and 8 weeks for tenant applications; currently the delays are 7 months for a landlord application and 8 months for a tenant application. Unfortunately, the investigation itself has been anything but timely, and the Ombudsman has not yet made any recommendations to help resolve the present crisis.

The LTB is Ontario's busiest tribunal, typically receiving over 80,000 applications annually. The November 2022 announcement of an additional \$1.4 million for the LTB for operational staff will hopefully assist the LTB in addressing ongoing complaints about its failure to manage its own process, including unanswered inquiries from parties, evidence not delivered to adjudicators by the day of their hearing, and delays in sending decisions to parties. Unfortunately, the new funds will do little to address the inefficiencies associated with the shift to an almost exclusively digital hearing format and the adoption of a new, non-regional scheduling model that has been criticized as not responsive to the realities on the ground, such as the availability of Tenant Duty Counsel or access to support from local rent banks. By doubling down on these two structural shifts at the LTB, Tribunals Ontario is compounding the delays that started with the failure to retain experienced adjudicators.

At the **HUMAN RIGHTS TRIBUNAL OF ONTARIO** (HRTO or the Tribunal), the number of final decisions after a full hearing has dropped from an average of over 100 per year to only 16 decisions in 2021/22. Even these 16 decisions are not, for the most part, written by the current panel of adjudicators. The overwhelming majority are overdue decisions: 12 of the 16 decisions are the final result of applications that were filed between 2016 and 2018.⁹ As for applications that were filed more recently, the 2021/22 Annual Report concedes that the HRTO failed in the past year to meet its own targeted timeframe for scheduling hearings in fully 100% of its applications.

Lawyers report that applications are often stalled at the HRTO for many months at one or more stages, causing hardship and unfairness for both applicants and respondents.

Notably, as with the Landlord and Tenant Board, members of the public now seem to be turning away from pursuing a remedy at the HRTO. The rate of abandonment of applications has doubled since 2017/18, with applicants now abandoning applications that have sat around at the Tribunal for months without being served on the opposing side. As well, the number of new applications fell in 2021/22 to 3,751, as compared to an average of 4,271 over the previous five years.

Increasingly in the past two years, the HRTO has dismissed hundreds of applications without an oral hearing, based on a summary review of the adequacy of the written application and any subsequent written submissions. These dismissals are Tribunal-

⁹ Many of these decisions were written by adjudicators whose appointments were not renewed by the current government and who had to complete hearings and write their outstanding decisions while employed elsewhere after the expiry of their appointment. This explains the delay in the release of decisions. It appears that only 4 of the 16 decisions were written by adjudicators who are currently at the HRTO.

initiated, triggered by a Notice of Intent to Dismiss (NOID). The HRTO issued almost four times as many NOIDs in 2021 as compared to the 5-year average pre-2018.¹⁰

This pattern of Tribunal-initiated dismissals has raised new barriers to justice, particularly for the over 80% of applicants who are not represented by counsel when they file their application. The human rights process was designed to allow unrepresented applicants to tell their story in their own words on the application form, without the need to address all the legal components of a discrimination case. This flexible process has also benefited respondents by reducing the legal red tape. Now, by requiring applicants to explain in writing at the outset how they will be able to prove discrimination, the HRTO is turning a user-friendly process into something that rivals the courts in terms of inaccessibility.

Moreover, the HRTO appears to be using this front-end dismissal initiative to reduce its backlog and avoid the requirement in the *Human Rights Code*¹¹ to give all parties the opportunity to make oral submissions, before dismissal, in every case within its jurisdiction. Based on its review of the application form and any subsequent written submissions, the HRTO has dismissed hundreds of cases in the past year on the basis that it lacks jurisdiction because, in its preliminary assessment, the applicant will not be able to prove a link between the negative treatment complained of and a prohibited ground of discrimination.

Notably, almost none of the newly appointed adjudicators who are issuing these dismissal decisions, have ever conducted a full evidentiary human rights hearing or written a complex discrimination decision requiring them to engage with the fundamental principles of human rights law.

The consensus among experienced counsel, retained to respond to a Tribunal-initiated dismissal notice, is that many if not most of the applications being challenged by the Tribunal are arguable claims, even if some are not clearly drafted on the application form by their previously-unrepresented client. These are applications that would previously have gone to a summary oral hearing or, in many instances, to mediation and, if not settled, to a full hearing.

The HRTO included a new category of 1,126 final decisions in its 2021/22 Annual Report, called “Final Decisions other than on Merits”. This category appears to capture all the dismissals based on this new and restrictive interpretation of its own jurisdiction

¹⁰ See: Frank Nasca, *Jurisdiction and Access to Justice: An Analysis of Human Rights Tribunal of Ontario-issued Notices of Intent to Dismiss*, Canadian Journal of Administrative Law & Practice; Vol. 35, Iss.3, (October 2022), and presented at OBA Annual Update on Human Rights Law, May 25, 2022. This paper documents an increase in Notices of Intent to Dismiss (NOID) from a pre-2018 five-year annual average of 260 to 989 in 2021. Applications based on race-related grounds were over-represented in the sample examined in the research paper.

¹¹ Section 43(2)1.

by the HRTO. A review of the dismissal decisions reveals a paucity of reasons and the repeated use of boiler plate language that is inconsistent with the duty to give adequate reasons as a matter of procedural fairness.¹² Given that less than 20% of applicants are represented when they prepare their applications,¹³ and that many applicants abandon their applications after receiving a Tribunal-initiated Notice of Intent to Dismiss, there is a very real risk that many of these dismissed and abandoned applications had arguable merit.

Notwithstanding the unprecedented increase in Tribunal-initiated dismissals, the backlog of applications at the HRTO has grown by 90% from 4,696 unresolved (active) cases at end of the 2016/17 fiscal year (the last year when this was information was published in the Annual Report) to 8,979 unresolved (active) cases as of December 31, 2021.¹⁴

The current backlogs and delays are causing real hardship for individuals who have experienced discrimination, whether in the workplace, in seeking housing, or in an educational or other service sector. An individual who has lost their employment due to discrimination is now much more likely to need to retain a lawyer to avoid a Tribunal-initiated dismissal, and if their application does move forward, they can only look forward to wading through a multi-year process. The delays are also causing hardship for employers, landlords, retailers and service providers, across the province, who have a discrimination application hanging over them and no certainty as to when the claim will be resolved.

Asking Ontarians to wait years for the resolution of a discrimination application is unacceptable. Experienced human rights counsel report that they must now consider whether the HRTO remains a viable option for clients who have experienced discrimination or harassment. Even more importantly, in dismissing hundreds of potentially arguable cases after only a cursory review of the self-drafted application form and any initial written submissions, the HRTO is conducting itself in a manner that is inconsistent with its statutory duty to hear oral submissions from the parties. The HRTO has abandoned the case resolution processes that successfully governed human rights enforcement for more than a decade. In reducing access to justice, it has created an unprecedented backlog and a deeply concerned human rights bar on both the applicant and respondent sides, as well as a troubled user community.

At the **SOCIAL BENEFITS TRIBUNAL** (SBT or the Tribunal), the latest Annual Report documents a continuing backlog, with 9,753 active cases outstanding on March 31, 2022, as compared to 6,675 outstanding cases on March 31, 2018. Over 90% of

¹² See: (Canada (Minister of Citizenship and Immigration) v. Vavilov 2019 SCC 65.

¹³ The Human Rights Legal Support Centre (HRLSC) provides summary telephone advice to assist applicants in self-drafting their applications. The HRLSC will then accept a retainer to provide representation if the applicant receives a NOID or is scheduled for a summary hearing, mediation or full hearing.

¹⁴ Pursuant to a *Freedom of Information* request, Tribunals Ontario informed Tribunal Watch Ontario that there were 8,979 active cases as of December 31, 2021.

appeals are for denial of disability benefits (ODSP). This means that people with disabilities are left struggling to survive on the much lower Ontario Works (welfare) benefits of \$733/month while they wait up to two years for an appeal hearing.

It is worth noting that many of these delayed appeals will result in a positive result for the appellant. In a typical year, the SBT decides almost 60% of ODSP appeal hearings in favour of the person with disabilities,¹⁵ and in about 25% of disability appeals, the Ministry itself reverses its original denial of benefits after an appeal is filed and before the hearing. In all successful cases, the individual will receive the increased financial support retroactively, but for a person with disabilities, waiting up to two years for a bump-up from welfare rates can mean a loss of housing or a deterioration in health.

In 2021/22, only 47% of appeals were scheduled for a hearing within 6 months (with the notice sent out within 30 days), as compared to 94% meeting this target in 2017/18. Although this is an improvement from 2019/20, when only 2% of appeals were scheduled within 6 months, there is now a risk that Tribunal will compromise the fairness rights of appellants caught in the backlog as it has begun scheduling multiple hearings on the same day without regard for the availability of counsel, thereby overwhelming the capacity of legal clinic representatives to provide representation.

For appellants who do get to a hearing, the cancellation of in-person hearings means that many can only participate by telephone because they do not have access to computers or the internet. The delays have meant that appellants must testify about the impact of the disability on their lives two years earlier, putting them at a significant disadvantage.

In the face of delays, fewer individuals are filing appeals to the SBT, perhaps preferring to start over with a new application, but this would deny them the chance for retroactive benefits. In 2021/22, the number of SBT appeals fell to 6,022, as compared to an average of 9,334 over the previous 5 years.

The 2021/22 Annual Report also documented an alarming increase in the number of instances where the individual appellant is not on the other end of the telephone line when their electronic hearing is called. In 2021/22, the SBT dismissed 808 ODSP appeals in absentia, a significantly higher number than the average for the previous five years (568). For self-represented appellants in particular, the failure to attend their hearing may be attributable to the barriers created by the SBT's pivot to electronic hearings instead of in-person hearings.

In the Automobile Accident Benefits Service division of the **LICENCE APPEAL TRIBUNAL**, where accident victims can dispute their insurer's compensation decisions, there is a growing volume of applications and a significant increase in time required to process cases. The Tribunal's Annual Report documents a backlog of active cases that has grown from 4,241 in 2017/18 to 16,204 as of March 31, 2022.

CONCLUSION

¹⁵ Tribunals Ontario Annual Report, 2021/22, SBT, Table 5.

Our adjudicative tribunal system deals with many important disputes that would otherwise be handled by the courts. We call on the Government and all parties to commit to restoring the accessibility of the tribunal justice system, to ensure that the people of Ontario have adjudicative tribunals that are independent, expert, inclusive and able to provide dispute resolution processes that are both fair and timely.

To this end, we are seeking a commitment from the Ontario Government, the Ministry of the Attorney General, and Tribunals Ontario to ensure commitments and actions to address this crisis, by:

- 1. Immediately establishing a backlog-dedicated panel of expert adjudicators, chosen through an expedited, competitive, merit-based, transparent process and assigned to resolve the thousands of applications that are stalled at Tribunals Ontario, using proactive case management, mediation and adjudication.**
- 2. Expediting the scheduling of cases in the backlog, while recognizing the important role of representatives such as legal clinics and the Human Rights Legal Support Centre in assisting thousands of low-income individuals who appear before the SBT, the LTB and the HRTO. This includes restoring regional-based scheduling that will benefit both sides by allowing to access to local rent support programs and tenant representation through the Tenant Duty Counsel Program.**
- 3. Re-establishing in-person hearings as a viable and accessible option for all parties.**
- 4. Conducting an internal review of case resolution practices at the HRTO to ensure compliance with the statutory duty to provide parties with the opportunity to make oral submissions before dismissal.**
- 5. Ensuring that that all tribunals have a full complement of expert adjudicators, chosen through a competitive, merit-based process, able to provide timely dispute resolution services, in both official languages.**
- 6. Restoring the standing stakeholder advisory committees that were disbanded since the current Government was first elected in 2018, allowing meaningful input into the design of tribunal processes, including improvements to the rules and policies.**
- 7. Depoliticizing appointments and reappointments to all adjudicative tribunals by establishing an [Adjudicative Tribunal Justice Council](#) to provide independent oversight of the adjudicative system.**