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Political patronage and the Ontario adjudicative tribunal system: a Tribunal Watch Ontario commentary

[Tribunal Watch Ontario](http://tribunalwatch.ca) is a non-partisan, public interest organization, dedicated to monitoring Ontario's adjudicative tribunal system and advocating for adjudicative independence, and access to justice. Contact info@tribunalwatch.ca for more information.

The recent controversy about the Ontario government's revival of the King's Counsel honorific is a stark reminder that political patronage is alive and well in Ontario.

The KC designation was bestowed on Conservative party contributors, and all current Conservative party members of the provincial Legislature who are lawyers. The honorific was also bestowed on many tribunal chairs and associate chairs, including some who preside over tribunals that have descended into dysfunction. The KC debacle is a disturbing reminder of the impact of patronage and favouritism on the affairs of the province. In this commentary, we consider how patronage and favouritism have impacted Ontario's adjudicative tribunal system.

Historically, appointed positions on adjudicative tribunals were treated like most other appointments to agencies, boards, and commissions. They were seen as plum patronage appointments, to reward supporters and encourage loyalty. Typically, when a new government was elected, there would be a wholesale change, at least in the senior leadership positions. The old government's patronage appointees would be turfed out to make way for new patronage appointments.

Adjudicative tribunals perform judicial or quasi-judicial functions – deciding rights and obligations for individuals in far more cases than come before the courts. We do not replace the judiciary when there is an election, and we should not replace those appointed to adjudicative tribunals either.

In Ontario, during the 14 years that the Liberals were in power, there was enough stability and longer-term vision to develop a more modern approach to depoliticize and regularize a merit-based approach for appointments and reappointments to adjudicative tribunals. That approach was largely reversed with the election of the Ford government in 2018.

Many of the key adjudicative tribunals are clustered under Tribunals Ontario. The leadership of Tribunals Ontario and its constituent tribunals is dominated by people with clear political affiliation who were appointed with little or no subject matter expertise or adjudication experience.

“While political affiliation should not be a bar to appointment, neither should it be a qualification.”

The Tory government also declined to reappoint experienced members who were recommended for reappointment by their respective tribunal Chair. While no reasons were ever provided, the only problem seemed to be that they had been appointed by the previous government, even though that government had made merit-based appointments a foundation of their tribunal reforms. The loss of the most experienced adjudicators, together with an initial failure to appoint anyone else, led to turmoil and catastrophic backlogs (see [Administrative Justice Delayed, Fairness Denied, Tribunal Watch Ontario Statement on the Ombudsman's report](#)).

Since its inception in early 2020, Tribunal Watch Ontario has monitored the appointment and reappointment of members to adjudicative tribunals. We have noted some appointments that suggest that political affiliation or favouritism were the primary qualification. While political affiliation should not be a bar to appointment, neither should it be a qualification.

The basis for the appointment of tribunal members has often been mysterious, even though the legislative requirements are clear. Section 14 of Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009 (ATAGAA) states:

14 (1) The selection process for the appointment of members to an adjudicative tribunal shall be a competitive, merit-based process and the criteria to be applied in assessing candidates shall include the following:

1. Experience, knowledge or training in the subject matter and legal issues dealt with by the tribunal.
2. Aptitude for impartial adjudication.
3. Aptitude for applying alternative adjudicative practices and procedures that may be set out in the tribunal's rules. 2009, c. 33, Sched. 5, s. 14 (1).

(2) If a member of an adjudicative tribunal is required by or under any other Act to possess specific qualifications, a person shall not be appointed to the tribunal unless he or she possesses those qualifications.

Despite this legislative direction, based on the biographical information provided at the time of the appointment, many of the people who have been appointed to tribunals under Tribunals Ontario have had neither subject matter expertise nor dispute resolution experience (let alone any apparent knowledge of how to run a hearing).

Many of these people can become excellent adjudicators with appropriate training and after a typically steep learning curve, but based on historical experience, it is hard to believe that there were so few candidates who had the credentials required by ATAGAA.

Problems with patronage appointments

One of the most serious problems with patronage appointments is that they undermine adjudicator independence. If appointment and reappointment decisions are based on political

connection or favouritism, those considerations may affect adjudicative decisions or may be perceived to do so. This is especially a problem for those tribunals where the government is a party.

As noted in a [previous Law 360 article](#) by Gary Yee and Raj Anand, from Tribunal Watch Ontario's Steering Committee:

Establishing a credible process for appointments and reappointments is critical to creating the foundation for a stable, expert and independent tribunal. Huge damage is caused if tribunal members appear to be given appointments or reappointments based on political connections or other unpredictable or questionable factors. These decisions should be based on merit and the proper job criteria. Otherwise, there will be a chilling effect on adjudicative independence, and the unpredictability will also lead to many qualified people being discouraged from applying or continuing. The tribunal will suffer with turnover, turmoil and loss of respect.

When governments mistreat our tribunal justice systems, this causes real harm to those who depend on adjudicative tribunals to decide cases in an independent, fair, expert and efficient manner.

The Adjudicative Tribunal Justice Council

Tribunal Watch Ontario believes that a clean, transparent and non-partisan method of appointing chairs and adjudicators to adjudicative tribunals is imperative. Recent history shows that governments cannot be trusted to resist the lure of patronage and favouritism. In a democracy like Canada, the stability of a justice system cannot rely on whether the same governing party gets elected again.

Tribunal Watch Ontario has proposed the creation of an [Adjudicative Tribunal Justice Council](#) (ATJC) to oversee the system. The Council would be an independent, arm's-length body with a mandate to oversee the appointment and reappointment of senior leadership positions and members of adjudicative tribunals. The Council must be enshrined in legislation to guarantee its own independence, funding, leadership and operational imperatives. Led by a board of governors and administered by its own executive, the Council would be truly arm's length from government, with a free hand to recruit appointees, establish cross-sector policies and guidance regarding compensation, benefits, and performance review, and be an independent entity to comment on proposed legislative change concerning individual tribunals or the administrative justice system as a whole.

The Council and its operation should be founded on international standards for tribunal excellence and address values that include independence, impartiality, accountability, expertise, accessibility, diversity, equity, procedural fairness, and respect for the law. Tribunal Watch Ontario has adopted a [Statement or Principles](#) that enshrine these standards.

The Administrative Tribunal Justice Council would be a progressive step toward restoring public confidence in our network of adjudicative tribunals. After all, so many more citizens in Ontario

are parties to tribunal adjudication than players in the courts. An independent Council would go a long way to avoid repeating our tainted history of interference with appointments and gratuitous conferring of meaningless honorifics.