Understanding the Tribunal Landscape

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Overview

So, you want to practise before a **tribunal**. Or maybe you think you do. Or perhaps you are unsure but are taking a course that requires you to understand a bit more about appearing before tribunals. Whatever has brought you to this place, we will shed some light for you on tribunal practice, both in Ontario and federally.

In Ontario's judicial system (borrowed from the English tradition), tribunals are the new kids on the block. Granted, tribunals in Ontario have been in existence for some time, with elements of the Ontario Land Tribunal dating back to 1906.[1] But the use of tribunals as a means of rendering greater access to justice for Ontarians really exploded in the last few decades of the 20th century.

What Are Tribunals?

You may be asking, what is a tribunal? Perhaps you've heard the term in relation to some well-known tribunals in Ontario, such as the Human Rights Tribunal of Ontario. Perhaps you realize that they have something to do with determining legal disputes. In fact, tribunals are specialized bodies of legal knowledge driven by the expertise of appointed decision-makers who adjudicate disputes in categories of law dictated by statute. Essentially, they are courts, except that tribunals don't possess the broad jurisdiction of the courts, and they do not require the appointment of a justice or justice of the peace. Nevertheless, tribunals function in areas that make an impact on many different aspects of society, such as assisting with municipal land planning, settling landlord and tenant disputes, or awarding compensation to individuals who have suffered an injury as the result of a violent act.

Tribunals are like courts because they have a trier of fact (like a judge), typically called an adjudicator or a tribunal member, who makes a determination based on arguments from (usually) two opposing parties. Adjudicators are governed by the legislation that empowers them to act, which means they can do only what the enabling legislation for that tribunal gives them jurisdiction to do. Certain tribunals have more than one adjudicator assigned to a case or hearing, and these are referred to as panels. Two or three panel members may be assigned to a case. Tribunals are unlike courts in that the hearings are typically not held in formal courtrooms; rather, tribunal hearings can be held in boardrooms, hotel rooms, community centres, or government offices. For this reason, along with a few others (less strict rules of evidence,

1 Then called the Office of the Provincial Municipal Auditor; see "Planning Matters" (last visited 10 July 2021), online: *Ontario Land Tribunal* <https://olt.gov.on.ca/tribunals/lpat/about-lpat>.

increased self-representation, shorter time frames), tribunals are seen as a less rigid approach to justice and as more user-friendly.

Why Tribunals?

The basic concept behind tribunals is to give individuals greater, more efficient, and more effective access to justice. Tribunal procedures can eliminate months, and even years, from the time that people sometimes spend in litigation. Many tribunals provide in-and-out service within a year of filing an application; a few, much less than a year; and a few others, a bit more. In addition, applicants can self-represent, thereby eliminating the cost of hiring a representative for a legal proceeding. Arguably, self-representation has become more complicated in the years following the big tribunal boom in Ontario, but it is nevertheless an easier system to navigate for individuals without legal training than is the traditional court system.

There are even online resources designed by legal professionals that can assist the self-represented litigant. For example, Steps to Justice Community Legal Education Ontario aims to provide greater access to justice and to empower individuals as they experience the legal system in Ontario. The program is accessed predominantly through its website,[2] which provides hands-on tools for Ontarians dealing with legal disputes in housing, employment, social assistance, and consumer law matters, among other issues.

Central to our discussion in this text, the website offers guidance in matters before the Landlord and Tenant Board, the Human Rights Tribunal of Ontario, and the Social Benefits Tribunal. Forms, checklists, and even online chats are available for users to equip and prepare themselves for the legal road ahead. Steps to Justice is a collaborative project, boasting both public and private partnerships, which speaks to the value of this access-to-justice resource.

Professional Ethics

The user-friendly approach to justice that tribunals offer does not translate into less procedural or legislative awareness on the part of practitioners. Indeed, the atmosphere is more relaxed than a courtroom setting, but as a representative, your reputation is just as much at stake, and your client's interests are every bit as integral to your preparation and presentation as they would be if you were in a courtroom. Therefore, you must be familiar with the procedural rules of the tribunal that you appear before, and you must

2 See "Steps to Justice" (last visited 15 July 2021), online: *Community Legal Education Ontario* <https://stepstojustice.ca>.

be equally well prepared with the legal knowledge required for your case. Professional responsibility should never be sacrificed, regardless of setting.

Because you are a licensee of the **Law Society of Ontario** (LSO), professional responsibility and ethics play fundamental roles in your career. Indeed, the **Rules of Conduct**[3] that apply to paralegals in Ontario underpin your entire legal practice. How you represent your client begins with your own passion for and knowledge about a particular legal subject. But your ethical boundaries are also important in representation. Ethical boundaries, including morals and values, are subjective; however, the Rules of Conduct established by the LSO apply to all paralegal licensees, regardless of where their personal ethics lie. The Rules of Conduct establish many parameters for client representation, including the duty that you owe to your client, professionalism, and advocacy. Some key rules are listed below:

> 2.01(1) A paralegal has a duty to provide legal services and discharge all responsibilities to clients, tribunals, the public and other members of the legal professions *honourably and with integrity*.
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> 2.01(2) A paralegal has a duty to *uphold the standards and reputation of the paralegal profession* and to assist in the advancement of its goals, organizations and institutions.
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> 2.01(3) A paralegal shall be *courteous and civil*, and shall *act in good faith* with all persons with whom he or she has dealings in the course of his or her practice. …
>
> 2.03(3) A paralegal *shall not engage in sexual or other forms of harassment* of a colleague, a staff member, a client or any other person on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.
>
> 2.03(4) A paralegal *shall respect the requirements of human rights* laws in force in Ontario and without restricting the generality of the foregoing, a paralegal *shall not discriminate* on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability with respect to the employment of others or in dealings with other licensees or any other person. …
>
> 3.01(1) A paralegal shall perform any services undertaken on a client's behalf to the standard of a *competent* paralegal.

3 See Law Society of Ontario, *Paralegal Rules of Conduct* (1 October 2014; amendments current to 1 July 2021), online: <https://lso.ca/about-lso/legislation-rules/paralegal-rules-of-conduct> (emphasis added).

3.01(2) A paralegal is required to recognize a task for which the paralegal lacks competence and the disservice that would be done to the client by undertaking that task. A paralegal *shall not undertake a matter without being competent* to handle it or being able to become competent without undue delay or expense to the client. …

3.02(1) A paralegal has a duty to provide *courteous, thorough and prompt service* to clients. The quality of service required of a paralegal is service that is competent, timely, conscientious, diligent, efficient and civil.

3.02(2) A paralegal shall be *honest and candid* when advising clients.

3.02(3) A paralegal *shall not undertake or provide advice* with respect to a matter that is outside his or her permissible scope of practice. …

3.03(1) A paralegal shall, at all times, *hold in strict confidence* all information concerning the business and affairs of a client acquired in the course of their professional relationship and shall not disclose any such information unless:

(a) expressly or impliedly authorized by the client;

(b) required by law or by order of a tribunal of competent jurisdiction to do so;

(c) required to provide the information to the Law Society; or

(d) otherwise permitted by this rule. …

3.04(1) A paralegal shall not act or continue to act for a client where there is a *conflict of interest*, except as permitted under this rule. …

4.01(1) When acting as an advocate, the paralegal *shall represent the client resolutely and honourably within the limits of the law* while, at the same time, *treating the tribunal and other licensees with candour, fairness, courtesy and respect*. …

4.01(5) When acting as an advocate, the *paralegal shall not*,

(a) *abuse the process of the tribunal* by instituting or prosecuting proceedings which, although legal in themselves, are clearly *motivated by malice* on the part of the client and are brought solely for the *purpose of injuring* the other party;

(b) *knowingly assist or permit* the client to do anything that the paralegal considers to be dishonest or dishonourable;

(c) *knowingly attempt to deceive* a tribunal or influence the course of justice by offering *false evidence, misstating* facts or law, presenting or relying upon a *false or deceptive affidavit, suppressing* what ought to be disclosed, or otherwise assisting in any *deception, crime or illegal* conduct;

(d) deliberately refrain from informing the tribunal of any *binding authority* that the paralegal considers to be directly on point and that has not been mentioned by an opponent;

(e) appear before a judicial officer when the paralegal, a partner of the paralegal, a paralegal employed by the paralegal firm or the client has a business or personal relationship with the officer that gives rise to, or might reasonably appear to give rise to, pressure, *influence or inducement affecting the impartiality of the officer*, unless all parties consent and it is in the interests of justice;

(f) knowingly assert as true a fact when *its truth cannot reasonably be supported by the evidence* or as a matter of which notice may be taken by the tribunal;

(g) make suggestions to a witness *recklessly or knowing them to be false*;

(h) endeavour or allow anyone else to endeavour, *directly or indirectly, to influence the decision* or action of the tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;

(i) *knowingly misstate* the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;

(j) knowingly permit a witness or party to be *presented in a false or misleading* way or to *impersonate* another;

(k) *knowingly misrepresent* the client's position in the litigation or the issues to be determined in the litigation;

(l) *needlessly abuse, hector, harass or inconvenience* a witness;

(m) *improperly dissuade* a witness from giving evidence or suggest that a witness be absent;

(n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge;

(o) needlessly inconvenience a witness; and

(p) appear before a court or tribunal while under the influence of alcohol or a drug. …

6.01(1) A paralegal shall *encourage public respect* for, and try to improve, the administration of justice.

6.01(2) A paralegal shall *take care not to weaken or destroy public confidence* in legal institutions or authorities by making irresponsible

> allegations or comments particularly when commenting on judges or members of a tribunal. …
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> 7.01(1) A paralegal shall *avoid sharp practice* and shall *not take advantage of* or act without fair warning on slips, irregularities or mistakes on the part of other licensees not going to the merits or involving the sacrifice of a client's rights.
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> 7.01(2) A paralegal shall *agree to reasonable requests* concerning trial dates, adjournments, waiver of procedural formalities and similar matters that do not prejudice the rights of the client. [Emphasis added.]

You will become more familiar with the Rules of Conduct as you continue in your studies and prepare for your licensing exam. And, of course, you will be well versed in them by the time you practise. But don't wait until then to get to know the rules that apply to you as a practitioner. As a student of legal studies and a future legal representative (or perhaps current, if you are doing summer or placement work), you should understand the field that you are about to enter. So pick up a copy of the Rules of Conduct to begin to familiarize yourself. The rules that govern ethics play a big role in this career path, and you should try to emulate the expected behaviour of a licensee while working toward to your goal.

Tribunal Practice

Pre-Hearing Proceedings

Proceedings before tribunals vary greatly depending on the body; for the 14 tribunals under the Tribunals Ontario umbrella, there are 14 different procedures. What they do have in common, however, are the distinctions between pre-hearing, hearing, and post-hearing processes.

At some tribunals, pre-hearing processes are as simple as the parties receiving a notice of hearing and nothing further. Of course, this notice of hearing can be sent from the tribunal only after a complete application has been received. A complete application includes payment of any required fees. Many tribunals require application fees, though some do not. After the notice of hearing is received, a party prepares accordingly and then appears on the assigned date at the right time and at the correct location for the hearing. All those details appear on the notice of hearing, as per the *Statutory Powers Procedure Act*.[4]

4 RSO 1990, c S.22 [SPPA].

PRACTICE TIP

Section 6 of the SPPA mandates that tribunals send a notice of hearing to the affected parties. All notices of hearing must include the statutory authority, or section number of the legislation, that applies to the hearing.

In addition, the SPPA differentiates among types of hearing notices (i.e., oral, written, and electronic). Notices for oral hearings must include the time, place, and purpose of the hearing, as well as a statement notifying the parties that the tribunal may proceed in their absence. Written and electronic notices include similar requirements, as well as a statement notifying the parties upon what grounds they may object to the written or electronic hearing and request an oral hearing in its place.

Some tribunals require disclosure before the hearing date but after the notice of hearing has been delivered, which may be outlined on the notice of hearing document. Other pre-hearing procedures may include case conferences, pre-hearing or settlement conferences, a schedule of events provided by the tribunal (as is the practice of the Assessment Review Board), a hearing to determine a jurisdictional question, or even a motion for early dismissal.

Hearing Process

On the hearing day, the parties should be prepared to appear at the time on their notice of hearing, taking into consideration the fact that there may be considerable delays in their case being heard on time. Some tribunals start at 9 a.m. and work through the docket; however, multiple matters are scheduled for the same date and time as a matter of tribunal scheduling efficiency. All parties should be present and ready to proceed; the tribunal may proceed in the absence of a party, and the decision may be unfavourable.

When all parties are before the tribunal and ready to proceed, the adjudicator typically begins with introductions and then a request for any preliminary matters. Preliminary matters may include a request for adjournment (although this would ideally be requested before the hearing date), a request for additional disclosure, or even a clarification of a procedural aspect of the hearing. Assuming that all parties are present and all preliminary matters have been dealt with, the hearing on the merits will begin, which means that parties will have the chance to present their case to the adjudicator.

Opening statements provide an opportunity for the parties to present an overview of their case theory, with reference to the witnesses and key

evidence the tribunal will hear. The length of an opening statement before a tribunal may vary from 1 to 20 minutes, but this is largely governed by the overall length of the scheduled proceeding (e.g., a morning versus multiple days or weeks), the complexity of the case, and the culture of the specific tribunal.

Next, the applicant will typically begin presenting their evidence by way of examination-in-chief, or direct examination. The respondent will have an opportunity to cross-examine any witnesses for the applicant. The adjudicator may also ask questions for clarification.

PRACTICE TIP

Tribunals enjoy less rigid rules of evidence than those enforced by the general court system. The basis for what evidence is allowed is established by section 15 of the SPPA, which permits the admission of any oral testimony, document, or thing that is relevant to the subject matter of the proceeding. The SPPA therefore makes hearsay evidence admissible before tribunals. Generally, tribunals consider the admissibility of evidence on the basis of relevancy, reliability, necessity, and fairness.

If any matters coming out of the cross-examination require additional clarification by the applicant, they may request an opportunity to redirect. Redirect should be requested only if it is necessary to clarify unclear or damaging information arising from cross-examination. It is not an opportunity to present new evidence. Once the applicant completes their questioning, the respondent presents their evidence and testimony through examination-in-chief. This is followed by cross-examination by the applicant and perhaps clarifying questions from the adjudicator.

After both sides have finished presenting their case to the tribunal, there may be an opportunity for closing statements. As a representative, it's important to have a closing statement prepared, even if the parties waive the right to present closing statements. In some tribunal settings, closing statements are rarely presented, but they will be expected in others. Closing statements give each side the opportunity to sum up their case, remind the tribunal of key evidence that was presented, direct the tribunal to important precedents in the case law, and essentially attempt to persuade the tribunal to decide in their favour. It would be entirely inappropriate to bring up new evidence in the closing statement. The length of closing statements, like opening statements, also varies depending on the circumstances.

Tribunal members may provide their decision on the day of the hearing or reserve their decision until a later date, at which time the parties would receive a full written decision with reasons via mail, fax, or email. Even oral decisions should be followed up with written reasons. Written reasons are a basic requirement under the principle of **procedural fairness** and form the basis required for an appeal or a judicial review.

Challenging Decisions

If the decision that you receive raises serious concerns with the application of the law, overlooks an important fact or facts, or disregards a principle of administrative law, you may be able to challenge the decision. Challenges are raised in three ways: (1) internal tribunal mechanisms for dealing with challenges, such as a request to review or a reconsideration (the terminology varies); (2) appeals to Divisional Court; or (3) an application for judicial review.

In determining the next step, practitioners must be alert to timelines for filing. A tribunal's timeline for review is typically 30 days from the date of the decision. Appeals to Divisional Court, which may be based on questions of law, jurisdiction, or egregious errors of fact, must be filed within 30 days of the tribunal's final decision. Applications for judicial review, which are based on a breach of jurisdictional authority, are not constrained by a specific deadline in Ontario, though excessively delayed applications may not be accepted, and a 30-day filing deadline is a good rule of thumb. Practitioners must also be aware of other steps that may be required, such as requesting a stay of the decision pending a final decision.[5]

Statutory Powers Procedure Act

A central piece of legislation in Ontario that governs tribunal procedure is the SPPA. The SPPA was originally enacted in 1971 but has undergone numerous changes since then, the most recent of which were provided by an amendment in 2015.[6] The Act was born out of the McRuer Report,[7] after a

5 For further reading, see Liz Nastasi, Deborah Pressman & John Swaigen, *Administrative Law: Principles and Advocacy*, 4th ed (Toronto: Emond, 2020) chs 10-12.

6 The amendment, found in the *Protection of Public Participation Act, 2015*, SO 2015, c 23, s 5, pertains to submissions for a costs order being made by way of written or electronic documents.

7 *Report of the Royal Commission on an Inquiry into Civil Rights in Ontario*, vol 1 (Toronto: Queen's Printer, 1968), online: <https://archive.org/stream/royalcommissioni01onta/royalcommissioni01onta_djvu.txt>.

police scandal created a gaping need for administrative reform.[8] The SPPA's purposefulness has been questioned over the years;[9] nevertheless, it has offered important basic procedural requirements that govern the Ontario tribunal setting. Section 2 states that the Act's core purpose is ensuring "the just, most expeditious and cost-effective determination of every proceeding on its merits." Section 25.1 of the SPPA empowers tribunals to set rules governing practice and procedure, and the Act specifically offers guidance with respect to:

- creating mechanisms for alternative dispute resolution (s 4.8);
- allowing for written or electronic hearings, in addition to or in conjunction with oral hearings (ss 5.1, 5.2, 5.2.1);
- awarding costs (s 17.1), which is rarely applied in practice;[10]
- providing opportunity for parties to examine witnesses (s 10.1);
- determining the admissibility and inadmissibility of evidence (s 15), which includes the fact that the normally strict rules of evidence are relaxed for administrative tribunal matters and that the SPPA allows for the inclusion of hearsay evidence;
- protecting the rights of witnesses to representation (s 11);
- summoning witnesses (s 12);
- referring a case to Divisional Court for a contempt hearing (s 13); and
- creating rules to review its own decisions (s 21.2).

In addition, the SPPA mandates that tribunals:

- provide "reasonable notice of the hearing" to parties (s 6);
- hold public hearings, with specific exceptions (s 9);
- protect witnesses against self-incrimination (s 14);
- provide written reasons for a decision (s 17); and
- create a record of proceeding for each matter (s 20).

Bill 276, which received royal assent in June 2021,[11] modifies the SPPA by placing a prohibition on taking and disseminating photos, audio, and video of tribunal proceedings and imposing a fine of up to $25,000 for violations.

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8 Hudson Janisch, "Something Old, Something New" (2010) 23 Can J Admin L & Prac 219.

9 David J Mullan, "Willis v McRuer: A Long-Overdue Replay with the Possibility of a Penalty Shoot-Out" (2005) 55 U Toronto LJ 535.

10 Robert A Centa & Denise Cooney, "Trends in Costs Awards Before Administrative Tribunals" (2014) 27 Can J Admin L & Prac 259.

11 Bill 276, *An Act to enact and amend various Acts*, 1st Sess, 42nd Leg, Ontario, 2021 (assented to 3 June 2021), SO 2021, c 25, Schedule 27.

***Decision No 650/98I*, 1998 CanLII 15958, [1998] OWSIATD No 990**

In this Ontario Workplace Safety and Insurance Appeals Tribunal decision, the issue raised pertains to the consolidation of similar matters into one hearing. The Tribunal considered its own powers under its enabling legislation, as well as those provided in the SPPA, the latter of which gives specific power to the Tribunal to combine proceedings involving "the same or similar questions of fact, law or policy" (s 9.1). The Tribunal dismissed arguments for consolidation, which emphasized timeliness, in favour of fairness, and the matters were not consolidated. Instead, the two appeals were scheduled to be heard consecutively by the same panel.

Section 32 of the SPPA also explicitly states that its provisions and regulations will prevail when they are found to be in conflict with the provisions or regulations of another act—unless expressly stated otherwise in the other act's provisions or regulations. In addition to the groundwork laid by the SPPA, each tribunal has its own enabling legislation, which works in conjunction with the SPPA. These separate pieces of legislation will be addressed in the chapters devoted to each tribunal throughout this text.

The SPPA was recently discussed in a Divisional Court case dealing with an appeal from a Landlord and Tenant Board order to reinstate a tenant to his care home following an eviction order.[12] The appellant charity, which ran the care home, argued that it was denied procedural fairness at the Board hearing on two grounds: (1) denial of an oral hearing, which in turn denied it the ability to call witnesses and cross-examine the respondent's witnesses; and (2) because the adjudicator dismissed evidence that the appellant wanted to raise in support of the unlawful eviction. The appellant raised the first argument on the basis of section 10.1 of the SPPA, which states:

> A party to a proceeding may, at an oral or electronic hearing,
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> (a) call and examine witnesses and present evidence and submissions; and
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> (b) conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding.

With reference to the second argument, the adjudicator dismissed the evidence, asserting that allowing such evidence would amount to an abuse

12 *Ottawa-Carleton Association for Persons with Developmental Disabilities/Open Hands v Séguin*, 2020 ONSC 7405.

of process. In making this decision, the adjudicator relied on section 23(1) of the SPPA, which states:

> A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

The Divisional Court found that the written hearing, followed by a telephone hearing for remedies, was sufficient and within the jurisdiction of the Board to decide.[13] Further, the Court found that the Board properly exercised its power under section 23(1) in denying the appellant the opportunity to present evidence about a procedure that amounted to an unlawful eviction at a hearing reserved for remedy alone, as this would have undoubtedly amounted to abuse of process. The appeal was ultimately dismissed on the grounds that the Board held the authority to reinstate the respondent and that there was no breach of procedural fairness.

Appointments

Now that you have an idea about where tribunals came from and how they are organized, it will be useful to know how adjudicators are appointed.

Together, the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*[14] and one of its regulations, *Appointment to Adjudicative Tribunals*,[15] outline a process for tribunal appointments that is competitive and merit-based, taking into consideration "experience, knowledge or training" and an aptitude for both "impartial adjudication" and the application of "alternative adjudicative practices" (ATAGAA, s 14). However, the merit-based approach as recommended in section 14 of the Act need not apply in circumstances of re-appointment, cross-appointment, or the appointing of a previous candidate, or for other reasons. The process must also be made public and any appointment or re-appointment must be recommended by the chair, although the requirement for the chair to approve re-appointments may be waived. In Ontario, a tribunal's open positions and appointments are posted on the public appointments website.[16]

The Adjudicator's Role

Once appointed to a tribunal, adjudicators (or tribunal members) play a key role in the resolution of a dispute and the manner in which access to justice

13 *Ibid* at paras 42-44.

14 SO 2009, c 33, Schedule 5 [ATAGAA].

15 O Reg 88/11.

16 "Public Appointments" (last updated 14 July 2021), online: *Government of Ontario* <https://www.ontario.ca/page/public-appointments>.

truly plays out. Adjudicators should be fair, impartial, patient, respectful, and efficient, all while being equipped with strong organizational, training, leadership, writing, and listening skills (to name just a few). Other key indicators of a good adjudicator are avoiding conflicts of interest, being on time for hearings, writing clear decisions backed by solid reasons, and understanding their role in a hearing.

On this final point, adjudicators are typically assumed to take a passive role in our adversarial system of justice. In an adversarial system of justice, two parties present their cases to an independent trier of fact (adjudicator) who evaluates the evidence and makes a decision on the matter, predominantly based on what has been presented to the trier of fact. This usually results in a less active role for the adjudicator in hearings. However, it is becoming more commonplace for adjudicators to take more active roles in the hearing room. This role is often adopted when there are self-represented parties who stand to benefit from additional guidance in order to navigate the procedures and processes of a tribunal:

> The comparatively relaxed rules of procedure of many tribunals, combined with increasing numbers of self-represented participants in proceedings before them, have made tribunals ripe grounds for the adoption of active adjudication—that is, methods of adjudication that see the decision-maker take on a more interventionist role in proceedings than the traditional model of a passive judge.[17]

The line of appropriateness in active adjudication can become blurred as tribunal members become increasingly comfortable in the role or when tribunal policies pave the way for an active role by the adjudicator. For example, the Social Benefits Tribunal's *Rules of Procedure* empower the Tribunal to question witnesses.[18] This is typically a role left to the parties' representatives through a direct or cross-examination, although certainly adjudicators and judges alike have for some time interceded to question witnesses in order to clarify their testimony. Likewise, the Ontario Municipal Board is vested with the power to summon witnesses for examination.[19] And the *Human Rights Code*[20] takes this approach one step further by empowering the Human Rights Tribunal of Ontario to conduct a direct or cross-examination of witnesses in a hearing.

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17 Brian Gover & Pam Hrick, "Sketching the Boundaries: Active Adjudication as a Means of Enhancing Fairness in Tribunal Proceedings" in *The Six-Minute Administrative Lawyer 2017* (Toronto: Law Society of Ontario, 2017) at 3-1.

18 Social Benefits Tribunal, *Rules of Procedure for Appeals to the Social Benefits Tribunal* (1 July 2018), r 1.5(i), online: *Tribunals Ontario* <https://tribunalsontario.ca/documents/sbt/SBT%20Rules%20Parts%201%20&%202%20EN.html#rule1>.

19 *Ontario Municipal Board Act*, RSO 1990, c O.28, s 53(c).

20 RSO 1990, c H.19, s 43(3)(c).

The excerpt above is taken from an article that marks the boundaries of active adjudication by noting when there may be more (as when adjudicators intervene with questions to focus issues) or less (as in professional disciplinary matters).[21] One example from the article highlights a Divisional Court decision[22] on appeal from the Landlord and Tenant Board, where the Court found that the adjudicator, while taking an active role in questioning witnesses, was respectful to both parties, giving "due concern to the procedural rights of both" and ensuring "both sides had the opportunity to give evidence and test the evidence of the other party."[23]

The conclusion of the article offers general guidelines for appropriate active adjudication, including asking open-ended questions rather than those more typical of cross-examination, intervening at the end of a witness's testimony to ask for clarification, fairly questioning all parties' witnesses, seeking consent from the parties to engage in active adjudication, and ensuring that parties understand the hearing procedure.[24]

Ontario

Clusters: The New Approach

At the turn of the 21st century, Ontario toyed with the idea of restructuring the tribunal landscape and proposed a "super-tribunal" in the labour area.[25] Not long after the proposal, the plan was scrapped because of a lack of support.[26] In a subsequent, more successful attempt to address concerns raised about serving parties that appeared before tribunals, the Ontario government introduced a new structure of tribunal clustering. Ushered in by the ATAGAA, the idea behind the scheme was to create greater efficiency among tribunals that shared similar interests.

Ontario has seen various implementations of clustering; the most recent approach created a super-body known as Tribunals Ontario, which is home to 14 different tribunals. There is also a smaller cluster known as Ontario Land Tribunals, which comprises five tribunals that are focused on matters such as land planning, protection (environment and heritage), and mining. Before this current organizational structure, tribunals in Ontario were grouped according to three different structures: Environmental Land

21 Gover & Hrick, *supra* note 17 at 3-5.

22 *Paul v Wollen*, 2015 ONSC 1458.

23 *Ibid* at para 6.

24 Gover & Hrick, *supra* note 17 at 3-12, 3-13.

25 Ron Ellis, "Super Provincial Tribunals: A Radical Remedy for Canada's Rights Tribunals" (2002) 15 Can J Admin L & Prac 15.

26 *Ibid*.

Tribunals Ontario, Social Justice Tribunals Ontario, and Safety Licensing Appeals and Standards Tribunals Ontario. As a result, remnants of the old organizational structure still exist. For example, those tribunals that were a part of Social Justice Tribunals Ontario (SJTO) are still identified as such at the beginning of the *Rules of Procedure* for each tribunal and still share an aspect of the SJTO rules.

***Grand River Conservation Authority v Ontario (Minister of Transportation),* [2010] OMBD No 326**

This case details an interesting nexus between the Board of Negotiation (BON) and the Ontario Municipal Board (OMB), both clustered under Ontario Land Tribunals. At the time of the decision, the cluster was known as Environmental Land Tribunals Ontario. The OMB barred an expert witness from testifying on behalf of one of the parties because the witness also served as a board member on the BON, which created a reasonable apprehension of bias.

Independence

The advent of this new scheme was accompanied by concern over tribunal independence.[27] **Judicial independence** is a cornerstone of our democracy and common law legal system, and it remains one of our constitutional doctrines. Judicial independence enshrines the main aspects of security of tenure, financial security, and administrative independence.[28] The Supreme Court of Canada has stated that the principle of judicial independence is reflected in the *Canadian Charter of Rights and Freedoms*[29] at section 11(d) and in the *Constitution Act, 1867*[30] at sections 96-100, as well as in the preamble.[31] Judicial independence consists essentially in the freedom "to render decisions based solely on the requirements of the law and justice." It requires that the judiciary be left free to act without improper "interference from any other entity"—that is, that the executive and legislative branches

27 The Ontario Bar Association (Report), "Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009: Cause for Concern—The Tribunal Independence Issue" (2011) 24 Can J Admin L & Prac 225.

28 Lori Hausegger, Matthew Henninger & Troy Riddell, *Canadian Courts: Law, Politics, and Process* (Toronto: Oxford University Press, 2009) ch 6.

29 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

30 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

31 *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at paras 44, 57.

of government not "impinge on the essential 'authority and function' … of the court."[32]

Ontario Hydro, [1997] OLRD No 3578

This case is an Ontario Labour Relations Board decision focused on an allegation of bias and impartiality against the adjudicator. The decision's reasoning discusses a tribunal's independence as it relates to the tribunal's status and freedom to make decisions free from the influence or interference of the government, whether it be the influence or interference of the persons who appoint tribunal members or otherwise.

Closely aligned to this central notion of judicial independence is tribunal independence, and the Ontario Bar Association (OBA) was quick to react to concerns stemming from the ATAGAA. The OBA is an independent body and the provincial chapter of the Canadian Bar Association (CBA). Its membership is voluntary and consists of lawyers, judges, and students. The OBA and the CBA jointly offer professional development opportunities for paralegals and lawyers, and they seek to advocate for the legal profession and facilitate law reform.[33] The OBA was not silent about its concern over the impact that the ATAGAA scheme might have on tribunal independence:

> [W]hile it is to be admired for its progressive provisions concerning the appointment and re-appointment of tribunal members, and for its creation of a number of instruments of public accountability for tribunals, it is also noteworthy for its disturbingly pervasive provisions that guarantee each line-ministry's control of "its" tribunals. These provisions cannot be reconciled with the rule-of-law principle of judicial independence and to see them now formally embedded in the Province's laws is deeply concerning.[34]

And further:

> The new Act is formally about governance and accountability of tribunals. However, since it addresses the governance and accountability of adjudicative tribunals only, it is, most importantly, about justice. And, from a justice perspective, it seems to this Association that this legislation's repudiation of the rule-of-law principle of judicial institutional independence must not go unnoticed or unremarked.[35]

32 *Ibid* at para 45.

33 "Who We Are" (last visited 15 July 2021), online: *Ontario Bar Association* <https://www.oba.org/About-US>.

34 Ontario Bar Association (Report), *supra* note 27 at preface.

35 *Ibid*.

The OBA's report specifically cited concern with the fact that the ATAGAA placed significant control over a tribunal in the hands of the minister overseeing the tribunal, thus fettering the independence of the tribunal body: "Of course, adjudicative tribunals are not courts, but their principal assignment is the exercise of judicial, adjudicative functions, and the law requiring them to be independent and impartial is clear."[36] In particular, concerns were raised over the amount of ministerial control pertaining to budget control, planning and reporting, the procedure for complaints, and the members' code of conduct,[37] to name a few.

Further concerns about independence were raised because the ATAGAA enabled a minister to invoke a performance review of a tribunal at any time under the supervision of any appointee at the minister's discretion.[38] In addition to listing other omissions and recommendations, the report concludes with the ominous statement that the ATAGAA leaves plenty to be desired as a long-term plan for administrative justice in Ontario.[39] Despite the OBA's concerns over the original ATAGAA, the clustering efforts to date have been touted by other parties as the start of a process of modernization, marking a movement toward certain improvement in the realm of administrative justice. The cluster landscape has yet to hit the federal tribunal structure.

The impact of clustering is reflected in the rules and practice directions shared by tribunals. While many tribunals have their own set of rules for procedure and process, and perhaps practice directions for specific matters (e.g., adjournments, review requests), Tribunals Ontario released a shared practice direction on hearing formats, which is relevant to all tribunals in the cluster. The practice direction states that all hearings will be held in written or electronic format subject only to any *Human Rights Code* accommodation requests or concerns that the new format will result in an unfair hearing.[40] Furthermore, a number of boards have retained their shared version of rules from the previous tribunal clustering scheme in addition to their own specific procedural rules. For example, the Landlord and Tenant Board Rules comprise the SJTO Common Rules followed by the Landlord and Tenant Board Specific Rules.[41] A similar format can be found in the rules of the other five tribunals that were originally part of the SJTO cluster. Practitioners should be familiar with both sets of rules and read them in conjunction with each other.

36 *Ibid* at para 2.

37 *Ibid* at para 3.

38 *Ibid* at para 8.

39 *Ibid* at preface.

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

41 Landlord and Tenant Board, "Rules, Practice Directions and Guidelines" (last modified 1 December 2020), online: *Tribunals Ontario* <https://tribunalsontario.ca/ltb/rules-practice-directions-guidelines>.

Accountability

Efficiency and independence are not the only pillars of a tribunal's public service. Accountability is a key feature as well, and it is also reflected in the clustering plan, as evidenced by the title of the legislation: *Adjudicative Tribunals Accountability, Governance and Appointments Act*. And one doesn't have to read far into the Act to find further reference to accountability. The purpose of the Act, as stated in section 1, is to "ensure that adjudicative tribunals are accountable, transparent and efficient in their operations while remaining independent in their decision-making." In fact, the term "accountability" appears no less than 31 times throughout the legislation, in reference to various matters, including public accountability documents (ss 3-6, 8-10) and the requirement to create ethics policies (s 6), including the review and governance of such documents (s 11), and member accountability (s 7). The ATAGAA mandates mission statements, service standards and consultation policies, and an ethics plan, to name a few requirements. The statute also requires publication of the public accountability documents. Tribunals Ontario adheres to the ATAGAA requirements through a page on the website that hosts all of the public accountability documents.[42] The Ontario Land Tribunals cluster offers similar transparency that is also accessible online.[43]

Accessibility and Diversity

Tribunals Ontario has underlined accessibility and diversity as core values in the tribunal system, and these values are reflected in its workforce and user processes.[44] The Accessibility and Accommodation Policy outlines a commitment to (1) customer service that respects the dignity and independence of all persons, (2) accommodation of assistive devices and support persons, (3) staff training in accessibility and human rights, and (4) the output of information in a user-friendly and accessible manner.[45] The accommodation of specific requests for parties is governed by each tribunal.

The Tribunals Ontario model for diversity is enhanced by a commitment to Indigenous services, specifically "ensuring that every Indigenous individual, who comes before any TO tribunal, has access to culturally appropriate

42 "Public Accountability Documents" (last visited 10 July 2021), online: *Tribunals Ontario* <https://tribunalsontario.ca/en/public-accountability-documents>.

43 "Accountability Documents" (last visited 10 July 2021), online: *Ontario Land Tribunal* <https://olt.gov.on.ca/about-olt/accountability-documents>.

44 "Accessibility and Diversity" (last visited 10 July 2021), online: *Tribunals Ontario* <https://tribunalsontario.ca/en/accessibility-and-diversity>.

45 *Ibid*.

services."[46] Case law research suggests that there have been no cases in which process accommodation has been requested for such "culturally appropriate services" in the tribunals that form Tribunals Ontario. However, there have been a few cases in the regulatory realm (both the Law Society Tribunal and the Health Practitioners Appeal Review Board) that address the need for an Indigenous panel where the party seeking redress identifies as Indigenous.[47]

Independence and Accountability in Non-Clustered Tribunals

Independence and accountability, among other key tribunal values, obviously apply to non-clustered tribunals as well. These tribunals are governed by legislation, the overseeing ministry, and the pressing need for public satisfaction in creating and instituting relevant policies. The levels of transparency in their internal processes vary. For example, the Ontario Labour Relations Board provides online annual statements[48] and a host of accountability documents, such as a member accountability framework, an ethics plan, and a service standards policy.[49] The Financial Services Regulatory Authority of Ontario provides online documents pertaining to its mandate, service standards, and accessibility.[50]

To further accountability oversight, the Ontario Ombudsman plays a key role in investigating complaints from individuals about Ontario tribunals. The Ombudsman's role is clearly defined as investigating situations in which individuals felt that they were treated unfairly by a tribunal. The power to review a tribunal's process is granted by both legislation and case law, and it allows the Ombudsman to make recommendations to a tribunal. Specifically, the Ombudsman can consider whether:

- the decision of the tribunal is authorized by the legislation,
- the decision is based on the evidence that was before the tribunal,

46 "Indigenous Services" (last visited 10 July 2021), online: *Tribunals Ontario* <https://tribunalsontario.ca/en/indigenous-services>.

47 See *Law Society of Upper Canada v Bogue*, 2018 ONLSTH 46; *SP v JVF*, 2020 CanLII 26459 (Ont HPARB).

48 "Reports, Highlights and Publications" (last visited 10 July 2021), online: *Ontario Labour Relations Board* <http://www.olrb.gov.on.ca/Publications-EN.asp>.

49 "Policies and Accountability Documents" (last visited 10 July 2021), online: *Ontario Labour Relations Board* <http://www.olrb.gov.on.ca/Policy-EN.asp>.

50 "About FSRAO" (last visited 19 August 2021), online: *Financial Services Regulatory Authority of Ontario* <https://www.fsrao.ca/about-fsra>; "Financial Services Regulatory Authority (FSRA)—Multi-Year Accessibility Plan (MYAP) 2020–2025" (last visited 19 August 2021), online: *Financial Services Regulatory Authority of Ontario* <https://www.fsrao.ca/about-fsra/financial-services-regulatory-authority-fsra-multi-year-accessibility-plan-myap-2020-2025>.

- the process the tribunal followed was fair and relevant and the material issues were addressed,
- adequate reasons were provided for the decision, and
- any underlying systemic issues related to the decision exist that the Ombudsman should look at.

The legislative powers of the Ombudsman in this respect flow from the *Ombudsman Act*.[51] Various cases have also discussed this power.[52]

Transparency in Ontario Tribunals

The advent of the *Tribunal Adjudicative Records Act, 2019*[53] introduced a new standard of tribunal transparency. This Act mandates that the tribunals identified in O Reg 211/19 make adjudicative records available to the public, subject to some exceptions and the existence of a confidentiality order. TARA is an example of a statutory enactment that followed judicial comment on the need for greater transparency in the tribunal system. *Toronto Star v AG Ontario*[54] was a landmark case that underscored the importance of the **open court** principle in our common law jurisdiction. This principle was thereby extended to the tribunal world by enacting legislation that removed barriers, such as the *Freedom of Information and Protection of Privacy Act,*[55] and removed processes that violated the right to freedom of the press (s 2(b) of the Charter).

The case arose in 2017 when the *Toronto Star* launched a lawsuit in an attempt to end what it called "blanket secrecy" in the Ontario tribunal system.[56] In an editorial, the *Star* criticized tribunals for a lack of access to records, which it correctly stated as being central to the principle of openness that is a hallmark of judicial proceedings. The SPPA requires that tribunals in Ontario hold open hearings (there are exceptions written into enabling pieces of legislation for some tribunals), and while this editorial recognized the ability of journalists to attend those hearings, it argued that the public's

51 RSO 1990, c O.6.

52 *Re Ombudsman of Ontario and Health Disciplines Board of Ontario*, 1979 CanLII 1763, 26 OR (2d) 105 (CA); *Re Ombudsman of Ontario and Ontario Labour Relations Board*, 1986 CanLII 2710, 58 OR (2d) 225 (CA); *Ontario (Ombudsman) v Ontario (Board of Radiological Technicians)*, 1990 CanLII 6919, 72 OR (2d) 632 (Div Ct).

53 SO 2019, c 7, Schedule 60 [TARA].

54 2018 ONSC 2586.

55 RSO 1990, c F.31 [FIPPA].

56 "Star Launches Legal Challenge to End Secrecy in Ontario Tribunals," *Toronto Star* (8 February 2017), online: <https://www.thestar.com/news/canada/2017/02/07/star-launches-legal-challenge-to-end-secrecy-in-ontario-tribunals.html>.

"right to know" is impaired by inaccessible tribunal records that flow from these open proceedings.

In the lead-up to the legal challenge, the *Star* tested nine Ontario tribunals. The findings were diverse. The Environmental Review Tribunal and the Ontario Energy Board came out as top performers. Obtaining access to records proved to be more difficult at the Ontario Workplace Safety and Insurance Appeals Tribunal and the Ontario Civilian Police Commission, where access to basic records was denied (although access was later granted by the Police Commission). The *Star*'s case is discussed in greater detail below in this chapter's Case in Point.

Federal

The division between federal and provincial tribunals exists because of the structure of our government. As you are likely aware from previous courses and readings, the *Constitution Act, 1867* creates a federal government that is empowered to legislate over specific matters as a result of section 91. Conversely, our provincial governments have jurisdiction over matters of a "local or private nature," as outlined in section 92. For example, the federal government legislates matters concerning employment insurance, and, consequently, a federal tribunal, known as the Social Security Tribunal, governs legal issues arising out of that program. In the same way, the provincial governments have jurisdiction over landlord and tenant matters, hence the Ontario Landlord and Tenant Board.

Of course, some tribunals appear to operate in both realms, such as the Canadian Human Rights Tribunal (CHRT) and the Human Rights Tribunal of Ontario. These are separate entities; they exist in both jurisdictions because both the federal and the provincial governments can legislate matters regarding human rights to the extent that a matter falls within their jurisdiction. For example, the CHRT is the place to go if you feel that you have been discriminated against at work when your employer is a federal agency (e.g., Canada Post). However, if your employer is not a federal agency (e.g., the local barber shop where you are employed), then you would pursue your discrimination matter before the Human Rights Tribunal of Ontario.

Understanding the difference in jurisdiction that arises as a consequence of sections 91 and 92 of the *Constitution Act, 1867* is key to grasping the federal and provincial tribunal divide. However, in spite of these jurisdictional differences, there is essentially no difference in how tribunals operate or how you should prepare strictly based on provincial/federal distinctions. Each tribunal, whether federal or provincial, may have

very different operating structures that result in different approaches to preparation for the practitioner.

Federal Governance and Accountability

Federally, some measure of tribunal independence and accountability is enabled by the *Administrative Tribunals Support Service of Canada Act*.[57] This Act also creates its namesake, the Administrative Tribunals Support Service of Canada, and it establishes the office of the chief administrator, whose role it is to support federal administrative tribunals in executing their duties and functions.

The independence of federal tribunals is recognized in the confirmation of the responsibilities of each tribunal's chairperson. The service supports 11 federal tribunals, some of which you will read about later in this book. Two of those federal tribunals, the CHRT and the Social Security Tribunal, provide some measure of accountability through their internal structure. This is evidenced by the documents available on their respective websites. For example, the Social Security Tribunal provides a code of conduct for members and service standards. The CHRT website is less forthcoming with this type of information; however, a contact is provided for the offices of the CHRT.

Appointments

Appointments to federal tribunals are made by the Governor in Council. Essentially, this means that the power to make appointments lies with the Governor General of Canada but that these decisions are made in conjunction with advice from the federal Cabinet. The appointment process for each federal tribunal is outlined in its enabling legislation. For example, the CHRT, which is governed by the *Canadian Human Rights Act*,[58] has 15 members who are appointed by the Governor in Council under section 48.1 of the CHRA. Similarly, the Immigration and Refugee Board's appointment process can be found in section 153(1) of the *Immigration and Refugee Protection Act*.[59] Available openings and appointments for federal tribunals are made public on the Government of Canada website.[60]

57 SC 2014, c 20, s 376.

58 RSC 1985, c H-6 [CHRA].

59 SC 2001, c 27.

60 "Governor in Council Appointments" (last modified 28 June 2021), online: *Government of Canada* <https://www.canada.ca/en/privy-council/topics/appointments/governor-council.html>.

The Auditor General investigated the appointment process of various federal agencies, specifically the Immigration and Refugee Board (IRB), in 2009 and 2016 and furnished a report[61] about the appointment process in federal tribunals. This report cited concerns with the criteria for candidates and reference checks, as well as a lack of performance-based insights during the appointment process.[62] However, despite recommendations made to the House of Commons and a plan proposed by the Standing Committee on Public Accounts (for guidance and transparency in the appointment process, among other things), a Public Appointments Commission was never created because of a 2012 budget clawback.[63] The 2016 audit considered 24 tribunals, with a specific focus on four, the IRB being one of those.[64] The report concluded that there was still a lack of transparency about the tribunal appointment process.[65]

Conclusion

Now that you have had a taste of the tribunal landscape, the following chapters will guide you through the more intricate procedures of some key tribunals, both federally and in Ontario. The focus of the remaining chapters is on those tribunals that dominate paralegal practice. Each chapter will offer relevant case law, as well as scenarios and review questions based on the content. As you step into the tribunal realm, you will find many colleagues (and perhaps some challenging foes!) navigating the same tribunal path with you; some will be paralegals, and some will be lawyers. The uniting factor is that all will be licensees of the LSO, with some exceptions. The *Law Society Act*[66] and By-Law 4[67] of the LSO allow for representation without a licence in exceptional situations, including by a law student, a paralegal student, or a family member or friend who acts without payment. Hopefully, as a student, you will have the chance for entry-level representation through a placement or volunteer opportunity, while working under the supervision of a licensee. To help you prepare, start navigating the chapters that lie ahead!

61 Office of the Auditor General of Canada, *Report 3—The Governor in Council Appointment Process in Administrative Tribunals* (Ottawa: Office of the Auditor General of Canada, 2016), online: <http://www.oag-bvg.gc.ca/internet/English/parl_oag_201602_03_e_41247.html>.

62 *Ibid*, s 3.4.

63 *Ibid*, ss 3.5-3.7.

64 *Ibid*, s 3.

65 *Ibid*, ss 3.13, 3.29-3.30.

66 RSO 1990, c L.8.

67 Law Society of Ontario, By-Law 4 (1 May 2007; amendments current to 27 May 2021), online: <https://lso.ca/about-lso/legislation-rules/by-laws/by-law-4>.

CASE *in* POINT

Toronto Star v Ontario (AG), 2018 ONSC 2586

Facts

The *Toronto Star* (the *Star*) filed an application with the Superior Court of Justice, challenging the application of FIPPA to 13 administrative tribunals listed as "institutions" pursuant to FIPPA's *General* regulation.[68] The application arose because of difficulties the *Star* faced in accessing adjudicative records from various provincial tribunals.

Obstacles to access arose on both the substantive and the procedural fronts. Substantive obstacles occurred because of the application of section 21 of the Act, which aims to protect the privacy interests of individuals when "adjudicative records" (as defined by SPPA) are requested. Procedural obstacles were encountered because of process requirements provided for under the FIPPA, which often led to delay. The *Star* challenged FIPPA's application on the basis of interference with freedom of the press as protected by section 2(b) of the Charter.

Issue

Do the substantive and procedural requirements of FIPPA, as they apply to the adjudicative records of administrative tribunals, infringe on freedom of the press as protected by section 2(b) of the Charter?

Law

Legislation

- *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11, s 52(1).
- *Canadian Charter of Rights and Freedoms*.
- *Freedom of Information and Protection of Privacy Act*, ss 21, 24(1.1), 24(2), 25, 27, 28(1), 28(2)(c), 28(4), 28(4)(b), 28(4)(c), 28(8.1), 50(1), 50(3), 51, 52(13), 54(1), 54(4).
- *General*, O Reg 460.

Jurisprudence

- *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835, 1994 CanLII 39.
- *R v Mentuck*, 2001 SCC 76.
- *R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46.

68 RRO 1990, Reg 460, Schedule.

Analysis

There is a long-established history of open courts in our common law jurisdiction that dates back to the Magna Carta, and the principle has been enforced in the Canadian arena through the courts' interpretation of section 2(b) of the Charter, as well as the access of the press to legal proceedings.[69] In the context of Ontario tribunals, the SPPA requires open hearings.[70] However, the FIPPA process for accessing records, as governed by sections 27, 28, and 50-4 of the Act, may result in delays that range from months to years.[71] In addition, FIPPA creates a presumption of non-disclosure; it ensures the protection of individual privacy by placing the onus on the party seeking disclosure to justify why the records should be disclosed:[72] "Personal information" is broadly defined in section 2(1) of the Act in a manner that creates the likelihood of a blanket exemption for most adjudicative records.[73] FIPPA is grounded in competing interests of openness and closure.

The open court principle is "inextricably tied"[74] to section 2(b) of the Charter and includes "access to the courts to gather information," as well as protection against measures that prevent the gathering of such information.[75] Such information includes adjudicative records, as these are inherently tied to the transparency that underlines the open court principle, as well as the preservation of the administration of justice.[76] The substantive obstacles (arising out of s 21) and the procedural obstacles (related to delay) constitute an infringement of section 2(b).[77]

Having found an infringement of a Charter right, the Court turned to the section 1 analysis, which applies the *Oakes*[78] test. The Court found that FIPPA has multiple important objectives, including openness and confidentiality.[79] There is a rational argument for including adjudicative tribunals within the FIPPA regime; the purpose of the Act overall is to balance rights of access with privacy.[80]

69 *Toronto Star*, *supra* note 54 at paras 3-4.

70 *Ibid* at para 6.

71 *Ibid* at para 19.

72 *Ibid* at para 23.

73 *Ibid* at paras 23, 29.

74 *Ibid* at para 54.

75 *Ibid*.

76 *Ibid* at para 63.

77 *Ibid* at paras 65, 70.

78 *R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46.

79 *Toronto Star*, *supra* note 54 at para 79.

80 *Ibid* at para 82.

Concerning the question of minimal impairment, the Court found that the substantive obstacles enshrined in section 21 of the Act, which make privacy and non-disclosure the presumptive rule, create a significant impairment that qualifies as a significant barrier to section 2(b) of the Charter. The procedural obstacles, though frustrating, are less a reflection of FIPPA itself and more likely a reflection of institution and bureaucracy; impairment is minimal in this respect.[81] When weighing the proportionality between the deleterious and salutary effects (see Box 1.1) of FIPPA's infringing measures, the effects of the former are substantial because they emphasize privacy over openness. This impacts freedom of the press substantially, and such deleterious effects outweigh any salutary effects.[82]

BOX 1.1

DELETERIOUS AND SALUTARY EFFECTS

The third prong of the Charter proportionality test requires a balancing of the deleterious effects of the legislation against the salutary effects of the legislation—there must be proportionality between the two. "Deleterious" refers to harmful aspects. "Salutary" refers to beneficial aspects. There is a good discussion about this prong of the proportionality test in *Thomson Newspapers Co v Canada (AG)*, [1998] 1 SCR 877, 1998 CanLII 829.

Decision

The provisions of FIPPA relating to the access to adjudicative records of tribunals infringe section 2(b) of the Charter, both substantively and procedurally; however, the procedural requirements are justified as a minimal impairment, whereas the substantive obstacles are not.[83]

Sections 21(1) and (3) of FIPPA are inoperative under section 52(1) of the *Constitution Act*. The ruling does not apply to non-adjudicative agencies or records held by tribunals that are outside the definition of adjudicative records; the ruling does apply to adjudicative records of the 13 tribunals named, and it can be extended to any other institution in the FIPPA schedule that is adjudicative in nature and holds adjudicative records.[84] The Court

81 *Ibid* at paras 105-9.

82 *Ibid* at paras 111-16.

83 *Ibid* at para 130.

84 *Ibid* at para 32.

declared FIPPA's application to adjudicative records to be invalid and suspended it for one year to allow time for legislative action.

The test provided by the *Dagenais* and *Mentuck* decisions[85] should be applied by any tribunal when a request for adjudicative records is made, as it is adaptable and flexible to meet the unique needs of the tribunal landscape.[86]

KEY LEGISLATION

Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009
- *Adjudicative Tribunals and Clusters*, O Reg 126/10
- *Appointment to Adjudicative Tribunals*, O Reg 88/11
- *Business Plan—Contents*, O Reg 89/11
- *Deadlines re Accountability Documents*, O Reg 90/11
- *Ethics Plan—Contents*, O Reg 91/11

Law Society of Ontario's *Paralegal Rules of Conduct*

Statutory Powers Procedure Act

85 *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835, 1994 CanLII 39; *R v Mentuck*, 2001 SCC 76.

86 *Toronto Star*, *supra* note 54 at paras 134-35.

KEY TERMS

judicial independence
a cornerstone of the Canadian judicial system that ensures security of tenure, financial security, and administrative independence

Law Society of Ontario
the licensing and regulatory body in Ontario for lawyers and paralegals

open court
a principle referring to a notion entrenched in common law that court processes and the events that transpire in a hearing must be available to the public and be discussed in the media to further the understanding of our legal system and the laws that govern the people

procedural fairness
a founding principle of administrative law, based on a party's right to be heard by an independent and unbiased decision-maker; to be informed of the decision made, including reasons for the decision; and to respond to the decision

Rules of Conduct
mandatory ethical guidelines for licensed paralegals in Ontario

tribunal
a quasi-judicial body with limited jurisdiction that determines questions of fact or law

REVIEW QUESTIONS

1. How does the Steps to Justice program enhance access to justice?
2. Tribunals are often viewed as being more efficient and relaxed than the standard courtroom. How will these characteristics influence your practice as a paralegal before tribunals?
3. Choose one of the Rules of Conduct highlighted in this chapter and explain, in your own words, what it will mean for you as a practitioner.
4. What was the purpose of the ATAGAA?
5. Why is independence of a tribunal important?
6. Why is tribunal accountability important?
7. What is the significance of the SPPA in Ontario?
8. What powers does the Ombudsman have when investigating a complaint about a tribunal?
9. What is the Administrative Tribunals Support Service of Canada?
10. How are federal tribunal appointments made?