11-13-2020

Procedural Discretionary Decisions and Access to Justice Before Administrative Tribunals

Rachel Elizabeth Weiner
Osgoode Hall Law School of York University (Student Author)

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RACHEL WEINER

A THESIS SUBMITTED TO THE FACULTY OF GRADUATE STUDIES
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE
DEGREE OF MASTER OF LAWS

GRADUATE PROGRAM IN LAW
OSGOODE HALL LAW SCHOOL
YORK UNIVERSITY
TORONTO, ONTARIO

September 2020

Abstract

This thesis considers procedural discretionary decision-making by administrative tribunals and access to justice for marginalized and low-income individuals. I begin by reviewing literature regarding discretionary decision-making, access to justice, procedural justice, and ideal theories focusing on transparent and respectful engagement and dialogue between decision-makers and litigants. I then analyze three case studies regarding procedural discretionary decision-making and accommodations in the hearing process, addressing primarily disability and language barriers experienced by litigants before the Social Benefits Tribunal, Human Rights Tribunal of Ontario, and Landlord and Tenant Board. I then compare theories of discretionary decision-making with actual decision-making practices employed by tribunal adjudicators. While certain positive practices may play a role in achieving more meaningful engagement between decision-makers and parties, my analysis also reveals systemic barriers to access to justice and limitations of procedural discretionary decision-making by tribunals.

Acknowledgements

I never anticipated that I would be writing a thesis during a global pandemic. I am honestly not sure I would have attempted such an ambitious project, knowing what this year would bring. However, with my thesis already underway by March 2020, I had the unexpected opportunity to examine my work through the lens of unprecedented changes in the world and the legal system, with the support of my mentors, colleagues, family, and friends.

First and foremost, I am grateful for the guidance and encouragement provided by my supervisor, Professor Craig Scott. His helpful feedback at every stage of this project has allowed me to deepen my analysis and examine administrative law theory and practice in new ways. Without the usual opportunities to discuss my thesis and interact in person with professors and colleagues over the last few months, it was incredibly important to my progress that Professor Scott remained engaged with my work, was always available to provide thoughtful comments, and continued to be confident in my ability to do my best work, even under less-than-ideal circumstances.

Second, I have greatly appreciated the feedback I received from Professor Janet Mosher, the second member of my committee. Her advice informed my initial thesis proposal and allowed me to strengthen earlier drafts of this thesis. Like Professor Scott, she encouraged me to consider additional questions and sources that allowed me to analyze tribunal decision-making in a more nuanced way.

Third, I also thank the Osgoode Graduate Program staff for their support. Professor Sonia Lawrence was approachable, positive and helpful in the development of my thesis proposal. Chantel Thompson, Ammad Khan, and Heather Moore also provided useful guidance at various times during the past year.

Finally, I am grateful to my family and friends for their encouragement and their patience. In particular, I am certain that my parents did not anticipate that their retirement from legal work would involve frequent discussions about administrative law, but their support has been invaluable.

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Introduction

"[G]overnments have a proactive human rights duty to prevent discrimination which includes ensuring their funding policies, programs and formulas are designed from the outset based on a substantive equality analysis and are regularly monitored and updated."[1]

This is not an aspiration, an advocacy statement, or ideal theory.

This is a recent description of human rights principles by the Ontario Divisional Court.

This statement appears in a judicial review decision regarding the Ontario government's compensation of midwives decided on June 26, 2020.[2] The Human Rights Tribunal of Ontario (HRTO) decided that discrimination based on gender played a role in the Ontario government's compensation of midwives, and the government subsequently sought judicial review.[3] In dismissing the government's arguments, the Divisional Court arguably went further than the HRTO and discussed the government's role as policymaker and funder.[4] It did so even though the Ontario government does not directly employ midwives and omitted them from the *Pay Equity Act*.[5] No matter how responsibility was delegated, the government could not escape its obligation to treat midwives equally.

This case raises issues regarding government allocation of resources, power imbalances, and systemic discrimination that are also relevant to the operation of several Ontario tribunals that have major impacts on low-income persons. These tribunals were ostensibly created to allow

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[1] *Ontario v Association of Ontario Midwives*, 2020 ONSC 2839 at para 189 (Div Ct) [*AOM*]
[2] Even though this may be a progressive statement of the law, the Divisional Court relied on Supreme Court of Canada and Canadian Human Rights Tribunal decisions that support its position: *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada*), 2016 CHRT 2 [*Caring Society*]; *Moore v British Columbia (Education)*, 2012 SCC 61 [*Moore*]
[3] *AOM, supra* note 1 at paras 9-10
[4] The HRTO decision focuses on the government's role as employer, its interactions with the midwives over a long period of time, and the fact that it did not follow relevant Ontario Human Rights Commission policies regarding discrimination in employment: *Association of Ontario Midwives v Ontario (Health and Long-Term Care),* 2018 HRTO 1335 at paras 315-321
[5] *Pay Equity Act*, RSO 1990, c P.7

for efficient and accessible adjudication of important issues, such as income support, housing, and claims of discrimination. However, taking a more skeptical view, they may also represent government delegation and abdication of responsibility for significant societal problems that primarily affect marginalized people. These tribunals have also recently been criticized for their delays and understaffing as a result of the Ontario government's failure to appoint adjudicators. While legal academics have adopted ideal theories about how tribunals should engage more meaningfully with litigants and promote human rights and access to justice, these ideals appear further and further from reality as tribunals have fewer resources to accomplish their mandates.

Although administrative law scholarship often focuses on judicial review, this is an avenue that is not often accessible to low-income parties. From the perspective of these individuals, how a tribunal decision-maker exercises discretion may be crucial for their income support, housing, or discrimination claim. Some tribunals, such as the Social Benefits Tribunal (SBT), decide appeals from the decisions of front-line bureaucrats.[6] In those cases, an appeal to a tribunal is necessary when parties are dissatisfied with the initial decision they receive. However, some tribunals, such as the Landlord and Tenant Board (LTB), adjudicate a party's legal matter for the first time. Institutional and individual procedural decisions made by tribunals may therefore enable or undermine the full and meaningful participation of marginalized parties in administrative decision-making.

In my thesis, I analyze procedural discretionary decisions made by tribunal adjudicators that relate to access to the tribunal process itself. Procedural discretionary decisions are choices that adjudicators make about the tribunal process based on their interpretation of the enabling legislation of the tribunal. In particular, I focus on decisions addressing disability and language barriers, and procedural accommodations that may address them. As I describe in more detail

[6] The SBT decides these appeals *de novo*, without any deference, and may consider new evidence if it is submitted at the appropriate time: O Reg 222/98, s 64. This means that they place themselves in the position of the front-line decision-makers and determine whether they reached the correct outcomes.

below, disability and language are significant barriers that affect many low-income parties before tribunals, and may be more likely to be discussed in tribunal decisions.

I will begin my thesis by reviewing the relevant literature regarding procedural discretionary decisions by administrative tribunals and discussing access to justice, procedural justice, and ideal theories of discretionary decision-making (chapter one). These theoretical models emphasize engagement and an environment of trust that promotes dialogue about the circumstances and needs of parties. They also reflect concepts of meaningful participation and treatment of parties with respect, dignity and transparency, integral to the meaning of access to justice that I will later describe.

I will then analyze three case studies regarding procedural decision-making and accommodations in the hearing process at the LTB, HRTO, and SBT (chapter two). To identify the approaches that tribunal adjudicators take to recognize barriers and accommodate litigants, I define "accommodation" broadly. This is consistent with what access to justice requires in the tribunal context, as detailed in chapter one. This definition of "accommodation" is intentionally wider than legal requirements imposed by human rights law, the *Canadian Charter of Rights and Freedoms*,[7] or procedural fairness to allow for analysis of situations, such as poverty, that may not strictly fit within these legal concepts.

After identifying approaches employed by adjudicators to make procedural discretionary decisions, I measure these approaches against ideal theories of discretionary decision-making (chapter three). I demonstrate that, in some situations, procedural discretionary decisions and accommodations to the hearing process may play a role in achieving more meaningful engagement between decision-makers and litigants. By providing transparent information about the tribunal process, identifying barriers before the hearing through pre-hearing motions and case management, addressing barriers that arise during the hearing in flexible ways, and

[7] *Canadian Charter of Rights Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act*, 1982 (UK), 1982, c 11 [*Charter*]

proactively inquiring, especially with self-represented parties, about potential accommodations that may be needed, tribunal adjudicators may promote more inclusive procedures consistent with theories of discretionary decision-making.

However, implementing these theories in the context of actual tribunal decision-making is not a simple matter, accounting for the practical realities facing tribunal adjudicators. I also discuss several factors that limit what decision-makers can achieve by exercising procedural discretion, including power imbalances,[8] the procedural fairness interests of opposing parties, limited tribunal resources, the tribunal's statutory mandate, and institutional policies developed to achieve that mandate. In doing so, I analyze differences in approach between the SBT, HRTO and LTB and offer explanations for these differences based on the tribunal context and academic literature. I identify situations where the reasons of tribunal adjudicators may mask systemic issues implicating access to justice. I also critically consider the limitations of judicial review in ensuring that tribunals engage meaningfully with parties.

My thesis concludes with some brief thoughts about what kinds of future research would be useful for testing and deepening my findings and arguments. In providing these observations, I reflect on the reasons why tribunals may reform their approaches to procedural discretionary decision-making. In particular, the COVID-19 pandemic has led to rapid changes to court and tribunal procedures, and may provide an opportunity to implement reforms that can promote access to justice.

[8] Power imbalances between parties, and between a party and a decision-maker are both relevant.

Chapter One: Procedural Discretionary Decisions, Access to Justice, and Theories of Discretion

Introduction

In this chapter, I will review academic literature regarding administrative decision-making, and explain why an examination of procedural discretionary decisions with a view to access to justice will add to our current understanding of administrative law. This analysis is conducted in three parts.

First, I will discuss how discretionary decision-making fits into the current understanding of administrative law. Within this discussion, I will explain why a study of procedural discretion and meaningful participation of litigants in administrative decisions may allow for a more nuanced analysis of discretion that transcends the "rule of law/arbitrary discretion" binary.

Second, I will explain how procedural discretionary decisions may relate to access to justice, as understood from different perspectives, including domestic constitutional and human rights law, international law, and litigants who identify as a member of one or more disadvantaged groups. Through the analysis of each of these points of view, I identify unifying principles regarding what access to justice means, and more specific criteria regarding disability and language barriers.

Third, I will describe how this concept of access to justice is reflected by theoretical models of discretion that emphasize meaningful engagement with litigants. I will also explain why this kind of decision-making is also consistent with current Supreme Court of Canada case law regarding judicial review and *Charter* and human rights values.

Discretionary Decision-making in Administrative Law

Much of the legal scholarship relating to administrative law focuses on judicial review – more specifically, how it addresses the tension between the rule of law and the discretion of administrative decision-makers. I will review this literature and how it has influenced the

development of administrative law doctrine by the Supreme Court of Canada. I will also explain why studying administrative discretion is important for understanding how administrative tribunals function and the theoretical tensions that animate studies of this area of the law. In doing so, I will provide examples relevant to tribunals that serve low-income parties to demonstrate how administrative discretion is exercised from a practical perspective. I also will address how theories of discretion that emphasize the democratic norms underlying administrative law and the meaningful participation of litigants may sidestep the seemingly endless debates regarding the contrast between the rule of law and seemingly unlimited administrative discretion.

Academic literature in Canadian administrative law often addresses the tension between meaningful judicial review, as a check on arbitrary decision-making, and the importance of deferring to expert decision-makers' exercise of discretion. This rule of law versus discretion binary is exemplified by the contrasting views of A.V. Dicey and John Willis. Dicey argued that it was the role of judges to safeguard the rule of law by ensuring that administrative tribunals do not exceed their delegated authority.[9] When courts can act as a meaningful check on administrative power, parties to administrative disputes can rest assured that they have a remedy for any arbitrary exercises of discretion. In contrast, Willis asserted that expert tribunals are best placed to make decisions that implement the intent of the legislature.[10] Willis took a functional approach, preferring expert government adjudicators and policymakers over generalist judges.

Mirroring the debate between Dicey and Willis, Canadian courts have struggled to develop an approach to judicial review that balances these competing concerns. In *Dunsmuir*, the Supreme Court of Canada developed a framework for judicial review, holding that reviewing courts should pay "respectful attention to the reasons offered or which could be offered in support of

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[9] AV Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed (London, UK: Macmillan, 1965) at 392-393

[10] John Willis, "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional" (1935) 1 UTLJ 53 at 75-81

a decision," [11] consistent with the views of David Dyzenhaus. However, lingering questions persisted regarding how and when courts should apply less intense scrutiny to administrative decisions by way of the reasonableness standard.[12]

For example, in *Wilson*, the Supreme Court of Canada split with respect to the result, the appropriate standard of review, and the approach to judicial review. In this case, there were conflicting lines of arbitral decisions about the dismissal of federal, non-unionized employees.[13] Justice Abella concluded that these employees must be dismissed for cause and explained why this approach was the only reasonable outcome.[14] In addition, she advocated for a single standard of review – reasonableness – in administrative law proceedings.[15] Justices McLachlin, Karakatsanis, Wagner, and Gascon agreed with the result Justice Abella reached, but held that it was "unnecessary" to "clarify or simplify our standard of review jurisprudence."[16] Justice Cromwell also concurred with Justice Abella in the result, but disagreed with her characterization of the reasonableness standard.[17] Finally, in contrast to the rest of the court, Justices Moldaver, Côté, and Brown selected the correctness standard, and concluded that dismissals without cause may be justified with notice.[18] They held that it was the court's role,

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[11] *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 48, citing David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford, UK: Hart Publishing, 1997) 279 at 286

[12] Both Justice Stratas and Paul Daly were critical of the state of law at this time, arguing that a focus on underlying first principles of administrative law would provide the necessary theoretical foundation: David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42:1 Queen's LJ 27 at 31-40; Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015) 52 Alta L Rev 799 at 800, 812, 815-818, 826-827

[13] *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at paras 59-61, 70, 83 [*Wilson*]

[14] *Ibid* at paras 39-69

[15] Justice Abella asserted that a single reasonable standard "accommodates the ability to continue to protect both deference *and* the possibility of a single answer where the rule of law demands it, as in the four categories singled out for correctness review in *Dunsmuir*": *ibid* at para 31, see also paras 15-37

[16] *Ibid* at para 70

[17] *Ibid* at para 73, see also paras 71-72

[18] *Ibid* at paras 80-148

pursuant to the rule of law, to resolve conflicting interpretations of a home statute adopted by administrative decision-makers.[19]

In December 2019, the Supreme Court of Canada attempted to simplify the law of judicial review in *Vavilov*.[20] The majority reasons endeavoured to pragmatically resolve specific issues of controversy and emphasize "responsive justification" in determining the reasonableness of administrative tribunal decisions.[21] Responsive justification means that a decision-maker must "explain why its decision best reflects the legislature's intention",[22] based on "the constellation of law and facts that are relevant to the decision."[23]

Only a few months after *Vavilov* was released, it is too early to tell whether this revised framework will have its intended effect. Just to consider one critical commentator, however, Paul Daly observes that the Court's revised framework is not built on an analysis of first principles of administrative law.[24] He asserts that the ad hoc approach of "responsive justification" endorsed by the Supreme Court could lead to challenges later on. One such challenge may relate to issues of persistent disagreement between tribunal decision-makers, the issue raised in *Wilson*. While the court in *Vavilov* emphasized the importance of the rule of law, it struggled to provide a practically workable solution to this problem.[25]

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[19] *Ibid* at paras 80-92

[20] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]

[21] Meanwhile, statutory appeals on questions of law should be reviewed on a standard of correctness, which would likely require even more rigorous review of decisions of some tribunals, such as the SBT or LTB: *ibid* at paras 36-52

[22] *Ibid* at para 133

[23] *Ibid* at para 105, see also para 106. The court also stated at paragraph 99 that "[t]o make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision."

[24] Paul Daly, "The *Vavilov* Framework and the Future of Canadian Administrative Law" (2020) 33:2 Can J Admin L & Prac 111 at 142-144

[25] While professing its commitment to the principle of the rule of law, the majority declined to permit reviewing courts to apply a correctness standard to resolve questions of persistent disagreement within a particular tribunal: *Vavilov, supra* note 20 at paras 71-72. The Court's solution – that tribunals will respond to signalling by courts to determine a consistent approach – may do little to resolve conflicting lines of cases from tribunals.

While the law/discretion binary may continue to animate debates regarding the standard of review and how to apply it, other scholars are engaged in studies of how discretion is exercised at first instance by administrative decision-makers themselves. Judicial review is only relevant when parties bring their dispute before a court in the first place. In all other cases, the way tribunal decision-makers exercise their own discretion is almost always, or at least very often, all that matters. This is particularly apt with respect to low-income litigants, who may not have the knowledge, resources, or legal representation to apply for judicial review successfully, or at all.

There are additional reasons why the study of administrative discretion is important. Commentators in the area of the social sciences are critical of the narrow focus of legal scholarship on judicial review. Many of these researchers emphasize the importance of how decision-makers reach outcomes consistent with the goals and practical realities of administrative bodies, rather than rules, enabling statutes, or legal fictions.[26] In addition, some legal academics, going back at least to John Willis,[27] have taken interest in discretionary decisions with a view to the expertise and process of administrative decision-makers.

Following Denis Galligan, I will assume that discretionary decisions may be usefully defined as choices by an administrative decision-maker between multiple outcomes based on the interpretation of governing legislation.[28] It follows that procedural discretionary decisions relate to choices regarding processes with reference to a tribunal's enabling statute, rather

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[26] Anna Pratt & Lorne Sossin, "A Brief Introduction of the Puzzle of Discretion" (2009) 24:3 CJLS 301 at 304-306.
[27] John Willis took an interest in the everyday workings of administrative tribunals, a subject that was analyzed by socio-legal scholars after he retired: Michael Taggart, "Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law" (2005) 43:3 Osgoode Hall LJ 223 at 249-251. See also Lorne Sossin, "From Neutrality to Compassion: the Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion" (2005) 55 UTLJ 427 at 429-430
[28] Denis Galligan, *Discretionary Powers* (Oxford: Oxford University Press, 1986) at 109-111. See also: Jennifer Raso, "From Enforcement to Integration: Infusing Administrative Decision-Making with Human Rights Values" (2015) 32 Windsor YB Access to Just 71 at 92-93 [Raso, "Human Rights"]

than substantive outcomes.[29]

There are two levels of discretion that tribunals may exercise.[30] First, an administrative body may make decisions at the systemic or institutional level to develop policies and standards that may apply to a variety of parties. Second, discretionary decisions may also be made at the level of individual cases decided within this framework. Both of these kinds of decisions may implicate procedural discretion. Although every decision may not fit neatly within these two categories, they still serve a helpful analytical function in analyzing a variety of settings where administrative decision-making occurs.[31] While the nature of the decision-maker's task and their organizational structure may lead to some practical differences between decision-makers,[32] these general distinctions provide a useful framework for envisioning the different roles that administrative decision-makers play.

Institutional decisions set standards, policies and procedures that govern how an administrative body will decide future cases.[33] The legislature may delegate to administrative bodies the power to make regulations or rules, while others may make some program decisions informally.[34] Many institutional decisions relate to approaches, programs and processes to be used in the future.[35] These decisions may have profound effects on how an administrative body operates, and have the potential to promote or undermine access to justice on a significant scale.

For example, Lorne Sossin describes how changes to the social assistance service delivery

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[29] I acknowledge that the distinction between process and substance is not always clear. Sometimes, procedural and substantive elements of an administrative decision may be interrelated. For example, David Dyzenhaus and Evan Fox-Decent discuss the duty to give reasons, explaining that it has implications both for procedural fairness and for the substantive reasonableness of a decision: David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v Canada*" (2001), 51 UTLJ 193 at 241-242
[30] Galligan, *supra* note 28 at 114-117; Raso, "Human Rights", *supra* note 28 at 92-94
[31] Galligan, *supra* note 28 at 116; Raso, "Human Rights", *supra* note 28 at 94
[32] Galligan, supra note 28 at 113
[33] *Ibid* at 115-116
[34] *Ibid*
[35] *Ibid* at 116-117

model in Ontario in the late 1990s created barriers to applicants attempting to access benefits.[36] New telephone screening procedures dehumanized applicants and imposed pressures, analogous to quotas, to screen applicants more efficiently.[37] Meanwhile, some applicants did not have access to telephones, and others were confused by the new process, intake scripts and voicemail systems.[38] Others were more likely to encounter difficulties with this new screening process if they had certain disabilities, such as a cognitive impairment.[39] Furthermore, applicants who qualified for in-person interviews attended a cold, sterile and degrading office environment.[40] Staff sat behind a thick plexi-glass screen, plastic chairs were bolted to the floor, and waiting rooms were devoid of posters, pamphlets, or other decoration.[41] These institutional changes had profound effects on the ability of applicants to access benefits and how they were treated in doing so.

Institutional procedural discretion may also be exercised by tribunals to create policies, procedures and approaches that advance the tribunal's statutory mandate. For example, Michelle Alton discusses adjudicative models in the tribunal context with reference to procedural fairness, describing case screening processes, provision of public legal information by the tribunal, alternatives to an in-person hearing, and designation of tribunal staff to assist litigants in completing forms and understanding tribunal procedures.[42] While the suitability of each of these approaches may vary depending on the tribunal context and the needs of users, tribunals often have significant flexibility to make institutional procedural decisions that may have a significant impact on how they function.

Nonetheless, even though policies or standards may constrain decision-makers or

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[36] Lorne Sossin, "Boldly Going Where No Law Has Gone Before: Call Centres, Intake Scripts, Database Fields, and Discretionary Justice in Social Assistance" (2004) 42:3 Osgoode Hall LJ 363 [Sossin, "Boldly Going"]. See also, Raso, "Human Rights", *supra* note 28 at 94
[37] Sossin, "Boldly Going", *supra* note 36 at 373-375
[38] *Ibid*
[39] *Ibid*
[40] *Ibid* at 381
[41] *Ibid*
[42] Michelle A Alton, "Rethinking Fairness in Tribunal Adjudication to Best Promote Access to Justice" (2019) 32 Can J Admin L & Prac 151 at 160-162, 169-177

administrative bodies, they retain varying degrees of discretion to decide individual matters. These individual decisions may relate to the rights and obligations of parties before them or specific policy issues falling under the relevant statutory scheme.[43] Many individual decisions deal with specific benefits, entitlements, or enforcement, while others, especially at the policy level, may set precedents which have implications going forward.[44]

The scope of a decision-maker's discretion in some cases may be broader than others, based on the nature and number of applicable standards that guide and constrain it.[45] Many policy decisions may have less rigorous or fewer applicable standards as compared to a decision about a specific person's rights or duties. That said, even where decision-makers are narrowly constrained, they may still be able to exercise their discretion to adapt to situations and applicants before them.

For example, Jennifer Raso describes how social assistance caseworkers have flexibility to decide what versions of certain documents they are willing to accept.[46] Applicants for social assistance are required to produce a variety of documents to confirm their identity, financial situation, housing situation, and immigration status.[47] That said, a caseworker may exercise discretion to allow applicants to produce photocopies, to show them an original that does not become part of the case file, or to assist disadvantaged applicants in collecting these documents.[48] By doing so, caseworkers can promote access to the welfare determination process by altering the procedures through which they receive documents. At the same time, of course, the same scope for discretion means that bureaucratically or unsympathetically-minded caseworkers can insist on a stricter application of such document requirements.

Individual adjudicators must also work within the constraints of policies, practice directions,

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[43] Galligan, *supra* note 28 at 114-115
[44] *Ibid* at 116-117
[45] *Ibid* at 114-115
[46] Raso, "Human Rights", *supra* note 28 at 95-96.
[47] *Ibid*
[48] *Ibid*

procedures and institutional approaches of their particular tribunal. Tribunals may have their own institutional practices for receiving evidence, analogous to the practices governing front-line social assistance caseworkers described by Raso.[49] Similarly, a tribunal might have specific practice directions that govern how and when hearings are scheduled and adjournments may be sought.[50] Although tribunal adjudicators may have discretion to alter or waive certain elements of these institutional practices in exercising their procedural discretion, these practices provides a starting point for how they approach their task.

In this regard, Raso analyzes how front-line caseworkers administering the Ontario Works program adapted to a new Social Assistance Management System (SAMS) put in place to limit their discretion.[51] [add sentence here] SAMS was created to reshape the role of social assistance caseworkers "away from client-centred social work and towards data entry and caseload management tasks."[52] To a large extent, SAMS achieved its objective – it decentred the role of caseworkers, directed them toward particular outcomes, and required them to spend significant time inputting and tracking data.[53] It was simply not possible for a caseworker to adjust the computer system-generated outcomes in every case.[54]

Nonetheless, Raso observes that at least some caseworkers navigated the new case management system to preserve their discretion in some of their cases. Based on interviews she conducted, Raso concludes that they circumvented SAMS in certain instances by inputting "placeholder" data, by adjusting dates to maximize benefits or minimize an overpayment, or by

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[49] For example, the Workplace Safety and Insurance Appeals Tribunal has a practice direction explaining how expert reports may be filed with the tribunal and outlining specific requirements that parties must follow: Workplace Safety and Insurance Appeals Tribunal, "Expert Evidence", online: <http://www.wsiat.on.ca/english/pd/pdExpert.htm>

[50] For example, Human Rights Tribunal of Ontario, "Practice Direction on Scheduling Hearings and Mediations, Rescheduling Requests, and Requests for Adjournments", online: <http://www.sjto.gov.on.ca/documents/hrto/Practice%20Directions/Scheduling%20of%20Hearings%20and%20Mediations.html>

[51] Jennifer Raso, "Displacement as Regulation: New Regulatory Technologies and Front-Lines Decision-Making in Ontario Works" (2017) 32:1 CJLS 75 [Raso, "Displacement as Regulation"]

[52] *Ibid* at 82

[53] *Ibid* at 85-86

[54] *Ibid* at 86

translating applicant requests into categories of allowable benefits.[55] This study demonstrates how it may be possible for decision-makers to preserve some discretion in some cases in response to institutional constraints.[56] However, in the words of Raso, "even as front-line workers re-skill and re-centre themselves as professional decision-makers […] SAMS continues to function as a uniquely powerful institutional force governing their everyday decisions."[57]

While tribunal adjudicators may not be subject to a computer system with such pervasive effects, they do operate within a matrix of procedures, rules, and institutional approaches that also significantly structure how they approach their procedural discretion. In some situations, tribunal adjudicators could also be placed in a position where they have limited opportunities to exercise their discretion to meet the needs of litigants.

Discretionary decision-making depends on how decision-makers interpret their enabling statute, from tribunal adjudicators to policymakers.[58] Galligan describes how decision-makers develop policies, procedures and approaches that embody a working conception of their statutory goals.[59] He also recognizes how decision-makers may interpret their home statutes in more of a practical way, based on their "working conception" of their job as a decision-maker, informed by their policy preferences, moral views and political opinions.[60] In other words, they may find it essential to "deliberately […] modify, embellish or depart from those objects or directions" specified in legislation or regulations to fulfill their statutory mandate.[61] This approach would apply regardless of where a decision may fall on a spectrum of administrative

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[55] *Ibid* at 88-92
[56] Laura Pottie & Lorne Sossin, "Demystifying the Boundaries of Public Law: Policy, Discretion, and Social Welfare" (2005), 38:1 UBC L Rev 147 at 152-159
[57] Raso, "Displacement as Regulation", *supra* note 51 at 88
[58] Galligan, *supra* note 28 at 108-117
[59] *Ibid* at 110
[60] *Ibid* at 110-111
[61] *Ibid* at 110. Although Galligan acknowledges that tribunal decision-makers are often viewed as independent from politics and objective in their approach, these ideal conceptions of tribunal decision-making have been criticized. He explains that in the exercise of discretion, "issues of policy and value are unavoidable", especially in "a more informal and adaptive environment" of an administrative tribunal: *ibid* at 118-119

decisions to quasi-judicial decisions.[62] Sossin explains that, "every bureaucratic decision represents both a political act and a personal judgment, whether it is a junior official recommending whether a license should be granted, or an administrative board interpreting the *Charter*."[63]

Consequently, decision-making is also influenced by a tribunal's institutional realities, including political pressures, economic pressures, equities, and how to allocate limited resources.[64] For example, the Ontario government of Premier Doug Ford halted evictions altogether in the context of the recent COVID-19 pandemic.[65] After this moratorium on residential evictions is lifted, the LTB may face an onslaught of eviction applications.[66] This increase may also reflect a recent trend upwards in evictions as landlords ended leases on the basis of renovating units and moving in themselves to circumvent rent controls.[67] A higher caseload would impose new pressures on the LTB.

A particularly troubling issue facing many Ontario tribunals is a shortage of adjudicators. In 2019, the HRTO began experiencing significant delays caused by an increase in its caseload and

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[62] Lorne Sossin, "An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law" (2002) 27:2 Queen's LJ 809 at 812-815 [Sossin, "Intimate Approach"]
[63] *Ibid* at 815
[64] *Ibid* at 110-112
[65] An order of the Ontario Superior Court states that evictions are suspended until the end of the month that Ontario's state of emergency, pursuant to the *Emergency Management and Civil Protection Act*, RSO 1990, c E.9 s 7.0.1(1), expires: *Attorney General for Ontario v Persons Unknown*, amended on 6 July 2020 (Ont SCJ), online: < https://www.ontariocourts.ca/scj/chief-justice-court-order-susp-resid-evict/>. The provincial declaration of the state of emergency ended in July 2020: Government of Ontario, "Emergency Information" (updated 27 July, 2020), online: < https://www.ontario.ca/page/emergency-information#emergencyorders>.
[66] The LTB is likely to begin processing eviction applications in August 2020: Advocacy Centre for Tenants Ontario, "5 Bill 184 Changes to the Law that Tenants Must Know" (27 July 2020), online: <https://www.acto.ca/5-bill-184-changes-to-the-law/> [ACTO, "Bill 184"]. Housing advocates predict that once the moratorium on evictions ends, thousands of people may be evicted from their homes: Victoria Gibson, "More than 6000 Ontario Tenants Could Face Eviction for Nonpayment of Rent during COVID-19, New Figures Show", *Toronto Star* (25 July 2020), online: < https://www.thestar.com/news/gta/2020/07/25/more-than-6000-ontario-tenants-could-face-eviction-for-nonpayment-of-rent-during-covid-19-new-figures-show.html>
[67] Advocacy Centre for Tenants Ontario, "We Can't Wait: Preserving Our Affordable Rental Housing in Ontario" (2019), online: <https://www.acto.ca/production/wp-content/uploads/2019/11/FINAL_Report_WeCantWait_Nov2019.pdf> at 18-19

vacant adjudicator positions.[68] Similarly, in early January of the current year, the Ontario Ombudsman began investigating delays at the LTB, attributed, at least in part, to staffing shortages.[69] Beyond failing to adequately staff tribunals, political appointments of adjudicators is another way that governments of the day may affect how well and how efficiently tribunals exercise their discretion. Democracy Watch recently commenced a legal challenge against the Ontario government on the basis of its practices regarding the appointment and reappointment of adjudicators.[70]

Furthermore, as creatures of statute, the mandate, role, and even the existence of tribunals may be changed by governments through changes to legislation. For example, the Criminal Injuries Compensation Board is currently winding down its last cases after the Ontario government decided that this tribunal would be replaced by an administrative process.[71] As well, Bill 184, *Protecting Tenants and Strengthening Community Housing Act*, may increase the workload of the LTB at the expense of vulnerable tenants.[72]

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[68] Paola Lorrigio, "Delays at Ontario human rights tribunal could undermine cases: lawyers," *National Post* (11 January 2020), online: <https://nationalpost.com/pmn/news-pmn/canada-news-pmn/delays-at-ontario-human-rights-tribunal-could-undermine-cases-lawyers>

[69] Tom Cardoso, "Ontario Ombudsman launches probe into long wait times at Landlord and Tenant Board", *Globe and Mail* (9 January 2020), online: < https://www.theglobeandmail.com/canada/article-ontario-ombudsman-launching-investigation-into-long-wait-times-at/>; Ben Spurr, "Surge of complaints prompts Ontario ombudsman to investigate delays at Landlord and Tenant Board", *Toronto Star* (9 January 2020), online: <https://www.thestar.com/news/gta/2020/01/09/surge-of-complaints-prompts-ontario-ombudsman-to-investigate-delays-at-landlord-and-tenant-board.html>

[70] Democracy Watch filed an application in Superior Court against Ontario on July 8, 2020, arguing that the government appointment and reappointment policies for tribunal members are inconsistent with the enabling statutes of these tribunals, the independence of these decision-makers, the rule of law, and the *Adjudicative Tribunal Accountability, Governance and Appointments Act, 2009,* SO 2009, c 33, Sch 5: *Democracy Watch v Ontario* (Notice of Application), online: < https://democracywatch.ca/wp-content/uploads/FinalNoticeOfApplicOntTribunalConstCaseJuly082020.pdf>

[71] Tribunals Ontario, Social Justice Division, Latest News, "CICB Update" (19 December 2019), online: <http://www.sjto.gov.on.ca/en/latest-news/#cicb> [Tribunals Ontario, "CICB Update"]

[72] Bill 184, *Protecting Tenants and Strengthening Community Housing Act*, 1st Sess, 42nd Leg, Ontario, 2020 (Royal Assent on 21 July 2020). Tenant advocacy groups, such as the Advocacy Centre for Tenants Ontario (ACTO), have raised significant concerns about how these legislative changes may affect vulnerable tenants. For example, ACTO asserts that Bill 184 allows a landlord to draft a repayment agreement that allows it to apply to LTB for an eviction order, without a hearing or prior notice, if the tenant breaches the agreement. ACTO explains that, under these

The political nature of administrative decisions may be dependent on government actions to direct what tribunals do.[73] However, the government's role in creating and making changes to tribunals by amending legislation also implies a level of democratic participation that may reconcile the law/discretion binary animating much of the scholarship regarding judicial review.[74] Some legal scholars argue that citizen participation and democratization of administrative bodies can lead to better outcomes for disadvantaged groups and advance substantive equality, while also providing constraints on seemingly "unlimited" discretionary power.[75]

Mary Liston asserts that a right to public participation in public law institutions may be realized through the requirements of procedural fairness, in addition to a broader conception of both individual litigant and public interest standing and consultation.[76] She describes how these mechanisms have operated in the context of environmental and Indigenous law, where more frequent participation of this nature tends to take place.[77]

Meanwhile, Lorne Sossin characterizes an exercise of discretion as a "social act" whereby a decision-maker mediates relationships based on an understanding and prioritization of relevant normative considerations.[78] He argues for administrative tribunals to engage the public in a democratic way.[79] He believes some decision-makers currently operate in a much more impersonal, distant way. For example, in the area of income tax administration, Sossin asserts that decision-makers may do all they can to avoid interacting with the subjects of their

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circumstances, the tenant would receive an eviction order and would have only 10 days to apply to the LTB to dispute this order and provide an explanation: ACTO, Bill 184, *supra* note 66.

[73] Galligan, *supra* note 28 at 110-112

[74] Pratt & Sossin, *supra* note 26 at 307-308

[75] *Ibid* at 306; Lorne Sossin, "Redistributing Democracy: An Inquiry into Authority, Discretion and the Possibility of Engagement in the Welfare State" (1994) 26:1 Ottawa L Rev 1 at 9 [Sossin, "Redistributing Democracy"]; Mary Liston, "Expanding the Parameters of Participatory Public Law: A Democratic Right to Public Participation and the State's Duty of Public Consultation" (2017) 63:2 McGill LJ 375 at 385-387

[76] Liston, *supra* note 75 at 396

[77] *Ibid* at 397

[78] Sossin, "Redistributing Democracy", *supra* note 75 at 4

[79] *Ibid* at 8

decisions.[80] He contrasts this example with a model of "engagement", where taxpayers could interact with government officials about the criteria they use and how they apply them.[81]

Sossin acknowledges that there are many different settings for administrative decision-making, and explains that his theory comprises a valid critique of any administrative context.[82] He considers a variety of decision-makers and asks whether they are truly "doing substantively different things?"[83] Any relevant difference, according to Sossin, "is simply one of context" and "[t]he similarities between the various kinds of bureaucratic decision-making may be more striking than the different contexts in which that decision-making takes place."[84]

As discussed later in this chapter, Sossin explains that engagement, in the context of his theory, means that a decision-maker actively listens to and take into account the views of parties, interacts with parties transparently, and establishes an atmosphere that allows for mutual trust.[85] Sossin describes this type of decision-making as a more "intimate approach", that requires a decision-maker to be more open and vulnerable, while engaging in a "joint venture" of decision-making with parties before them.[86]

Similarly, Geneviève Cartier argues that discretion cannot exist beyond the reach of the rule of law, and theories that view discretion as unilateral power must be flawed.[87] Instead, she advocates for a theory of "discretion as dialogue", that legitimizes the decision-making process

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[80] *Ibid* at 36
[81] *Ibid* at 37
[82] Sossin, "Intimate Approach", *supra* note 62 at 812, 815
[83] *Ibid* at 814
[84] *Ibid* at 814-815. Regardless of whether "relationships may be coercive (i.e. the penal bureaucracy), adversarial (i.e. the tax collection bureaucracy), or beneficial to a specific target group (children's aid bureaucracy)", administrative decision-makers must follow the rule of law, act within the confines of their enabling statutes, and be accountable to the public interest in ways that engage both their legal judgment and their humanity.
[85] Lorne Sossin, "The Administration and Criminalization of the Homeless: Notes on the Possibilities and Limits of Bureaucratic Engagement" (1996) NYU Rev L & Soc Change 623 at 676-677, 680-681, 687-688 [Sossin, "Homeless"]
[86] Sossin, "Intimate Approach", *supra* note 62 at 843, 854
[87] Geneviève Cartier, "Administrative Discretion and the Spirit of Legality: From Theory to Practice" (2009) 24:3 Can JL & Soc'y 313 at 329-330 [Cartier, "Spirit of Legality"]

through participation by and accountability to the parties.[88] This collaborative exercise allows for the consideration of values and norms that account for the public interest.[89] As explained in further detail below, Cartier defines "dialogue" as an interaction where parties listen to each other, consider each other's perspectives, and consider norms and values that "transcend their particular positions".[90]

Sossin and Cartier's theories may demonstrate how exercises of discretion may be meaningful from the point of view of parties before them, while also sidestepping the law/discretion binary. Although these theories are not restricted to procedural decision-making, it may make sense to begin analyzing them from the point of view of procedure to address questions of access to justice.

As Sossin explains, "[f]or there to be opportunity for engagement, those affected by discretionary acts must be aware of the decision, its motivations, and its impact on them and the community at large."[91] Parties must be willing to participate in a process they can access, while officials must be committed to engaging with them, understanding that meaningful interaction is vital to the legitimacy of their ultimate decision.

Thus, a first step toward analyzing discretionary decision-making may be to focus on procedural decisions and to determine whether meaningful engagement takes place. However, for this analysis to reflect the context of tribunals serving low-income people, it is important to consider how access to justice should be understood. This question is the focus of the second part of this chapter.

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[88] *Ibid* at 329-330

[89] *Ibid* at 320. These values may be derived from the decision-maker's enabling statute, or other relevant principles articulated in the *Charter*, international law, or common law. Cartier relies on Sossin's work to explain that, at least at the level of ideal theory, the public interest is always present when an administrative decision is made: *Ibid* at 645, citing Sossin, "Intimate Approach", *supra* note 62 at 813

[90] Cartier, "Spirit of Legality", supra note 87 at 321-322; Geneviève Cartier, "Administrative Discretion as Dialogue: A Response to John Willis (or: From Theology to Secularization)" (2005) 55 UTLJ 629 at 644-647 [Cartier, "Dialogue"]

[91] Sossin, "Redistributing Democracy", *supra* note 75 at 39

Procedural Discretionary Decisions and Access to Justice

To evaluate whether procedural discretionary decisions advance access to justice, it is important to examine what access to justice means. In this section, I will consider the meaning of access to justice as defined by legal scholars, as expressed by members of disadvantaged groups, as articulated by Canadian courts, and as stated in the context of international law. An analysis of each of these perspectives reveals common principles about access to justice that may be applied to tribunal procedures. These principles relate to equal, meaningful, and respectful participation, but also go further to include the responsibility of tribunals to, at times, be proactive about identifying the needs of litigants before them.

Roderick Macdonald describes how the meaning of "access to justice" has evolved over time.[92] This evolution began in the 1960s with the concept that litigants required legal representation to access courts by way of initiatives such as legal aid certificates, duty counsel programs, and community legal clinics.[93] In contrast, in the 1970s and 1980s, governments also realized the importance of developing institutional alternatives to the traditional court process. They created new adjudicative bodies, such as small claims court and administrative tribunals, to allow for more efficient and less legalistic adjudication.[94] They also modified court procedures to allow for alternate dispute resolution, case management, and specialization, such as the "commercial list" or "estates list", to streamline court proceedings.[95] Subsequently, in the 1990s, access to justice efforts focused on participation in law-making institutions in government and other public bodies through public consultations, non-governmental organizations, and other mechanisms.[96]

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[92] Roderick A Macdonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19 at 19-23
[93] *Ibid* at 20
[94] *Ibid* at 20-21
[95] *Ibid* at 21-22
[96] *Ibid* at 22-23

Macdonald concludes that we are presently focused on ensuring an "equal right to participate in every institution where law is debated, created, found, organized, administered, interpreted and applied."[97] This is a wide-reaching goal that recognizes systemic barriers to access to justice and the connections between the legal system and other government programs. To achieve it, members of groups who have been historically excluded should receive equal opportunities to access legal education as well as positions in other legal institutions, including courts.[98] In addition, such an approach recognizes the role of health and social services agencies and how they interact with the legal system.[99]

In the context of my thesis, I will analyze only a small part of the broader socio-legal system that Macdonald invokes, relating to tribunals in Ontario where low-income individuals may face barriers to accessing administrative processes and where tribunal statutory mandates provide some measure of procedural discretion. To determine what meaningful participation requires in such a context, I will consider views regarding access to justice expressed by members of marginalized groups, Supreme Court of Canada case law regarding substantive equality and human rights, and relevant international law principles such as "full and effective participation and inclusion in society" and "equal recognition before the law" as stated in the *Convention on the Rights of Persons with Disabilities*[100] and other international law instruments.

I begin with consideration of how individuals who identify as members of groups that have been historically disadvantaged or excluded from legal processes view access to justice. While views of Canadian courts and international organizations are also important, engagement of litigants requires examination of the legal system from their point of view.

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[97] *Ibid* at 23
[98] *Ibid*
[99] *Ibid:* "The correlation between health, social service, employment, security from violence and access to civil justice is cited as a reason for a proactive access to justice strategy that would also involve establishing partnerships with health and social services agencies."
[100] *Convention on the Rights of Persons with Disabilities*, 30 March 2007, 2515 UNTS 3, arts 3, 12 (entered into force 3 May 2008, ratified by Canada 11 March 2010) [*CRPD*]

First, members of vulnerable communities may approach the legal system remembering past injustices and marginalization. In doing so, they may question whether access to oppressive procedures really achieves justice. For example, Sarah Buhler's interviews with community members in Saskatoon demonstrated that some individuals may not wish to access legal proceedings at all, without acknowledgement and reform to address past injustices.[101] The participants in these interviews were low-income and some were Indigenous.[102] Many had experienced racism, poverty, and social exclusion.[103] Similarly, a Canadian Bar Association study interviewing members of marginalized groups concluded that community members did not believe the legal system would hold people to account for breaching rules or abusing power.[104]

These studies highlight that even though legal systems promise ideals of fairness and justice, work is required to rebuild relationships and establish trust with members of marginalized groups. They also emphasize the vital importance of seeking reforms that promote the respect for and well-being of parties.[105]

These findings are consistent with a study conducted by Janet Mosher, who interviewed racialized youth who had been targeted by their schools, by police, or both in the context of school disciplinary matters.[106] Many of the youth that Mosher interviewed described the racism they experienced at the hands of the police or their teachers.[107]

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[101] Sarah Buhler, "Don't Want to Get Exposed: Law's Violence and Access to Justice" (2017) 26 J L & Soc Pol'y 68 at 88-89
[102] *Ibid* at 71-73
[103] *Ibid* at 71-73
[104] Amanda Dodge, "Access to Justice Metrics Informed by the Voices of Marginalized Community Members: Themes, Definitions and Recommendations Arising from Community Consultations" (2013) Canadian Bar Association, online: <www.cba.org/CBA/cle/PDF/JUST13_PaperDodge.pdf> at 2, cited in Buhler, *supra* note 101 at 79-80
[105] Buhler, *supra* note 101 at 86-88
[106] Janet E Mosher, "Lessons in Access to Justice: Racialized Youths in Ontario's Safe Schools" (2008) 46:4 Osgoode Hall LJ 807 at 831-835
[107] *Ibid* at 832

According to these youth, access to justice did not mean a particular institutional process, but was instead connected to more fundamental values of respect and equality.[108] Many shared the views noted above regarding the futility of accessing legal systems to redress wrongs against them.[109] They wanted the legal system to acknowledge who they were, without stereotypes, and to hold authorities to account if they misuse their power.[110] Attitudes of respect and dignity needed to go both ways. In the words of one interviewee: "You could respect the police, but only if they respect you ... I show my teachers respect but they still have to earn my full respect by showing respect back."

The statements of participants in these studies are consistent with scholarship regarding procedural justice. This scholarship addresses elements of a decision-making process that people consider when deciding whether the process was conducted fairly and legitimately, independently of the outcome.[111] While the outcome that is reached is also important, litigants who believe that the process is "procedurally just" will be "more likely to perceive that the substantive outcome is fair – even when it is adverse to them".[112] Nancy Welsh summarizes the key factors associated with procedural justice as the expression of voice, "trustworthy consideration" (defined as "a demonstration that encourages people to believe that their voice

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[108] *Ibid* at 848-850
[109] *Ibid* at 844
[110] *Ibid* at 848-850
[111] Rebecca Hollander-Blumoff & Tom R Tyler, "Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution" (2011) 1 J Disp Resol 1 at 3, 7. Hollander-Blumoff and Tyler define procedural justice at 3 in the following way: "procedural justice in psychology captures the subjective assessments by individuals of the fairness of a decision making process. Judgments about procedural justice are distinct from those about distributive justice (the fairness of the outcome), as well as from outcome favorability (how good the outcome is for any given party)" (footnotes omitted). Welsh explains that, "[i]f people believe that they were treated fairly in a decision-making or dispute resolution procedure (i.e., the process was "procedurally just" or "procedurally fair"), they are more likely to (1) perceive that the substantive outcome is fair-even when it is adverse to them; (2) comply with the outcome; and (3) perceive that the sponsoring institution is legitimate" (footnotes omitted): Nancy A Welsh, "Do you Believe in Magic: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation" (2017) 70:3 SMU L Rev 721 at 734
[112] Welsh, *supra* note 111 at 734

was heard by the decision-maker"), a "neutral", "even-handed" forum "that applies the same objective standards to all", and "treatment that is dignified."[113]

Rebecca Hollander-Blumoff and Tom Tyler explain that procedural justice scholars have studied formal adversarial legal settings, as well as more informal processes such as arbitration, mediation, and alternative dispute resolution.[114] They conclude that, in these more informal contexts, procedural justice continues to matter:

> [i]ndividuals want the benefits of looser process but still expect or want the rule of law and elements that foster procedural justice too. Understanding that people value fairness in these processes can provide researchers and theorists a measure of comfort that procedural justice helps bridge the gap that may exist between ADR and rule of law – that procedural justice may ameliorate the potential tensions between the two ideals.[115]

Welsh analyzes factors relevant to procedural justice in the context of mediation, taking into account imbalances of power that undermine the participation of people of "lower status".[116] She concludes that participants value being able to exercise their voice, particularly by having the opportunity to tell their own story.[117] However, they may be dissuaded from doing this if they are "ignored, excluded, or disrespected",[118] or they feel "marginalized or perceive that others are prejudiced against them".[119] She also observes that "inequality, bias, and prejudice can get in the way of listening to someone else's perspective, accurately understanding what she has said, and caring to understand her perspective."[120]

Values of respect and equality also animate domestic jurisprudence under domestic law, under the *Charter,* the *Human Rights Code*,[121] and international law. Jurisprudence and commentary

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[113] *Ibid* at 733-734
[114] Hollander Blumoff & Tyler, *supra* note 111 at 4, 13-18
[115] *Ibid* at 19
[116] Welsh, *supra* note 111 at 742-749
[117] *Ibid* at 743
[118] *Ibid* at 745
[119] *Ibid* at 746
[120] Ibid at 748
[121] *Human Rights Code*, RSO 1990, c H19, s 41 [*Code*]

relating to *Charter* rights, human rights and international law demonstrate how these concepts can be realized through recognizing and addressing barriers to access. I will primarily analyze this case law as it relates to specific barriers related to disability and English language proficiency, which are particularly relevant to proceedings before tribunals adjudicating issues that disproportionately impact low-income people.

Roderick Macdonald characterizes the barriers to access to justice in four broad categories that seek to include, rather than exclude, factors that play a role in limiting the ability of parties to participate in the justice system. He asserts that many people may be excluded from the justice system for overlapping reasons relating to socio-demographic factors, disability, stigmatization, or psychological factors, such as a history of trauma.[122] His work demonstrates how barriers should be conceptualized in an open-ended way, focused on systemic problems that transcend the legal context to implicate health and social services agencies as well.

First, physical and material barriers may be created by the tribunal's physical location, hours of operation, facilities and physical spaces, and processes. This occurs when these elements of how a tribunal functions do not appropriately account for the personal situation of litigants, such as disabilities, lack of resources, or work schedule.[123] Second, objective barriers relate to "cost, delay and complexity" associated with overly complex legal systems and rules.[124] Third, subjective barriers refer to institutional design choices that favour a certain socio-demographic profile.[125] In other words, individuals who are "white, male, middle-aged, middle-and-upper-class, English- or French-speaking, citizens" will often navigate our adversarial system more effectively.[126] Fourth, sociological and psychological barriers acknowledge the connection between legal structures and the social marginalization of vulnerable people.[127] While this kind

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[122] Macdonald, *supra* note 92 at 29-31
[123] *Ibid* at 27
[124] *Ibid* at 27, see also: 28
[125] *Ibid* at 28
[126] For example, they are more likely to have resources to hire a lawyer, may be more willing to take aggressive positions, and may be more interested in monetary remedies rather than an apology: *ibid*
[127] *Ibid* at 28-29

of "barrier" is often dismissed since it is not directly related to the legal system, Macdonald disagrees with this approach. He explains that "[m]ost often problems with access to justice are problems of perception and formulation".[128]

In addition, the operation of colonial legal institutions and structures, such as the Canadian residential school system and the operation of the First Nations child welfare system, may also create or perpetuate trauma experienced by marginalized and vulnerable individuals.[129] Canadian legal structures often ignore the legal traditions, perspectives, and voices of Indigenous people, while privileging Western institutions and approaches.[130] This may be the case even where there is significant procedural discretion but it is not exercised in ways that are sensitive to the barriers and perspectives of participants.[131] This may explain, at least in part, why Indigenous applicants have been reluctant to commence applications at the HRTO.[132] The

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[128] *Ibid* at 29

[129] The Truth and Reconciliation Commission of Canada, "Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission" (2015), online: <http://nctr.ca/assets/reports/Final%20Reports/Executive_Summary_English_Web.pdf>; *Caring Society, supra* note 2

[130] Ardith Walkem, "Wrapping Our Ways Around Them: Aboriginal Communities and the Child, Family and Community Service Act (CFCSA) Guidebook", (2015) ShchEma-mee.tkt Project, Nlaka'pamux Nation Tribal Council at 8-9, online: <https://www.nntc.ca/docs/wowat_bc_cfcsa_1.pdf>

[131] British Columbia Civil Liberties Association, West Coast Women's Legal Education and Action Fund & Pivot Legal Society, "Blueprint for an Inquiry: Learning from the Failures of the Missing Women Commission of Inquiry" (2012), online: <https://bccla.org/wp-content/uploads/2012/11/20121119-Report-Missing-Women-Inquiry.pdf>. For example, the Missing Women Inquiry, conducted between 1997-2000, was critiqued for leaving "systemic concerns around socio-economic marginalization off the table, themes of organized crime and police corruption troublingly unexplored, and key witnesses uncalled", while failing to support potential marginalized witnesses and groups with funding for legal representation or other supports that would have addressed barriers to their participation (5-8). In particular, the Inquiry failed to put in place timely, accessible procedures for witnesses by allowing a support person, permitting witnesses to testify in another room or behind a screen, allowing evidence to be taken by affidavit, keeping the identities of witnesses confidential, providing legal support, and working with community-based organizations who could provide support (at 33-37). To the extent that supports were provided, they were insufficient, complex to access, and introduced late in the inquiry process. In addition, when alternative processes were used, the evidence gathered was deemed to be less helpful, because it had not been tested through cross-examination (46-47). Rather than address any specific reliability concerns on a case-by-case basis, the Inquiry made a broad procedural decision to rely on traditional rules of evidence that discounted testimony from the most marginalized people.

[132] Andrew Pinto, "Report of the Ontario Human Rights Review 2012" (November 2012), online: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/>: "The Review received feedback from several stakeholder groups and individuals that persons of Aboriginal ancestry are not engaging with the Ontario human rights system, and in turn, that the human rights system is not responding effectively to the needs

Human Rights Legal Support Centre (HRLSC) continues to recognize that "Indigenous peoples have not traditionally used the human rights process as the western legal perspective is foreign to the world-views of many Indigenous peoples."[133] To ensure greater accessibility by Indigenous parties, institutions may be developed or adapted to employ procedures that are closer to Indigenous dispute resolution, that allow for the participation of Indigenous communities, and that have Indigenous decision-makers.[134]

Macdonald's approach encourages the analysis of how barriers may implicate intersectional discrimination. While I will focus on barriers relating primarily to disability and to language,[135] it is also important to recognize that "analysis of discrimination based on a single identity trait does not adequately account for intersecting aspects of identity, such as race and sex."[136] Legal theorists and law reform organizations have identified legal problems and offered ideas for reform based on the connection between law and overlapping identities to better reflect the

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of Aboriginal communities and individuals. At the same time, Aboriginal people in Ontario experience discrimination on a frequent basis […] The Cornish Report identified as areas of concern the disempowering effect of the human rights system which forces Aboriginal people to participate in a process that is not their own and the lack of access to the human rights system, given the system's low visibility and the lack of confidence in the system by Aboriginal people."

[133] Human Rights Legal Support Centre, "Annual Report 2018-19" at 8, online: <https://www.hrlsc.on.ca/en/about-us/reports-and-statistics/annual-reports> [HRLSC, "Annual Report"]

[134] For example, in the context of child protection in British Columbia, traditional Indigenous dispute resolution can be incorporated into provincial processes to allow for the child's Indigenous culture, community, and identity to be properly considered. The governing legislation allows for procedural discretion to adopt "other dispute resolution mechanism[s]" which provides some flexibility in this regard. However, the juxtaposition of Indigenous dispute resolution processes and provincial processes demonstrate the significant differences between them: Walkem, *supra* note 130 at 113-118, 121-122

[135] There are a variety of barriers that face litigants before administrative tribunals. However, to ensure manageable scope of research for my thesis, I focused mainly on disability and language. These are significant barriers discussed in the literature that are relevant to at least some participants with legal matters before each of the SBT, HRTO and LTB. As well, all three tribunals explicitly acknowledge both of these barriers on their websites, and therefore, parties may be more likely to raise these issues at, or prior to, the hearing. Consequently, my method of reviewing tribunal decisions may be more likely to yield a greater number of cases, as compared to other barriers. I discuss my methods further in chapter 2.

[136] Suzanne B Goldberg, "Intersectionality in Theory and Practice" in Emily Grabham, Davina Cooper, Jane Krishnadas & Didi Herman, eds, *Intersectionality and Beyond: Law, Power and the Politics of Location* (Abidingdon: Routledge-Cavendish, 2009) 124 at 124-126, citing Kimberlé Crenshaw, "Demarginalizing the Intersection between Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics" (1989) U Chi Legal F 139 at 139-167

lived experience of individuals who experience discrimination.[137] Whenever possible, I will consider barriers facing marginalized and vulnerable clients before administrative tribunals with an intersectional lens.

Some tribunals, including those within the Social Justice Tribunals Division of Tribunals Ontario,[138] acknowledge that the *Human Rights Code* requires that they accommodate litigants who face barriers related to prohibited grounds of discrimination. The common rules that apply to the Social Justice Division of Tribunals Ontario state that:

> A party, representative, witness or support person is entitled to accommodation of *Human Rights Code*-related needs by the [Social Justice] tribunal and should notify the tribunal as soon as possible if accommodation is required.[139]

According to human rights law principles, such accommodations must be granted to the point of undue hardship.[140] In evaluating undue hardship, the *Code* allows for consideration of cost, outside sources of funding, and health and safety.[141] In addition, a tribunal may, under some circumstances, have a duty to inquire if an adjudicator knows or ought to know that there is a

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[137] *Ibid* at 133-143

[138] Tribunals Ontario was created in 2019, merging three tribunal clusters: Social Justice Tribunals Ontario (SJTO), Environment and Land Tribunals Ontario, and Safety Licensing Appeals and Standards Tribunals Ontario. The Social Justice Division of Tribunals Ontario is comprised of the tribunals that formerly belonged to SJTO. It includes five other tribunals in addition to the LTB, HRTO and SBT: the Child and Family Services Review Board (CFSRB), the Criminal Injuries Compensation Board (CICB), the Custody Review Board (CRB), and the Ontario Special Education Tribunals (English and French) (OSETs): Tribunals Ontario, Social Justice Division, "Social Justice Tribunals Ontario 2017/18 - 2019/20 Business Plan", online: <http://www.sjto.gov.on.ca/documents/sjto/2017-18%20to%202019-20%20Business%20Plan.html> [Tribunals Ontario, "Business Plan"]. Last year, the Ontario government decided to replace the CICB with an administrative, rather than tribunal, process. The CICB will process all applications received by September 30, 2019 before winding down its operations: "CICB Update", *supra* note 71. In addition, as of July 1, 2020, five tribunals including the Conservation Review Board, Environmental Review Board, Board of Negotiation, Local Planning Appeal Tribunal, and Mining and Lands Tribunal were removed from Tribunals Ontario to create a smaller cluster called Ontario Land Tribunals: O Reg 282/20, s 1

[139] Tribunals Ontario, Social Justice Division, Social Justice Tribunals Ontario Rules of Procedure: Common Rules, Rule A-5.1, online: <http://www.sjto.gov.on.ca/en/rules-of-procedure> [Tribunals Ontario, "Social Justice Tribunals Common Rules"]

[140] Ontario Human Rights Commission, "Policy on Ableism and Discrimination on the Basis of Disability" (2016) at 28-29, online: <http://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#_edn239> [OHRC, "Ableism"]; *Human Rights Code*, *supra* note 121, s 17(2)

[141] Ontario Human Rights Commission, *supra* note 140 at 43-45, 51-54; *Human Rights Code*, *supra* note 121, s 11(2), 24(2)

reason to accommodate, based on information and reasoning that does not reflect stereotypes.[142]

David Lepofsky and Randal Graham describe how barriers affect persons with disabilities in particular. They define a "barrier" with reference to the definition in the *Accessibility for Ontarians with Disabilities Act 2005*, namely "anything that prevents a person with a disability from fully participating in all aspects of society because of his or her disability."[143] Lepofsky and Graham recognize six categories of barriers, explaining that persons with a wide variety of disabilities may experience these barriers differently.[144] They also explain that discriminatory views may be reinforced by the existence of physical or legal barriers in a "vicious cycle", since they contribute to a culture that excludes persons with disabilities.[145]

The Supreme Court of Canada also addressed barriers that affect persons with disabilities in *Eldridge*,[146] decided under *Charter* section 15. This case is about a failure of the British Columbia government to provide sign language interpretation for deaf patients receiving medical care in hospitals.

The majority of the Supreme Court held that failure to provide sign language interpretation violated s. 15 of the *Charter*. In doing so, the court focused on what deaf patients needed to

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[142] I will discuss the case law in this area, as it relates to the HRTO, SBT, and LTB, in the second and third chapter of my thesis: *Audmax v Ontario (Human Rights Tribunal)*, 2011 ONSC 315 at paras 36-42 (Div Ct) [*Audmax*]; *Beaux Properties Management Co v Shomer*, 2019 ONSC 6170 at paras 1-3 (Div Ct) [*Beaux Properties*]; *Director, Ontario Disability Support Program v Miller* (28 January 2005), File No 02/054 (Div Ct) Killeen, Stayshyn, Molloy, JJ, unreported [*Miller*]

[143] *Accessibility for Ontarians with Disabilities Act*, 2005, SO 2005, c 11, s 2, cited in M David Lepofsky & Randal NM Graham, "Universal Design in Legislative Drafting — How to Ensure Legislation is Barrier-Free for People with Disabilities" (2010) 27 NJCL 129 at 139

[144] Lepofsky and Graham define six types of barriers: physical, attitudinal, communication, informational, technological, and legal. They also classify legal barriers, described as "legislation, policies or practices that impede a person with a disability from fully participating in an activity or opportunity", as their own category. This demonstrates the importance of law in creating or dismantling barriers to equality for persons with disabilities: *ibid* at 139-140

[145] M David Lepofsky, "The *Charter*'s Guarantee of Equality to People with Disabilities - How Well Is It Working?" (1998) 16 Windsor YB Access Just 155 at 160-161

[146] *Eldridge v British Columbia (Attorney General),* [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*]

access medical care in the same way as the rest of the population in an analysis that reflects substantive equality:

> [i]n order to receive the same quality of care, deaf persons must bear the burden of paying for the means to communicate with their health care providers, despite the fact that the system is intended to make ability to pay irrelevant. Where it is necessary for effective communication, sign language interpretation should not therefore be viewed as an 'ancillary' service. On the contrary, it is the means by which deaf persons may receive the same quality of medical care as the hearing population.[147]

The Supreme Court of Canada's reasoning emphasizes what it means for different groups to access the same services on equal terms, and how treating them differently is necessary to achieve this goal. With respect to the facts of this particular case, deaf people required sign language interpretation to communicate with their doctors in the same way as other patients.

In the disability context, *Charter* section 15 should be informed by relevant international law, including the *CRPD*.[148] The principles of the *CRPD*, as outlined in Article 3, include respect for dignity, non-discrimination, "full and effective participation and inclusion in society", and accessibility.[149] Full and effective participation is defined by the United Nations Committee on the Rights of Persons with Disabilities as "engaging with all persons, including persons with disabilities, to provide for a sense of belonging to and being part of society."[150] To discharge this obligation, states must provide persons with disabilities with appropriate supports,

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[147] *Ibid* at para 92

[148] Ravi Malhotra, "Has the *Charter* Made a Difference for People with Disabilities?: Reflections and Strategies for the 21st Century" (2012) 58 SCLR 273 at 295. Some court decisions have relied upon the *CRPD* to inform the analysis of *Charter* section 15, for example: *R v Capay*, 2019 ONSC 535 at paras 151, 156 (SCJ). However, other decisions ignore the *CRPD* or refuse to rely upon it: *Tanudjaja v Attorney General (Canada)*, 2014 ONCA 852, leave to appeal to SCC refused, [2015] SCCA No 39

[149] *CRPD*, *supra* note 100, art 3

[150] United Nations, Committee on the Rights of Persons with Disabilities, "General Comment No 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention" (9 November 2018) at para 27 [Committee on the Rights of Persons with Disabilities, "General Comment No 7"]

promote an environment of respect rather than stigma, facilitate participation when needed, and consult with persons with disabilities to understand their needs and lived experience.[151]

More specifically, Article 13 refers to access to justice.[152] The UN Committee on the Rights of Persons with Disabilities has drawn the connection between Article 13 and Article 9, regarding accessibility: "[t]here can be no effective access to justice if the buildings in which law-enforcement agencies and the judiciary are located are not physically accessible, or if the services, information and communication they provide are not accessible to persons with disabilities."[153] The Committee has written about the importance of transparent accommodations within the legal system.[154] It has also highlighted the need for meaningful participation through recognizing communication barriers and physical barriers, providing information in a comprehensible way, and addressing financial disadvantage.[155]

The Committee on the Rights of Persons with Disabilities refers to other related international human rights instruments and their committees, such as the *International Convention on Civil and Political Rights*[156] and the Human Rights Committee, and the *International Convention on Economic, Social and Cultural Rights*[157] and the Committee on Economic, Social and Cultural Rights.[158] However, to date, the Committee on the Rights of Persons with Disabilities has not

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[151] *Ibid* at para 37
[152] *CRPD*, *supra* note 100, art 13
[153] United Nations, Committee on the Rights of Persons with Disabilities, "General Comment No 2 (2014), Article 9: Accessibility" (22 May 2014) at para 37 [Committee on the Rights of Persons with Disabilities, "General Comment No 2"]
[154] United Nations, Committee on the Rights of Persons with Disabilities, "General Comment No 6 (2018) on equality and non-discrimination" (26 April 2018) at paras 51-52 [Committee on the Rights of Persons with Disabilities, "General Comment No 6"]
[155] *Ibid* at para 52
[156] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*]
[157] *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976, accession by Canada on 19 May 1976) [*ICESCR*]
[158] Committee on the Rights of Persons with Disabilities, "General Comment No 2", *supra* note 153 at paras 1-2, 6; Committee on the Rights of Persons with Disabilities, "General Comment No 6", *supra* note 154 at para 5. In addition, the UN Committee on the Rights of Persons with Disabilities refers to the *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969, ratified by Canada on 14 October 1970), the *Convention on the Elimination of All Forms of Discrimination*

authored any joint general comments with these related bodies. I discuss the *ICCPR* and *ICESCR* in more detail below in relation to discrimination on the basis of language, although they are also relevant to the disability context.

The Law Commission of Ontario's "Framework for Law as it Affects Persons with Disabilities"[159] applies the substantive equality analysis from the *Charter* jurisprudence and the *CRPD* to laws, policies and practices. Its principles recognize the diversity within communities of persons with disabilities and their intersectional experiences:

> all people exist along a continuum of abilities in many areas, that abilities will vary along the life course, and that each person with a disability is unique in needs, circumstances and identities, as well as to the multiple and intersecting identities of persons with disabilities that may act to increase or diminish discrimination and disadvantage.[160]

One part of the framework specifically addresses "processes under the law", asking three questions that are particularly relevant to the procedures of tribunals:

> How have the processes under the law been designed to be as simple and transparent as possible for users?
>
> […]
>
> How have the processes been designed to include and accommodate the specific needs of persons with disabilities, including those who are facing additional barriers arising from low-income, or who have needs related to other aspects of their identities, or who are transitioning between programs or life-stages?
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> […]

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against Women, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981, ratified by Canada 10 December 1981), and the *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990, ratified by Canada 13 December 1991) in Committee on the Rights of Persons with Disabilities, "General Comment No 7", *supra* note 150, at para 3, capturing other intersectional perspectives.

[159] Law Commission of Ontario, "A Framework for the Law as it Affects Persons with Disabilities: Final Report" (2012), Chapter IV: Advancing Equality for Persons with Disabilities Through Law, Policy and Practice at 1-6, 19-20 online: <https://www.lco-cdo.org/en/our-current-projects/the-law-and-persons-with-disabilities/persons-with-disabilities-final-report-september-2012/a-framework-for-the-law-as-it-affects-persons-with-disabilities/>

[160] *Ibid* at 4

> What mechanisms does the law provide to review or evaluate unique needs or requests for accommodation from affected individuals with disabilities?[161]

A process that takes into account these questions is more likely to respect the general principles underlying the Law Commission report, such as respect for dignity, meaningful participation, responding to diversity, and promoting autonomy and independence of persons with disabilities.[162]

As *Charter* jurisprudence, international law, and analysis of barriers explain what access to justice means for persons with disabilities, it also addresses language barriers as well. Karen Cohl and George Thomson, conducting research on behalf of the Law Foundation of Ontario, analyzed barriers to access to justice that may be attributed to issues regarding linguistic interpretation. This project focused on members of vulnerable groups facing language barriers, who often faced intersectional discrimination based on race, disability, literacy, poverty, immigration status and lack of knowledge of the legal system.[163] Consistent with the interviews with marginalized communities summarized above, Cohl and Thomson's report concluded that persons who do not speak the language of a legal proceeding may be less likely to access or trust in that process.[164]

Cohl and Thomson also raised issues regarding how interpretation services are provided by tribunals. It explained that some administrative tribunals may arrange and pay for language and sign-language interpreters, while others may ask litigants to bring a friend, family member, or a professional interpreter at their own expense.[165] Cohl and Thomson expressed concerns that proper communication may be compromised if the interpreter is not sufficiently knowledgeable, is not an objective party, or is interpreting over the telephone without access

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[161] *Ibid* at 19-20
[162] *Ibid* at 3-4
[163] Karen Cohl and George Thomson, "Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services" (2008), Law Foundation of Ontario at 15-17, online: <https://lawfoundation.on.ca/download/connecting-across-language-and-distance-2008/>
[164] *Ibid* at 17
[165] *Ibid* at 18

to body language and other silent cues.[166] Furthermore, it may be difficult to find a qualified interpreter for some rare dialects or for sign language.[167]

Charter section 14 jurisprudence provides some helpful principles that address some of these barriers. This provision imposes a specific requirement to promote equality in certain legal proceedings, requiring that "[a] party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter."[168]

Although there is little case law regarding the application of *Charter* section 14 in administrative law proceedings, a tribunal may be required to arrange and pay for an interpreter, especially when a party cannot afford to do so. Litigants have successfully claimed the right to an interpreter in the context of labour arbitration and refugee proceedings.[169] However, while the Alberta Court of Appeal affirmed that the right applies in family law proceedings,[170] lower courts in Quebec have questioned whether this right applies to litigation between private parties.[171] The law is also somewhat uncertain with respect to whether the state is required to pay for an interpreter in the administrative law context. An Alberta trial court ordered that the state pay for an interpreter in the context of a judicial review about language-based discrimination.[172] In contrast, other trial courts have ordered that the parties cover the cost in the context of citizenship revocation proceedings, as well as in private law matters.[173] That said,

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[166] *Ibid* at 18-19
[167] *Ibid* at 14-15, 19
[168] *Charter*, *supra* note 7, s 14. See also: *Canadian Bill of Rights*, SC 1960, c 44, reprinted in RSC 1985, Appendix III, s 2(g), granting the right to an interpreter to parties and witnesses before courts, commissions, boards and tribunals.
[169] *Roy v Hackett* (1987), 62 OR (2d) 365, [1987] OJ No 933 (CA) in labour arbitration proceedings, and *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, leave to appeal to the SCC dismissed, [2001] SCCA No 435, in refugee proceedings
[170] *Anand v Anand*, 2016 ABCA 23 at paras 10-27
[171] *Farimex marketing international inc v Owen*, [2000] JQ No 1179, 2000 CanLII 18938 (SC); *Roy-Sinclair (Syndic de)*, 2007 QCCS 617 at para 15
[172] *Caron v Alberta (Chief Commissioner of the Alberta Human Rights and Citizenship Commission)*, 2007 ABQB 525 at paras 1, 17-33
[173] *Wyllie v Wyllie* (1987), 37 DLR (4th) 376, 4 ACWS (3d) 183 (BCSC) [*Wyllie*] in the context of family law proceedings. See also: *Royal Bank of Canada v Welton*, [2009] OJ No 4205 at para 8, 2009 CarswellOnt 6053 (SCJ)

in each case, the court specified that the state may be required to pay if the party lacked financial resources.[174]

The *ICCPR* and the *ICESCR* also discuss discrimination, including discrimination on the basis of language, in a way that supports language interpretation in administrative law proceedings. Article 26 of the *ICCPR* specifically states that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law", referring specifically to the ground of "language".[175] The UN Human Rights Committee has emphasized that Article 2 of the *ICCPR* imposes a positive obligation on states to ensure the rights in the Convention and also to provide for an effective remedy where rights are violated.[176] Similarly, Article 2 of the *ICESCR* recognizes both formal and substantive equality with reference to language.[177] The UN Committee on Economic, Social and Cultural Rights also requires states to adopt positive measures to prevent both direct and indirect discrimination.[178]

In *R v Tran*,[179] the Supreme Court of Canada outlined a framework for applying *Charter* section 14 to the criminal law context that explains when interpretation is necessary and standards of quality that it must meet. Although this is a criminal law case, principles regarding the right to interpretation derived from criminal law may inform what access to justice before

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[*Welton*] in the context of civil litigation, and *Canada (Minister of Citizenship and Immigration) v Phan*, 2003 FC 1194 at paras 39-50 [*Phan*] in the context of citizenship revocation, citing *Wyllie*.

[174] In *Wyllie, supra* note 173, the British Columbia Supreme Court explained that: "[t]he question that remains unanswered is, is there an obligation upon the court or the Crown in civil proceedings to pay an interpreter's fee upon the court being satisfied that the litigant requiring an interpreter is unable to pay the necessary fee? The wording of Section 14 is bold and unequivocal and it might well be that upon the basis of impecuniosity that a court would so order." In both *Welton, supra* note 173 and *Phan, supra* note 173, the court confirmed that the party was not impecunious, referring to *Wyllie*.

[175] *ICCPR, supra* note 156, art 26

[176] United Nations, Human Rights Committee, "General Comment No 32: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (29 March 2004) at paras 6, 10, 13, 15. States may be required to attend to and redress some situations regarding the interactions between citizens and the state, as well as between private parties. In this regard, the UN Human Rights Committee has recognized that states must take positive steps to protect people from such discrimination: para 8.

[177] *ICESCR, supra* note 157, art 2

[178] United Nations, Committee on Economic, Social and Cultural Rights, "General Comment No 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)" (2 July 2009) at paras 2, 8-9, 10-11

[179] *R v Tran*, [1994] 2 SCR 951 at para 11, 117 DLR (4th) 7

administrative tribunals may require. Based on the domestic and international law principles discussed above, interpretation at the state's expense may be guaranteed in at least some proceedings before administrative tribunals. In addition, where *Charter* section 7 or section 15 interests are implicated, there may be a requirement for interpretation in administrative proceedings to ensure a fair trial or substantive equality.

The *Tran* framework mandates that an interpreter should be provided in two distinct circumstances. In the words of the Court, these circumstances arise when:

> (1) it becomes apparent to the judge that an accused is, for language reasons, having difficulty expressing him- or herself or understanding the proceedings and that the assistance of an interpreter would be helpful; or
>
> (2) an accused (or counsel for the accused) requests the services of an interpreter and the judge is of the opinion that the request is justified.[180]

The court emphasized that it is not necessary for an accused to make a formal request for an interpreter.[181] Rather, courts must be attentive to an accused's language difficulties as part of their responsibility to ensure a fair trial process. Furthermore, courts should generally be receptive to requests for an interpreter that are made in good faith, rather than scrutinizing them for "an oblique motive".[182]

Once interpretation is necessary, it must meet five criteria with respect to its quality. First, interpretation must be continuous. Breaks and interruptions in interpretation may undermine a person's understanding of the trial process.[183] Second, interpretation must be precise, to convey, as closely as possible, what is communicated in a courtroom. Nonetheless, it is a human exercise conducted in real time, and cannot be expected to be perfect.[184] Third, interpretation should be impartial or objective, without any connection to the accused person

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[180] *Ibid* at para 48
[181] *Ibid* at paras 48-49
[182] *Ibid* at paras 52-53
[183] *Ibid* at paras 56-58
[184] *Ibid* at paras 59-60

or the case which might create bias or perception of bias.[185] For example, a relative, friend, the judge, or a person whose interests may be affected by the case should not be responsible for interpretation. Fourth, interpretation must be competent, such that the quality of interpretation is "high enough quality to ensure that justice is done and seen to be done".[186] Finally, interpretation should be contemporaneous, occurring as the legal proceeding progresses. The Supreme Court stated that it was "generally preferable" if interpretation is provided consecutively, after people finish speaking, rather than simultaneously.[187] Consecutive interpretation makes it easier to determine if there are problems with the quality of interpretation and allows the accused an opportunity to react to what is happening, for example, to make an objection.[188]

Principles relating to language barriers that may be drawn from *Charter* jurisprudence include the importance of taking requests for interpretation in good faith, and the need for decision-makers to proactively identify a need for interpretation as it arises within a proceeding. The five criteria regarding quality of interpretation are also relevant in analyzing tribunal decision-making when questions are raised about whether proper interpretation took place.

Taken together, interviews with marginalized groups, *Charter* and human rights principles and case law, and international law demonstrate key principles that inform what access to justice means. They illustrate that tribunal processes that promote meaningful participation through inclusive design, appropriate supports, and accommodations allow litigants to overcome barriers to access. They also demonstrate the importance of processes that treat parties with dignity and respect, in accordance with the procedural justice literature. Finally, these processes are not entirely passive – rather, they place responsibility on tribunals to identify barriers and accommodation needs when parties do not formally request them. This active role

[185] *Ibid* at paras 61-63
[186] *Ibid* at para 62
[187] However, since this may prolong the trial, the court ultimately left this to the discretion of the trial judge: *ibid* at paras 64-65
[188] *Ibid* at paras 64-65

that tribunals are required to play means that they must meaningfully communicate with litigants and consider the proceeding from their perspective in the course of making procedural discretionary decisions.

Nonetheless, there are limits to the access to justice concerns that the doctrine of procedural fairness, as defined by tribunals and courts, can address. The duty of fairness is informed by five factors, as described in *Baker*, and only two of these factors relate directly to the circumstances of a particular litigant – "the importance of the decision to the individual or individuals affected" and "the legitimate expectations of the person challenging the decision".[189] In the tribunal context, which is closer to a court process than front-line decision-making, "the nature of the decision being made and the process for making it" may demand comparatively greater procedural protections.[190] However, on some occasions, these three factors may be outweighed by the statutory scheme and the agency's chosen procedures pursuant to its enabling statute.[191]

As well, legislatures have the power to limit the application of the common law doctrine of procedural fairness, as elaborated in *Baker*, by way of "clear statutory direction."[192] In its analysis of a legislative scheme limiting the independence of tribunal members, the Supreme Court of Canada held that:

> [c]onfronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice […] However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication.[193]

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[189] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 25-26, 174 DLR (4th) 193 [*Baker*]
[190] *Ibid* at para 23
[191] *Ibid* at paras 24, 27
[192] *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch),* 2001 SCC 52 at para 22
[193] *Ibid* at paras 21-22

This means that the legislature may intentionally limit the scope of procedural discretionary decisions that tribunal adjudicators are empowered to make.

Moreover, procedural fairness may not encompass all interests protected by the *Charter* and the *Code*. Procedural fairness will only protect interests under section 7 of the *Charter* when section 7 is engaged.[194] As well, procedural fairness may protect the rights of persons with *Code*-protected interests to a lesser extent than the *Code* upon judicial review. The LTB, HRTO, and SBT acknowledge they are bound by the *Code*,[195] and have been held to this standard by the Divisional Court.[196] However, the British Columbia Court of Appeal recently held that the British Columbia Human Rights Tribunal was required to conduct a procedurally fair hearing, but was not necessarily required to accommodate pursuant to human rights law. The tribunal's obligation was:

> to ensure the hearing was procedurally fair given [the applicant's] disabilities but not to accommodate to the point of undue hardship as if the Tribunal were an employer or service provider, for example[, …] the obligation to provide a procedurally fair hearing protects the participation of persons with disabilities in a hearing such as this. An alleged failure to 'accommodate' such a person in a hearing can and should be assessed as an issue of procedural fairness on judicial review and where appropriate a remedy can be provided.[197]

This reasoning has the potential to encourage tribunal adjudicators to interpret the duty of fairness in more limited ways that place less weight on access to justice considerations described in this chapter.

Finally, adjudicators must take into account fairness to all parties, despite imbalances of power between them. If prejudice to the opposing party will result from adapting tribunal procedures,

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[194] *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 113
[195] For example, Tribunals Ontario, "Social Justice Tribunals Common Rules", supra note 139 at Rule A5.1: "A party, representative, witness or support person is entitled to accommodation of *Human Rights Code*-related needs by the tribunal and should notify the tribunal as soon as possible if accommodation is required."
[196] For example, *Beaux Properties, supra* note 142 at paras 1-3
[197] *CS v British Columbia (Human Rights Tribunal),* 2018 BCCA 264 at para 22, leave to appeal to SCC refused, [2018] SCCA No 357

this will limit what adjudicators can achieve for marginalized parties. In other words, even when a tribunal, such as the HRTO, has expansive discretionary procedural powers, adjudicators cannot go too far to help one party at the expense of another.[198]

Consequently, where parties have needs and circumstances that implicate access to justice, tribunal adjudicators may be able to address some but not all of these concerns by exercising their procedural discretion. As I will explain in further detail below, in my descriptions and critiques of tribunal case law, I define "accommodation" more broadly than what procedural fairness, or even human rights law, strictly demands. This allows me to consider the limitations of procedural discretionary decision-making to promote access to justice.

Theories of Discretion that Advance Access to Justice

In this section, I discuss theoretical models of engagement between tribunal decision-makers and parties. I will explain what these theories require and how they relate to the definition of access to justice discussed earlier. I also address how they promote existing norms that underlie the law of procedural fairness, the Supreme Court of Canada's recent decision in *Vavilov*, and tribunal decision-making consistent with *Charter* and human rights values. In doing so, I will argue that these theories of engagement are an appropriate benchmark against which one may assess tribunal procedural decisions to determine whether tribunals are affording parties access to justice in a meaningful way.

Legal academics have constructed theoretical models regarding discretionary decision-making that account for the meaningful participation of lay people. These theoretical models reflect concepts of meaningful participation and treatment of parties with respect, dignity and transparency integral to access to justice. In slightly different ways, as already briefly noted earlier, Lorne Sossin, Geneviève Cartier, and Jennifer Raso have written about how decision-making can be approached in a more collaborative, respectful and democratic way that is

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[198] Freya Kristjanson & Sharon Naipaul, "Active Adjudication or Entering the Arena: How Much Is Too Much?" (2011) 24 Can J Admin L & Prac 201 at 222-223

consistent with human rights values. However, each of these academics acknowledges practical obstacles in implementing their ideal theories, related to factors such as the volume of cases heard by administrative tribunals, power imbalances associated with cases involving marginalized parties, and the current law of judicial review.

Lorne Sossin advocates for meaningful engagement between applicants and decision-makers, often from the point of view of marginalized parties. He discusses this theory in the context of a variety of administrative settings, including income tax,[199] and administrative proceedings with a significant impact on low income people, including housing and income support.[200] He argues that decision-makers should actively listen to and consider the views of parties and their advocates, interact more transparently, and establish an atmosphere that allows for empathy and trust.[201]

For example, Sossin recognizes that front-line public officials in New York City who make decisions about people who are homeless often have significant discretion.[202] He observes that "[t]he contact between officials and the homeless is typically devoid of trust, empathy, and mutuality."[203] He attributes this approach to the dual role of decision-makers as "individuals confronting a person in need" and also "as agents of the state dealing with a file".[204] Similarly, in his writing about Canadian administrative law, Sossin also states that administrative decision-makers generally approach their task with an approach that is "detached" from parties before them.[205]

The way forward, according to Sossin, is to establish relationships of "engagement" and

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[199] Sossin, "Redistributing Democracy", *supra* note 78
[200] Sossin, "Homeless", *supra* note 85; Sossin, "Intimate Approach", *supra* note 62
[201] Sossin, "Homeless", *supra* note 85 at 676-677, 680-681, 687-688; Sossin, "Intimate Approach", *supra* note 62 at 811, 854
[202] Sossin, "Homeless", *supra* note 85 at 632. Sossin accounts for a wide range of government actors and employees of privatized, non-profit institutions, explaining at 631 that he will address front-line decision-makers who decide welfare entitlements, shelter workers, and law enforcement.
[203] *Ibid* at 670; Sossin, "Intimate Approach", *supra* note 62 at 812
[204] Sossin, "Homeless", *supra* note 85 at 670
[205] Sossin, "Intimate Approach", *supra* note 62 at 811

"mutual respect and trust".[206] Sossin contends that engagement can mean "attraction, commitment, and entanglement".[207] Engagement promotes meaningful discussion and understanding, encouraging decision-makers to exercise their discretion to "become the human face of the administrative state, breaking down the barriers to communication which bureaucratic interaction has thrown up."[208] In this way, Sossin argues that decisions reached in a more engaged way may more effectively take into account an individual's actual needs and circumstances while also fostering their autonomy and treating them with respect.[209]

Sossin recognizes that Max Weber's "iron cage" of rational-legal administration may prevent some instances where decision-makers act in ways that are "capricious" and "corrupt".[210] However, he asserts that empowering citizens by providing for a more open exchange of knowledge may be possible, at least the level of ideal theory, without undermining the impartiality and fairness of the proceedings.[211] Sossin explains that case law regarding bias allows for a more personal relationship between a party and a decision-maker, as long as the decision-maker maintains an open mind.[212] Sossin's theory is supported by factors discussed in the procedural justice scholarship regarding fair processes, including an opportunity for parties to present their stories, and a decision-maker who is respectful, impartial, transparent, consistent, and trustworthy.[213]

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[206] Sossin, "Homeless", *supra* note 85 at 671; Sossin, "Intimate Approach", *supra* note 62 at 811
[207] Sossin, "Homeless", *supra* note 85 at 671
[208] *Ibid* at 633
[209] *Ibid*
[210] Sossin, "Intimate Approach", supra note 62 at 831
[211] *Ibid* at 831
[212] *Ibid* at 819-821
[213] Hollander-Blumoff & Tyler, *supra* note 111 at 5-6. Welsh also observes that transparent and authentic procedures that show that a mediator actually demonstrated "trustworthy consideration" are more likely to be perceived by litigants as fair. In these situations, it may be more likely that parties will "*hear* and *share* information that may surprise or enlighten them, that such information may create new opportunities for resolution, that the parties may experience enhanced trust, and that this trust and the expanded exchange of information thus may produce both an integrative solution and a changed relationship" (736). However, it may be more difficult for mediators to demonstrate trustworthy consideration when they are of relatively "high status", as compared to a party. These issues may be addressed, at least in part, through inclusive appointments, accounting for implicit bias,

However, it is unclear how this theory would operate in the real world, and Sossin's approach may lead to more litigation, even if, ultimately, a court may uphold the decision. Sossin also addresses fairness, explaining that mutual exchange of knowledge should be required in all cases, not only when an adverse finding is made against a party.[214] However, he acknowledges that the current doctrine applied by courts is only relevant "when a fundamental right is being taken away."[215]

Sossin also advocates for more transparent reasons from administrative officials. That said, although parties may appreciate more straightforward, accessible, and honest reasons, it is unclear whether this is a practical or achievable goal. Sossin refers to the "internal" reasons provided by the immigration officer in *Baker,*[216] arguing that these would be preferable to sanitized "external" reasons meant for public consumption.[217] Sossin explains that the immigration officer's notes demonstrate his "assumptions, value judgments, first impressions and broader personal and ideological agendas", mainly because "[h]e never expected them to see the light of day."[218] That being the case, it is difficult to contemplate that decision-makers would be prepared to share their "internal reasons" even on a without prejudice basis, as Sossin suggests.[219] It may be slightly more realistic to require "more modest improvements" that encourage clearer, more detailed, and more comprehensive reasons,[220] but such reasons appear to fall short of Sossin's goals of transparency and authenticity.

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and reflective listening that allows mediators to check in with parties to ensure they understand what is being said: Welsh, *supra* note 111 at 733-734, 747-752, 756-757

[214] Sossin, "Intimate Approach", *supra* note 62 at 826-827

[215] *Ibid* at 827

[216] "PC is unemployed - on Welfare. No income shown - no assets. Has four Cdn.-born children- four other children in Jamaica- HAS A TOTAL OF EIGHT CHILDREN […] The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region": *Baker, supra* note 189 at para 5

[217] Sossin, "Intimate Approach", *supra* note 62 at 835-838

[218] *Ibid* at 835

[219] *Ibid* at 837

[220] *Ibid* at 838

Sossin focuses on two concepts that support engagement: democratic deliberation and dialogic administration. With respect to democratic deliberation, Sossin characterized decision-makers as "enlightened listeners" who take into account diverse perspectives and create an inclusive environment for sharing them.[221] Meanwhile, dialogic administration requires that adjudicators focus on norms and values based on their enabling statute, rather than attempting to remain "neutral".[222] He contends that this is a "dialogic" process because it has the potential to expose power imbalances and to demonstrate whether and how public administration actually achieves its statutory goals.[223]

Nonetheless, Sossin recognizes that this potential may not be realized in practical decision-making. He acknowledges the idealized nature of his theory, particularly in situations where imbalances of power are significant:

> Engagement and interdependency between citizens and bureaucrats would seem to be best suited to settings where citizens are relatively advantaged (i.e. regulatory settings where government authorities interact with industry groups on relatively equal footing). This degree of mutuality is much more difficult to achieve where vulnerable groups are affected and where individuals may be dependent on a favourable administrative decision for their welfare (as in public housing or refugee settings). How meaningful is intimacy when one participant holds disproportionate power over the other? Is well-intentioned informality sufficient to address the potential harm of a relationship characterized by power and dependency?[224]

He states this concern another way when he concedes that, "[w]hen a family's shelter or an individual's health is at stake and there is nowhere else to turn, I would agree that the good intentions of an open and honest official may not be enough."[225]

Under these circumstances, Sossin suggests that it may be necessary to provide an "intermediary", such as a state-funded lawyer or social worker, to mediate this power

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[221] Sossin, "Homeless", *supra* note 85 at 676-677
[222] *Ibid* at 678-680; Sossin, "Intimate Approach", *supra* note 62 at 831
[223] Sossin, "Homeless", *supra* note 86 at 678-680
[224] *Ibid* at 849
[225] *Ibid* at 850

imbalance.[226] He also asserts that that an administrative decision-maker could owe a public law duty to provide "the fullest possible benefit" to vulnerable parties.[227] While this duty may address some substantive equality concerns, Sossin does not explain how it would work in practical terms, and how it would relate to specific statutory powers and objectives delegated to decision-makers to implement.

Geneviève Cartier proposes a similar theory, while also addressing some of its practical implications and problems. She asserts that exercises of administrative discretion may be viewed as a dialogue, employing a "bottom-up" theoretical approach that prioritizes the inclusion of parties in decision-making.[228] According to her model, decision-makers and participants first understand each other's positions and then engage in dialogue with one another, taking into account opposing norms and values, regarding how a decision should be reached.[229]

At the first step, both the decision-maker and the party must understand and consider the situation from the other's point of view.[230] It is vital for the decision-maker to take care to "demonstrate openness and genuine listening" to understand the experiences and circumstances of parties before the tribunal.[231]

At the second step, Cartier emphasizes the importance of engagement between a decision-maker and a party about relevant factors to a discretionary decision. Cartier describes how a decision-maker must make choices in this regard, to determine the relevant norms and values within a margin of appreciation.[232] The decision-maker must consider the perspective and input of each party in a meaningful and transparent way, through a process of "authentic

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[226] *Ibid* at 850-851
[227] *Ibid* at 850-853
[228] Cartier, "Dialogue", *supra* note 90 at 645
[229] *Ibid* at 644-646; Cartier, "Spirit of Legality", *supra* note 87 at 321-324
[230] Cartier, "Dialogue", *supra* note 90 at 644-645
[231] *Ibid* at 644-645
[232] *Ibid* at 645

reflection".[233] In other words, the decision reached and its rationale should directly flow from the dialogue between the party and adjudicator.

Cartier considers practical implications of her theory based by reflecting on her own personal experience.[234] Cartier explains how she made a decision about law students in her position as dean of a law school.[235] She describes how she viewed the situation as an opportunity to test out her theory of dialogue:

> I therefore asked the student directly how *she* would analyse and sort out the competing or coexisting considerations that needed to be taken into account if she were the associate dean asked to make the decision. I could immediately see a shift in perspective and tone from the student. She was asked for one moment to forget her particular case and to think about what the norms, the guidelines for taking such decisions, should be in the event of other requests' being made in the future.[236]

After receiving the student's analysis of the relevant factors, Cartier spent time considering the student input, gathering other relevant information, and deciding the matter.[237] She provided the student with the decision and reasons by e-mail.[238] Most importantly, she ultimately evaluates the success of this experiment from the student's point of view: "very often I received a reply from the student, who, even faced with an unfavourable decision, accepted it and even sometimes thanked me for listening."[239]

However, Cartier acknowledges that her ideal theory may be difficult for administrative decision-makers to implement in other contexts. She explains that vulnerable people with much at stake and no legal training may not be able to engage with decision-makers the way the law student engaged with her.[240] She recognizes that power imbalances in such situations

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[233] *Ibid* at 645-647
[234] Cartier, "Spirit of Legality", *supra* note 87 at 330-333
[235] *Ibid*
[236] *Ibid* at 331
[237] *Ibid* at 332
[238] *Ibid*
[239] *Ibid*
[240] *Ibid*

may mean that dialogue may be more difficult to achieve or may be less meaningful.[241] She questions how practical her approach may be in contexts where decision-makers hear large volumes of cases, constrained by institutional policies and guidelines.[242] She also wonders whether administrative decision-makers would actually engage responsively and honestly, rather than fashioning "acceptable" after-the-fact justifications for their decisions.[243] She raises but does not answer the following query:

> Does a case like *Baker* actually direct decision makers toward a responsive and attentive approach to exercises of discretion, or does it, as some have somewhat cynically suggested, simply alert them to take formal but hollow steps – that is, to hide their real motivations and write down reasons that appear to comply with the substantive requirements of fairness?[244]

While the questions Cartier asks are relevant and important, the application of her theory to the real world is uncertain since she does not provide answers to her own questions.

Finally, Jennifer Raso theorizes that decision-makers should consider human rights values in exercising their discretion in a way that reflects engagement and dialogue, as advanced by Sossin and Cartier. She asserts that human rights values should apply to both institutional and individual decisions to ensure that parties are treated with dignity and respect, and that social programs meet the community's needs.[245] In making decisions in individual cases, Raso recommends that human rights principles such as the dignity of a party may serve as a framework in reconciling competing norms and guidelines.[246] Raso explains that taking into account human rights values in administrative decision-making is important since this may allow human rights to inform many situations that are not often or cannot be brought before

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[241] *Ibid*
[242] *Ibid* at 332-333
[243] *Ibid* at 333
[244] *Ibid*
[245] Raso, "Human Rights", *supra* note 28 at 99-102
[246] *Ibid* at 99

rights enforcement institutions.[247]

However, Raso also acknowledges that there are barriers to implementing her approach. Raso concedes that rights enforcement structures will remain important since the use of human rights values by decision-makers "will not prevent all decision-makers from using their discretion to discriminate against marginalized individuals".[248] She also recognizes that that administrative agencies attempt to make decisions in a consistent way, and to do so, employ an "overwhelming number of rules and policies […] to constrain front-line workers".[249]

Despite their idealized nature, theories of engagement may be particularly apt in light of the majority reasons of the Supreme Court of Canada in *Vavilov*. As noted earlier, the Court focuses on a concept of "responsive justification", relying on procedural concepts and case law in redesigning the framework for substantive judicial review.[250] According to the majority, decision-makers should provide responsive reasons when important interests, such as a party's "life, liberty, dignity or livelihood", are at issue.[251] In the court's words, when "a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention."[252]

Meaningful engagement with litigants would arguably be necessary for decision-makers to provide these reasons that demonstrate a logical chain of reasoning based on the evidence and arguments before them.[253] Nonetheless, the Supreme Court's decision in *Vavilov* may raise more questions than it answers. Although, instinctively, it may appear helpful to require reasons that are attentive to the interests and perspectives of parties, it remains unclear whether and how this would improve the accessibility and fairness of the decision-making

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[247] *Ibid*
[248] *Ibid* at 100
[249] *Ibid* at 102. This tension between institutional policies and flexibility for individual decision-making is also demonstrated in Raso's analysis of the Ontario Works case management system, discussed earlier in this chapter: Raso, "Displacement as Regulation", supra note 51
[250] *Vavilov*, *supra* note 20 at para 77, citing *Baker, supra* note 189
[251] *Ibid* at para 133
[252] *Ibid*
[253] *Ibid* at paras 102-103

process.

A comparison of ideal theories of engagement and real-world procedural decision-making may allow for a better understanding of this question. Procedural justice literature demonstrates that fair processes may be more important where there are imbalances of power.[254] Nonetheless, administrative law literature does not frequently engage with the ways marginalized parties experience more informal tribunal procedures and associated implications for the legitimacy of administrative tribunals. Ideal theories of engagement focus on the humanity of the administrative process, treating parties with respect and dignity, and creating an environment of trust that allows for dialogue about a party's circumstances and needs. While it is unclear whether these theories can be practically implemented in the real world, Sossin, Cartier and Raso raise significant concerns in this regard. Examining actual procedural decisions from administrative tribunals and evaluating them against these ideal theories may demonstrate to what extent engagement and dialogue may be achieved and whether it truly advances access to justice.

[254] Where there is an imbalance of power, "procedural justice is more important and more influential for those who are lower status": Welsh, *supra* note 111 at 740, see also 741-742

Chapter Two: Procedural Decisions at the Social Benefits Tribunal, Human Rights Tribunal of Ontario, and Landlord and Tenant Board

A review of cases decided in the past five years by the Social Benefits Tribunal (SBT), Human Rights Tribunal of Ontario (HRTO), and Landlord and Tenant Board (LTB) demonstrates some striking patterns of adjudication of procedural requests for accommodation during the hearing process.[255] The SBT's lay adjudicators often took a practical, case-by-case approach, informed by a context where most or all appellants have some form of disability. Meanwhile, the HRTO's approach is informed by a human rights analysis and active adjudication practices, applied by legally trained adjudicators who may occasionally take an overly technical approach to balance fairness to applicants and respondents. Finally, the vast caseload and interests of landlords to process their eviction applications quickly has led to institutional practices at the LTB that undermine the ability of individual LTB members to meaningfully evaluate accommodation needs of tenants before them.

In this chapter, I will briefly review my methods for reviewing this case law, so as to arrive at the general conclusions stated in the opening paragraph. Then, I go into considerable detail by providing context from, and engaging in analysis of, publicly available tribunal documents, academic and policy analyses, and statements from individuals who have navigated these systems or who work in them to support vulnerable groups. This overview and analysis includes a review of the statutory mandate of each tribunal and relevant court decisions.

Methods

My review of SBT, HRTO, and LTB decisions focuses on the adjudication of requests for procedural accommodation. A primarily doctrinal method is a logical step to map the topography of tribunal procedural decisions in this area, as little academic literature exists

[255] When I reference tribunal decision-makers at the SBT, HRTO or LTB as a general class, this is shorthand for some decision-makers comprising an indeterminate percentage of all decision-makers. I am not asserting all decision-makers exercise their discretion in the specified way. While I was able to determine some general trends from the body of case law reviewed in this chapter, these trends were often based on a relatively small number of cases.

documenting this case law.[256] In this section, I describe the perspective I bring to my analysis of tribunal case law, how I define "accommodation", how I conducted my case law searches, and the limitations of my doctrinal method.

An analysis of decisions of the Ontario SBT, HRTO and LTB from 2014-2019 enabled me to review a significant number of tribunal decisions as well as relevant judicial reviews.[257] The majority of the cases I read highlighted one or more barriers associated with disability and language proficiency, as these barriers were the primary focus of my case law search. In addition, some cases exemplified other types of barriers, relating to family status, domestic violence and limited financial resources.

Given the number of decisions released by these tribunals in this time period, it was not possible to read each one, or to search keywords that would capture every way an adjudicator could describe a particular issue. As well, there may be some exchanges that occur at hearings

[256] Rónán Kennedy, "Doctrinal Analysis: The Real 'Law in Action'" in Laura Cahillane & Jennifer Schweppe, eds, *Legal Research Methods: Principles and Practicalities* (Dublin: Clarus Press, 2016) 21 at 25-26

[257] I reviewed LTB, HRTO and SBT decisions for a five-year period, from 2014-2019, using LexisNexis, Westlaw and CanLII. SBT decisions were only available from CanLII. My samples were comprised of the number of decisions available from each tribunal in this five-year period: 27,470 (SBT), 8792 (LTB), 8645 (HRTO). Given the sheer number of cases, I searched the case law to target relevant procedural decisions. I began with general searches using search terms regarding "accommodation" and "hearings". After reviewing these cases, I then performed additional searches relating to accommodation and specific barriers and solutions related to disability that I identified through previous searches ("adjourn", "break", "telephone", "late", "extension", "wheelchair", "time", "morning", "afternoon", "support person", "device", "writing", "written", "chair", "light", "loud", "clear", "service dog", "service animal" and "location"). With respect to language barriers, I used search terms to identify situations where there was a flaw in interpretation ("flaw", "problem", and "understand"), an issue of fairness regarding interpretation ("fair" and "natural justice"), or where a non-professional interpreter was present ("family", "relative", "friend", "neighbor" and "neighbour"). With respect to the HRTO in particular, I searched cases relevant to its active adjudication practices and how they apply them (by searching "active adjudication" and cases that cite s 41 and s 43 of the *Code*). I also updated my searches on May 4, 2020 and again on July 29, 2020 to capture additional LTB and SBT decisions from 2019. It is possible that these two tribunals have not yet forwarded all of their decisions from 2019 to the relevant databases. With respect to court cases, I looked at judicial reviews in the housing, human rights, and social assistance context in provinces and territories across Canada. I used more general search terms to find decisions that were judicial reviewed in these contexts on the basis of procedural fairness or accommodation needs (for example, in the human rights context, I searched "human rights" together with "procedural fairness", "natural justice" and "accommodation").

or barriers experienced by parties that do not appear in written decisions at all.[258] Therefore, while I reviewed a sufficient number of cases to observe some general trends, these trends may not account for the approaches of every adjudicator at each tribunal during the relevant timeframe.

I place my analysis of tribunal decisions in context and am transparent about my own perspective, to address some of the shortcomings of this primarily doctrinal method.[259] This context includes policy papers, tribunal documents, and studies conducted by researchers and advocates that are relevant to these particular tribunals. In addition, my research is intentionally and transparently focused on access to justice, informed by barriers faced by marginalized groups.

Accordingly, in my descriptions and critiques of tribunal case law, I define "accommodation" broadly, consistent with the definition of access to justice described above.[260] I consider any factor that can undermine a party's ability to participate fully and meaningfully as a "barrier".[261] Similarly, any request to overcome a barrier proposed by the applicant or implemented by the tribunal comprises an "accommodation". This definition of "accommodation" is intentionally wider than legal requirements imposed by the *Code*, the *Charter* or the doctrine of procedural fairness. This allows me to analyze situations that may not be sufficiently addressed by these legal concepts, but may nonetheless be relevant to access to justice and legal theories of dialogue and engagement. For example, this definition would encompass barriers such as poverty that may not strictly fit into grounds of discrimination described in the *Code*.

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[258] These could include barriers that prevented a party from attending the hearing in the first place. To analyze information associated with these types of barriers, it would have been necessary to conduct interviews with parties and adjudicators. However, this methodology falls outside of a manageable scope for my thesis.
[259] Drawbacks of a purely doctrinal method include the lack of context accompanying legal decisions and the seemingly objective nature of this method, when it is, in fact, influenced by the perspective of the researcher: Terry Hutchinson, "Doctrinal Research: Researching the Jury" in Dawn Watkins & Mandy Burton, eds, *Research Methods in Law* (New York: Routledge, 2013) 7 at 15-17; Kennedy*, supra* note 256 at 26-30
[260] As an "equal right to participate in every institution where law is debated, created, found, organized, administered, interpreted and applied": Macdonald, *supra* note 92 at 23
[261] In doing so, I adopt Lepofsky and Graham's definition of "barrier", as noted above: Lepofsky & Graham, *supra* note 145 at 139

That said, it is notable that procedural discretionary decisions and hearing accommodations cannot address all access to justice issues and barriers faced by parties. As described above, the legal doctrine of procedural fairness is limited by the tribunal's statutory scheme, its chosen procedures, and fairness to opposing parties. In addition, the procedural justice literature demonstrates that parties evaluate the fairness of procedures based on factors that go beyond procedural accommodations. These factors, such as diverse appointments of decision-makers or the training of decision-makers to engage in reflective listening or to consider unconscious bias,[262] are significant, but cannot be adequately captured by the written decisions and operational policies that I reviewed. That said, as described further below, some of the cases I reviewed demonstrated the possibility for more meaningful procedural decisions that reflect some of the values inherent in the procedural justice literature, despite certain limitations that decision-makers face.

Social Benefits Tribunal

The SBT hears cases relating to Ontario's two income support programs: Ontario Works and Ontario Disability Support Program benefits. The SBT's approach to discretionary decision-making reflects a practical, individualized approach employed by lay adjudicators in a context where many appellants have a disability and may also face other barriers to a fair hearing.

Since a large majority of the accommodation cases I identified are appeals of ODSP decisions, it is important to put these decisions into that context. More Ontarians are receiving ODSP than

[262] Welsh, *supra* note 111 at 750-752, 756-758, 760

ever before.[263] However, their lived experience reflects a program characterized by insufficient benefits, demeaning conditions, coercion and stigma.[264]

The standard of living for recipients of ODSP has become increasingly limited because benefit rates have not kept up with the costs of goods and services.[265] In 2020, a single person receives $1169 each month, while a couple with two children receives $2,126.[266] The Income Security Advocacy Centre has recently stated that, because of their limited means, benefit recipients may live in "substandard, dangerous housing", rely on food banks and other charities, and go without essentials they need.[267] Similarly, the Canadian Centre for Policy Alternatives reported in 2016 that single ODSP recipients were 33% below the poverty line, while recipients with two children were 11% below the poverty line.[268]

Furthermore, ODSP recipients also report that their treatment by front-line ODSP staff does not always respect their dignity. The ODSP Action Coalition collected statements in 2011 from

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[263] This upward trend may be partially attributable to an aging population and an increase in ODSP applicants with mental health conditions, which in turn may relate to an increase in diagnosis and changes to ODSP adjudication practices. In addition, employment rates have fallen, and unemployed workers are less likely to qualify for other income support programs, such as Workplace Safety and Insurance Board (WSIB) or Canada Pension Plan - Disability (CPP-D): Don Kerr, Tracy Smith-Carrier & Juyan Wang, "From Temporary Financial Assistance to Longer Term Income Support: Probing the Growth in ODSP" (2019) 79 CRSP 11 at 14-24.

[264] For example: Janet Mosher, "Welfare Reform and the Making of a Model Citizen" in Margot Young *et al*, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 119 at 126-127; Denise Réaume, "Dignity, Choice, and Circumstances" in Christopher McCrudden, ed, *Understanding Human Dignity* (Oxford: OUP for The British Academy, 2013) 557; Income Security Advocacy Centre and the Ontario Community Legal Clinic System's Steering Committee on Social Assistance, "Feedback Submission on 'Income Security: A Roadmap for Change' to the Minister of Community and Social Services" (15 December 2017) at 2-3, 5, online: <http://incomesecurity.org/resources/publications/> [ISAC, "Roadmap"]

[265] ODSP Action Coalition, "Dignity, Adequacy, Inclusion: Rethinking the Ontario Disability Support Program, Submission to the Commission for the Review of Social Assistance in Ontario" (29 June 2011) at 17-20, online: <https://www.odspaction.ca/node/157>; ISAC, "Roadmap", *supra* note 264 at 4; Income Security Advocacy Centre, "Pre-Budget Submission to the Ontario Legislature's Standing Committee on Finance and Economic Affairs and the Ontario Minister of Finance" (January 2019) at 3-4, online: <http://incomesecurity.org/resources/publications/> [ISAC, "Pre-Budget Submission"]

[266] Income Security Advocacy Centre, "OW & ODSP Benefit Rates and the Ontario Child Benefit" (February 2020) online: <http://incomesecurity.org/resources/publications/>

[267] ISAC, "Pre-Budget Submission", *supra* note 265 at 3-4

[268] Kaylie Tiessen, "Ontario's Social Assistance Poverty Gap" (2016) Canadian Centre for Policy Alternatives at 6, online: <https://www.policyalternatives.ca/sites/default/files/uploads/publications/Ontario%20Office/2016/05/CCPA%20ON%20Ontario%27s%20social%20assistance%20poverty%20gap.pdf>

benefit recipients who said that they were treated like "a non-person", "an ungrateful child" and "a criminal".[269] Similarly, the Income Security Advocacy Centre reported in 2017 that "[f]ront-line workers are the first to say that their time and energy are guided by the punitive rules that they are expected to enforce."[270] These rules relate to initial and ongoing eligibility for benefits and can be complex, confusing and lacking in transparency.

Therefore, it is important to consider the statutory mandate and procedures of the Social Benefits Tribunal in the context of a program that often feels inadequate and disrespectful to its recipients, who may struggle to meet their expenses with the benefits they receive. The vulnerability of these recipients and their response to the imbalances of power in this system as a whole are relevant to their experience of the SBT's procedures.

Statutory Mandate

The statutory mandate of the SBT balances fair procedure and efficiency in the hearing process. The SBT is constituted by the *Ontario Works Act, 1997*, and is empowered to hold hearings in person or in writing.[271] Oral hearings may be held "at the places in Ontario and in the manner and at the times the Tribunal considers most convenient for the proper discharge and speedy dispatch of its business."[272]

The SBT's Rules of Procedure outline the powers of adjudicators, which allow them broad scope to alter hearing procedures.[273] For example, an adjudicator can alter time limits within the Rules, hear multiple appeals brought by the same appellant consecutively, convene a pre-hearing conference, make changes to the order that issues are considered or that parties present their case, narrow the issues and limit evidence on particular issues, make interim orders, or "take any other action appropriate in the circumstances."[274] Other rules allow

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[269] ODSP Action Coalition, *supra* note 265 at 11-12
[270] Income Security Advocacy Centre, "Income Security: A Roadmap for Change" (October 2017) at 95, see also 90-102, online: <http://incomesecurity.org/resources/publications/>
[271] *Ontario Works Act, 1997*, SO 1997, c 25, Sch A, ss 65(1)-(2) [*Ontario Works Act*]
[272] *Ibid*
[273] Social Benefits Tribunal, "Rules of Procedure for Appeals to the Social Benefits Tribunal", online: <http://www.sjto.gov.on.ca/documents/sbt/SBT%20Rules%20Parts%201%20&%202%20EN.html#rule1>
[274] *Ibid,* Part II, Rule 1.5

hearings to be conducted "in person, in writing, by telephone or by other electronic means as the SBT considers appropriate",[275] and provide procedures for requesting adjournments.[276]

The SBT states on its website that they will provide accommodations based on *Human Rights Code* grounds.[277] It explains that appellants may make requests in writing or by calling an Appeals Resolution Officer assigned to the appeal. The SBT's frequently asked questions webpage also explains that appellants may bring a support person and request cost of transportation to the hearing if they cannot afford it.[278]

The Divisional Court has recognized that the SBT must interpret its mandate in accordance with reasonable accommodation consistent with *Human Rights Code* and *Charter* values, given that its enabling statute is intended to support persons with disabilities.[279] It has also acknowledged that the SBT must take into account any information they have about a party's disability, even if that party does not appear at the hearing.

For example, the SBT has granted adjournments to give the appellants a chance to explain why they were not able to attend on the assigned hearing date, since their failure to appear may relate to their disability.[280] The SBT will evaluate any explanations provided with an open mind,

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[275] *Ibid*, Part II, Rule 7.7
[276] *Ibid*, Part II, Rule 13
[277] Social Benefits Tribunal, "Accessibility and Accommodation", online: <http://www.sjto.gov.on.ca/sbt/accessibility-and-accommodations/> [SBT, "Accessibility and Accommodation"]. This website links to the Tribunals Ontario, Social Justice Division, "Accessibility and Accommodation Policy", online: <http://www.sjto.gov.on.ca/documents/sjto/Accessibility%20and%20Accommodation%20Policy.html> [Tribunals Ontario, "Accessibility and Accommodation Policy"]
[278] Social Benefits Tribunal, "Videos and FAQs", online: <http://www.sjto.gov.on.ca/sbt/faqs/> [SBT, "Videos and FAQs"]
[279] *Pavon v Ontario (Director, Ontario Disability Support Program)*, 2013 ONSC 4309 at para 45 (Div Ct). Similarly, the Social Justice Tribunals Ontario cluster has a common set of rules that apply to the SBT, HRTO and LTB. Rule A-5 requires that all three tribunals must accommodate the *Human Rights Code* needs of parties, witnesses and support persons: Social Justice Tribunals Ontario Rules of Procedure: Common Rules, Rule A-5, online: Tribunals Ontario, Social Justice Division <http://www.sjto.gov.on.ca/en/rules-of-procedure/> [SJTO, "Common Rules"]
[280] *1707-06287 (Re),* 2018 ONSBT 51 at para 5, citing *Miller, supra* note 142. Further examples are reproduced below at note 286.

even if medical evidence may not be completely relevant or a disability may not be the only reason for the accommodation.[281]

Types of Accommodations Provided

The SBT provides a variety of accommodations, informed by the medical restrictions and requests of appellants before it. The SBT begins its inquiries regarding potential accommodations at the stage of the initial appeal form, but is also willing to grant accommodations that are requested later on in the process.[282]

The SBT's appeal form proactively asks appellants about procedural accommodations to the hearing process. It includes a question asking whether the appellant requires an interpreter and, if so, requests the language and dialect.[283] The form also specifically inquires whether sign language interpretation is needed.[284] Finally, the form provides a box for the appellant to explain any "[p]hysical or other accommodation to participate in the hearing."[285] However, the form does not include much information about what barriers to the hearing process may be addressed, what accommodations are typically provided, or what kind of information may be needed to support them.

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[281] *1703-02211 (Re),* 2018 ONSBT 5598 at paras 7-10

[282] It may be impossible to conclude with certainty, based on the decisions I reviewed, whether decision-makers always take consistent approaches. On many issues, the number of cases I found was small. In addition, it is impossible to discern situations where decision-makers could have raised issues on their own motion and did not do so. However, to the extent that I can draw conclusions, the majority of the decisions I read were generally consistent with each other.

[283] Social Benefits Tribunal, "Forms and Filing", Appeal (Form 1) at 2, online: <http://www.sjto.gov.on.ca/sbt/forms-filing/#form1> [SBT, "Appeal Form"]

[284] *Ibid*

[285] *Ibid.* For the most part, based on my research, this process appears to work successfully. However, in one case, when the appellant requested a two-hour hearing block on his Appeal Form, his hearing was scheduled for 90 minutes. After discussing this issue before the hearing started, the appellant and adjudicator agreed that 90 minutes would be sufficient: *1803-01447 (Re),* 2019 ONSBT 2645 at paras 4-5

This lack of information is disappointing, since the SBT is willing to grant a wide range of accommodations. They include:

- Adjournments for a variety of reasons, including in response to a failure of the appellant to appear,[286] for the appellant to get legal advice or representation,[287] because the appellant is not well enough to participate,[288] or to determine accommodations;[289]
- Allowing an appellant's matter to proceed first on the hearing day;[290]
- Allowing an appellant to testify in writing;[291]
- Providing the appellant with breaks[292] and opportunities to change position;[293]
- Allowing additional time to file the appeal,[294] and provide submissions and evidence;[295]
- Holding the hearing in the morning[296] or the afternoon;[297]
- Providing the appellant with questions in writing;[298]
- Formatting documents accessibly for appellants with visual disabilities;[299]
- Accommodations to address an appellant's ability to learn and process information;[300]

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[286] For example: *1707-06145 (Re),* 2018 ONSBT 967 at paras 2-8; *1708-06625 (Re),* 2018 ONSBT 1203 at paras 3-8; *1704-03035 (Re),* 2018 ONSBT 630 at paras 3-9; *1611-08205 (Re),* 2017 ONSBT 6284 at paras 3-7
[287] *1607-04556 (Re),* 2017 ONSBT 2120 at para 3; *1608-05938 (Re),* 2017 ONSBT 4070 at paras 2-4; *1712-10427 (Re),* 2018 ONSBT 3553 at para 8
[288] *1702-01113 (Re),* 2018 ONSBT 1205 at paras 4-7
[289] For example: *1704-02853 (Re),* 2017 ONSBT 4674 at para 10; *1706-05104 (Re),* 2018 ONSBT 4282 at paras 2-3
[290] *1802-01128 (Re),* 2018 ONSBT 4020 at para 2; *1608-05922 (Re),* 2017 ONSBT 4706 at para 1
[291] In *1412-13744 (Re),* 2016 ONSBT 4635 at paras 29, 39-41, the SBT directed the appellant to provide medical evidence to support a request to answer written questions in the form of an affidavit. Upon receiving this evidence, the SBT was willing to allow this accommodation to the hearing process.
[292] *1601-00146 (Re), 2016 ONSBT 5339* at para 1; *1408-08806 (Re),* 2016 ONSBT 598 at para 6; *1810-06627 (Re),* 2019 ONSBT 3263 at paras 8-10
[293] *1405-06041 (Re),* 2015 ONSBT 6344 at para 15; *1507-07094 (Re),* 2016 ONSBT 3673 at para 3
[294] *1506-06006 (Re),* 2016 ONSBT 5089 at para 2; *1312-12902RR (Re),* 2017 ONSBT 1687 at paras 17-22; *1406-06261 (Re),* 2015 ONSBT 6395 at paras 3-6; *1402-02492 (Re),* 2015 ONSBT 5576 at paras 3-6; *1506-05797 (Re),* 2016 ONSBT 366 at paras 5-6; *1506-06244 (Re),* 2016 ONSBT 3170 at paras 6-7; *1606-04478 (Re),* 2017 ONSBT 3872 at paras 5-8 (delay of 7.5 months); *1610-07319 (Re),* 2017 ONSBT 6075 at paras 3-6 (delay of 5 months); *1802-01019 (Re),* 2018 ONSBT 4903 at para 7
[295] *1402-01765 (Re),* 2017 ONSBT 3366 at paras 9-12 [*1402-01765 (Re) 2017*] and *1402-01765 (Re),* 2018 ONSBT 489 at para 20 [*1402-01765 (Re) 2018*] regarding the same appeal; *1705-03640 (Re),* 2018 ONSBT 3945 at paras 9-10
[296] *1810-06627 (Re),* supra note 292 at paras 8-10
[297] *1705-04114 (Re),* 2017 ONSBT 6059 at paras 1-2; *1402-01842 (Re),* 2017 ONSBT 2250 at para 1
[298] *1601-00474 (Re),* 2016 ONSBT 4777 at para 3
[299] *1802-00966 (Re),* 2018 ONSBT 4293 at paras 2-6; *1704-02957 (Re),* 2017 ONSBT 6205 at para 7
[300] *1706-05023 (Re),* 2018 ONSBT 202 at para 2

- Accommodations to the physical hearing room, such as dimming the lights,[301] providing a room with natural light rather than fluorescent lighting,[302] or keeping the door open;[303]
- Providing the appellant with a different chair,[304] allowing the appellant to sit in a different place,[305] or allowing the appellant to give evidence lying down;[306]
- Changing the location of the hearing;[307]
- Changing the method of hearing to a hearing in writing,[308] teleconference,[309] in person,[310] or a hybrid of these approaches;[311]
- Allowing the appellant to be accompanied by a service dog;[312]
- Allowing the appellant to be accompanied by a support person;[313]

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[301] *Ibid* at para 2
[302] *1403-02784 (Re),* 2015 ONSBT 4792 at para 3
[303] *1802-01128 (Re), supra* note 290 at para 2; *1803-01379 (Re),* 2018 ONSBT 5393 at para 2
[304] *1607-05236 (Re),* 2018 ONSBT 768 at para 19 [*1607-05236 (Re) 2018*] and *1607-05236 (Re),* 2017 ONSBT 3745 at para 2 regarding the same appeal; *1408-08806 (Re), supra* note 292 at para 6
[305] *1511-10141 (Re),* 2016 ONSBT 5079 at para 7 (seating arrangement to address a hearing impairment)
[306] *1608-05629 (Re),* 2017 ONSBT 3867 at para 3
[307] *1404-04409 (Re),* 2015 ONSBT 3806 at para 15 (meetings conducted by telephone or close to the appellant to accommodate his anxiety regarding public transportation); *1705-04551 (Re),* 2018 ONSBT 2225 at paras 6-7 (to conduct the hearing in the city where the appellant lives, as he does not have access to transportation); *1707-05605 (Re),* 2017 ONSBT 6143 at para 4 (hearing held close to where the appellant lives and postponed to avoid winter driving); *1703-01860 (Re),* 2018 ONSBT 1647 at para 4 [*1703-01860 (Re) #1*] (SBT was open to changing the venue to one that accommodated the appellant's scent sensitivity)
[308] *1703-01860 (Re),* 2018 ONSBT 2355 at paras 15-19 [*1703-01860 (Re) #2*] (to accommodate scent sensitivity when the appellant could not suggest alternate venues); *1601-00294R (Re),* 2018 ONSBT 1719 at para 8 (in writing to accommodate disabilities and financial circumstances of the appellant); *1602-01243 (Re),* 2017 ONSBT 5481 at para 15; *1909-06766 (Re),* 2019 ONSBT 3802 at para 2; *1807-05066 (Re),* 2019 ONSBT 2264 at para 3
[309] *1702-01317 (Re),* 2017 ONSBT 4428 at para 3 (oral hearing requested by appellant); *1608-05793 (Re),* 2017 ONSBT 3517 at para 2 (appeals converted to oral hearings from telephone hearings based on an accommodation request before the hearing); *1703-02315 (Re),* 2017 ONSBT 6392 at para 4 (telephone hearing requested to accommodate agoraphobia); *1506-06006 (Re), supra* note 294 at para 1 (changed to telephone hearing on the day of the hearing to accommodate disabilities); *1712-10308 (Re),* 2018 ONSBT 5057 at para 3 (to accommodate electro-sensitivity); *1612-09123 (Re),* 2017 ONSBT 4315 at para 22 (to accommodate anxiety about leaving home); *1410-12252 (Re),* 2015 ONSBT 5821 at para 13 (to accommodate anxiety); *1511-10029 (Re),* 2017 ONSBT 3119 at para 1 (unspecified medical reasons)
[310] *1603-01657R (Re),* 2018 ONSBT 852 at paras 9-12; *1712-10427 (Re), supra* note 287 at para 30
[311] *1705-03640 (Re),* 2018 ONSBT 4734 at paras 2-6 (openness to a hybrid hearing where some evidence is received by affidavit); *1703-01860 (Re) #1, supra* note 307 at para 4 (openness to hearing beginning by telephone and becoming a written proceeding based on appellant's limitations)
[312] *1408-09364 (Re),* 2015 ONSBT 5088 at para 1; *1512-11672R (Re),* 2017 ONSBT 4458 at para 3
[313] *1703-02128 (Re),* 2018 ONSBT 2874 at para 8; *1803-01379 (Re), supra* note 303 at para 2; *1707-05734 (Re),* 2018 ONSBT 1701 at para 2; *1501-00396 (Re),* 2015 ONSBT 5988 at para 13; *1607-05333 (Re),* 2017 ONSBT 1836 at paras 2-3; *1810-06627 (Re), supra* note 292 at paras 8-10

- Interpretation, including sign language interpretation, arranged by the tribunal at its own expense.[314]

Case Management and Accommodation Requests Prior to the Hearing Date

The SBT has case management procedures in place that provide a forum to discuss accommodations prior to the hearing date. According to the SBT's Practice Direction on Pre-Hearing Conferences, the Tribunal itself may also decide to schedule a pre-hearing conference even if the parties do not request one.[315] The SBT usually holds pre-hearing conferences by telephone or videoconference where procedural matters are at issue, but where significant prejudice may otherwise result, it may be held in person as well.[316]

Some decisions regarding accommodations were issued after a pre-hearing conference – for example, to set timelines to receive evidence regarding the merits of the case that accommodate an appellant's disabilities,[317] to set timelines to receive evidence in support of an accommodation request,[318] to allow an appellant to bring a late appeal,[319] to select a venue that accommodates the appellant,[320] or to determine a method of hearing that accommodates the appellant.[321]

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[314] SBT, "Accessibility and Accommodation", *supra* note 277. Social Benefits Tribunal, "Language Services," online: <http://www.sjto.gov.on.ca/sbt/language-services/> [SBT, "Language Services"]. As well, in *1709-07502 (Re)*, 2018 ONSBT 1716 at para 6, the Tribunal confirms its policy that it will arrange and pay for third party interpreters required by appellants.

[315] Social Benefits Tribunal, "Practice Direction on Pre-Hearing Conferences" (effective January 1, 2016), online: <http://www.sjto.gov.on.ca/documents/sbt/Pre-Hearing%20Conferences.html>

[316] *Ibid*: Procedural questions that may be resolved by pre-hearing conference outlined in the Practice Direction include deadlines to complete steps in the hearing process, the length of the hearing, or the order of proceedings. However, the Practice Direction provides adjudicators with flexibility, stating that "any other matter that may assist in the just and expeditious disposition of the appeal" may be decided as well.

[317] *1402-01765 (Re) 2017, supra* note 295 at paras 9-12

[318] *1611-08690 (Re),* 2018 ONSBT 2576 at paras 2-5

[319] *1312-12902RR (Re), supra* note 294 at paras 17-22

[320] *1703-02128 (Re), supra* note 313 at paras 3-11; *1705-03640 (Re), supra* note 311 at paras 3-4. See also: and *1703-01860 (Re) #2, supra* note 308 at paras 15-19

[321] *1705-03640 (Re), supra* note 311 at paras 2-6

These case management conferences were often held at the request of the SBT to narrow issues in complex cases,[322] to provide directions after an adjournment was granted,[323] or to determine procedural matters such as where a hearing should be held.[324] However, one pre-hearing conference was held at the request of the respondent to address an issue of jurisdiction.[325]

Accommodation Requests at the Hearing

Although some appellants may request accommodations early on, the case law reflects flexibility when an accommodation request is made at the hearing itself. They may grant the request or adjourn the hearing to provide time for appellants to consider what accommodations they need and provide appropriate medical support for them.

SBT members may grant accommodations at the hearing without prior notice from the appellant; for example, they may convert an in-person hearing to a telephone hearing,[326] dim the lighting, simplify the language of questions, and assist the appellant with medical evidence.[327] Similarly, if the appellant has an episodic condition where it is impossible to predict her level of functioning, the Tribunal may grant an adjournment. The SBT understands that, in some cases, "it is the nature of [the appellant's] condition that she cannot predict when she is going to have a bad day."[328]

When appellants do not understand that they can request accommodations in advance, the SBT member explains this process and may adjourn to provide the appellant with the opportunity to make a request.[329] In particular, the SBT recognizes that appellants with limited English proficiency may require an adjournment to both arrange for an interpreter and allow the

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[322] *1402-01765 (Re) 2017, supra* note 295 at paras 9-12
[323] *1611-08690 (Re), supra* note 318 at paras 2-5
[324] *1703-02128 (Re), supra* note 313 at paras 3-11
[325] *1312-12902RR (Re), supra* note 294 at paras 17-22
[326] *1506-06006 (Re), supra* note 294 at para 1; *1511-10029 (Re), supra* note 309 at para 1
[327] *1706-05023 (Re), supra* note 300 at para 2
[328] *1702-01113 (Re), supra* note 288 at para 7
[329] *1704-02853 (Re), supra* note 289 at para 10

appellant time to get legal advice.[330] The SBT may adopt stricter timelines than they did in response to a previous adjournment with respect to the same matter if an appellant has difficulties putting together an accommodation request or supporting it with the relevant evidence – however, the SBT will not necessarily deny a second adjournment request outright.[331]

The SBT will also be willing to adjourn the hearing if accommodations themselves cause unexpected difficulties. For example, technical problems may occur during a telephone hearing.[332] Similarly, a scheduled interpreter may fail to attend or arrive late,[333] speak the incorrect language or dialect,[334] or may not interpret accurately.[335] The SBT has also adjourned a hearing because an appellant has expressed concerns with telephone interpretation.[336]

These cases demonstrate that SBT members generally exercise their discretion flexibly, taking accommodation needs of appellants seriously even if they are first raised at the outset of the hearing or during the hearing itself.

Inquiries about Accommodations and Evaluation of Practices Employed by Regional Offices

SBT members sometimes identify accommodation issues on their own motion at the hearing, even when appellants do not raise the issue on their own. For example, a member asked an appellant who had a stroke whether this led to any limitations that should be

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[330] For example: *1612-09469 (Re),* 2017 ONSBT 3737 at paras 2-3; *1807-04766 (Re),* 2019 ONSBT 994 at paras 1-5; *1711-09229 (Re),* 2018 ONSBT 2764 at paras 1-2; *1703-02308 (Re),* 2018 ONSBT 2357 at paras 2-3
[331] *1611-08690 (Re), supra* note 318 at paras 2-5; *1703-02013 (Re),* 2017 ONSBT 5013 at paras 6-10
[332] *1712-10308 (Re), supra* note 309 at paras 4-5 (appellant and representative had problems using speakerphone during a telephone hearing); *1409-09769 (Re),* 2017 ONSBT 1182 at paras 4-5 (SBT member had difficulties accessing the teleconference line).
[333] For example: *1705-05222 (Re),* 2017 ONSBT 6326 at paras 2-3; *1705-04067 (Re),* 2017 ONSBT 6233 at para 2; *1611-07950 (Re),* 2017 ONSBT 2947 at para 2; *1606-04106 (Re),* 2017 ONSBT 2959 at paras 2-3; *1804-02374 (Re),* 2018 ONSBT 5047 at paras 4-7
[334] For example: *1705-04550 (Re),* 2017 ONSBT 6301 at paras 3-5; *1610-07745 (Re),* 2017 ONSBT 2481 at paras 3-5; *1609-06560 (Re),* 2017 ONSBT 1333 at paras 4-9; *1802-01285 (Re),* 2018 ONSBT 4679 at paras 3-4
[335] *1610-07270 (Re),* 2017 ONSBT 4565 at paras 3-4; *1810-06568 (Re),* 2019 ONSBT 2043 at paras 3-8; *1803-01927 (Re),* 2018 ONSBT 5352 at paras 3-7; *1711-09798 (Re),* 2018 ONSBT 4981 at paras 5-7
[336] *1705-03762 (Re),* 2017 ONSBT 5851 at para 5; *1507-07094R (Re),* 2017 ONSBT 2588 at paras 5-6; *1604-02711 (Re),* 2017 ONSBT 1477 at paras 2-9

accommodated.[337] In addition, when an appellant experienced memory problems during his testimony, the adjudicator asked him about it, learned that his medication was affecting his memory, and raised the possibility of an adjournment.[338]

Similarly, if an appellant seems to have a language barrier, the SBT will raise this as a matter of human rights and section 14 of the *Charter*.[339] The SBT arranges for interpretation provided by an objective, impartial interpreter at the tribunal's expense, upon receiving an appellant's request prior to the hearing or if it becomes obvious at the hearing that an appellant requires one.[340] That said, the SBT provides appellants with the option to bring someone they know if they prefer, as long as that person interprets accurately and fairly.[341] For example, a family friend was permitted to interpret as an accommodation for the appellant's anxiety.[342] Once interpretation has been arranged, SBT members regularly inquire about potential problems with interpretation[343] and may order an adjournment if there are doubts regarding the quality of interpretation.[344]

The SBT has also concluded that some policies of local disability benefits offices fail to accommodate appellants to the required extent. The SBT has held that pre-formulated letters are not always enough to accommodate a party. For example, when an appellant missed

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[337] *1304-04164 (Re),* 2015 ONSBT 2490 at para 3
[338] *1709-07977 (Re),* 2019 ONSBT 9 at paras 3-4
[339] *1702-01099 (Re),* 2017 ONSBT 4332 at paras 2-4. See also: *1609-06411 (Re),* 2017 ONSBT 1331 at paras 1-2
[340]SBT, "Language Services", *supra* note 314; SBT, "Accessibility and Accommodation", *supra* note 277. See, for example, *1810-06568 (Re), supra* note 335 at paras 3-8, where the SBT adjourned a hearing because of inaccurate interpretation, even where the appellant's bilingual spouse was present; *1609-06745 (Re),* 2017 ONSBT 1733 at paras 3-5, where an interpreter did not arrive at the hearing and the SBT refused to allow a friend to interpret; *1602-01419 (Re),* 2016 ONSBT 5834 at para 1, where the SBT provided an interpreter and the appellant's son did not interpret; *1806-04272 (Re),* 2019 ONSBT 389 at para 1, where the SBT did not allow the appellant's son to interpret and adjourned to arrange for an interpreter.
[341] *1402-02043R (Re),* 2015 ONSBT 2325 at para 12; *1307-06812 (Re),* 2015 ONSBT 2388 at paras 3-4
[342] *1502-01815 (Re),* 2016 ONSBT 881 at para 3
[343] For example*: 1712-10011 (Re),* 2018 ONSBT 3123 at paras 3-6; *1712-10271 (Re),* 2018 ONSBT 3394 at para 1; *1711-09155 (Re),* 2018 ONSBT 3966 at para 3. However, in *1811-07754 (Re),* 2019 ONSBT 2526 at para 14, the SBT did not inquire further when the appellant stated that he had difficulty understanding questions from his representative even though an interpreter was present. It is possible that the SBT did not intervene because the appellant was represented and because he had some proficiency in English.
[344] *1705-03849 (Re),* 2018 ONSBT 2146 at para 1

multiple deadlines for providing documentation for a medical review, the Director was required to take into account the appellant's mental health disabilities and whether she had a family doctor.[345] Failing to take into account the appellant's own personal circumstances meant that she was not appropriately accommodated.[346] Similarly, in accepting a late appeal from an appellant with paranoid schizophrenia, the SBT commented that it was "aware that the Appellant may have been difficult to deal with at the time but the local office failed to accommodate the Appellant and subsequently caused him undue stress."[347]

Disrespectful and unfair interactions with local offices may cause appellants to be less forthcoming about accommodation requests and to find hearings to be more stressful. In one case, where it was difficult to find a venue that accommodated an appellant's multiple chemical sensitivities and physical limitations, she expressed an unwillingness to engage in further negotiations around the accommodation of these conditions.[348] While it may not always be reasonable for an appellant to refuse to engage in their own accommodation process, this case highlights the importance of respectful and efficient arrangement of accommodations at all levels.

Discretionary Decision-Making Practices

When SBT members decide accommodation requests, they take a practical approach that weighs the interests of the parties, the importance of moving the appeal process ahead, and any medical evidence they already have before them. In doing so, a few cases demonstrate that at least some SBT members attempt to view the appellant as a whole person, and to take into account their personal circumstances that may not directly relate to their disabilities.

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[345] *1808-05527 (Re),* 2019 ONSBT 1447 at paras 11-14
[346] *Ibid*
[347] *1312-12902RR (Re), supra* note 294 at paras 17-22
[348] *1703-02128 (Re), supra* note 313 at para 7

Weighing the Interests and Prejudice to the Parties

The SBT analyzes prejudice to the appellant and the respondent, the Director of the Ontario Disability Support Program, taking into account relevant circumstances affecting the appellant, including an appellant's medical conditions. For example, the SBT allowed an appellant to file an appeal late, taking into account that her depression significantly worsened when her mother died, and that she had to move.[349] While accommodating the appellant's depression was an important reason for allowing the extension of time, her depression was considered in the context of her other circumstances. In addition, the Tribunal acknowledged that "denying the extension would prejudice the Appellant significantly more than any possible prejudice that could be experienced by the Director".[350] However, in some cases, as noted below, the SBT denied accommodations after balancing the interests of the parties, on the basis of delay, failure of the appellant to participate, or other factors that demonstrated to the decision-maker that the hearing process had been frustrated.

For the most part, the Director did not oppose accommodations requested by appellants, which may provide decision-makers with more scope to allow them, since prejudice to the opposing party is not a significant factor. In some cases that I reviewed, the Director consented to accommodations such as extension of time to appeal, adjournments, a change of venue for the hearing, and the arrangement of language interpretation.[351] In one case, counsel for the

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[349] *1506-06244 (Re), supra* note 294 at paras 6-7

[350] *Ibid* at para 7. See also: *1606-04478 (Re), supra* note 294 at paras 5-8 (delay of 7.5 months); *1610-07319 (Re), supra* note 294 at paras 3-6 (delay of 5 months)

[351] With respect to extension of time to appeal: *1603-01820 (Re),* 2017 ONSBT 3547 at para 4; *1606-03867 (Re),* 2017 ONSBT 2431 at para 6. With respect to adjournment to arrange for accommodations, see: *1705-04114 (Re), supra* note 297 at paras 1-2; *1703-02211 (Re), supra* note 281 at para 9. With respect to an adjournment when the appellant did not attend: *1504-03288RR (Re),* 2018 ONSBT 1113 at para 6; *1711-09393 (Re),* 2018 ONSBT 3031 at para 5. With respect to an adjournment because of an error on the notice of hearing: *1602-01423 (Re)*, 2017 ONSBT 2107 at para 5. With respect to an adjournment and a change of venue, see: *1707-05605 (Re), supra* note 307 at paras 3-5. With respect to an adjournment to arrange language interpretation, see: *1705-04550 (Re),* supra note 334 at para 3; *1610-07745 (Re), supra* note 334 at paras 3-5; *1604-02711 (Re), supra* note 336 at paras 2-9; *1609-06560 (Re), supra* note 334 at paras 4-9; *1806-03654 (Re),* 2019 ONSBT 7 at paras 2-4; *1712-10011 (Re), supra* note 343 at paras 3-6; *1705-04425 (Re),* 2018 ONSBT 85 at para 2; *1601-00474 (Re), supra* note 298 at para 3; *1609-06745 (Re), supra* note 340 at para 5. In *1810-06627 (Re), supra* note 292 at paras 8-10, respondent's counsel agreed to a number of accommodations, including an in-person hearing, after having requested a written

Director consented to an adjournment for the appellant to obtain legal representation, but expressed concerns that "an adjournment would lead to a similar situation in the future."[352] In another appeal, the Director's counsel took no position on an adjournment request at all.[353]

However, in a few cases, the respondent opposed requests that could engage access to justice concerns. For example, the Director objected to two extensions of time,[354] as well as two adjournments when the appellant did not attend the hearing.[355] In addition, a Case Processing Officer (CPO) appearing for the Director questioned the adjournment requested by the appellant on the basis of a language barrier, after the Director filed written submissions in English shortly before the hearing.[356]

When the SBT evaluates prejudice to the appellant or the respondent that may be caused by a delay, it will take into account whether the appellant is still receiving income support. For example, where an appellant is over the age of 65 and no longer receiving income support, the prejudice to the Director is a lesser concern.[357] The SBT may also consider that an appellant may have to pay back interim support received pending the appeal if the appeal is unsuccessful.[358]

Additional Evidence is not Always Required

In evaluating the interests of the parties, the SBT may not always require additional evidence. Evidence about an appellant's disabilities and circumstances is often already available and may

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hearing. See also: *1408-08806 (Re), supra* note 292 at para 6 where the respondent's representative agreed to sit in a different location to give the appellant more room for her electronic devices and orient herself so they were facing one another and *1802-00966 (Re),* supra note 299 where the Case Presenting Officer agreed to make best efforts to convert the Director's submissions to a format that was accessible to the appellant, taking into account his visual disability.

[352] *1711-09242 (Re),* 2018 ONSBT 2638 at para 5, see also paras 3-4, 6-7

[353] *1702-01317 (Re), supra* note 309 at para 5

[354] *1312-12902RR (Re), supra* note 294 at paras 17-22; *1609-07071 (Re),* 2018 ONSBT 639 at paras 30-47

[355] *1412-13744 (Re), supra* note 291 at paras 24-25; *1801-00291 (Re),* 2018 ONSBT 3683 at paras 3-8

[356] The SBT allowed the adjournment, noting the CPO's disrespectful conduct: *1804-02168 (Re),* 2019 ONSBT 35 at paras 11-15

[357] *1702-01668 (Re),* 2018 ONSBT 2204 at para 10

[358] *1607-05236 (Re) 2018, supra* note 304 at para 22

provide enough information to support the accommodations requested. For example, in one case, an appellant's grandfather came to the hearing to explain why the appellant could not attend. Based on the medical evidence already in the file, the SBT granted an adjournment.[359]

Even if nobody attends to explain the appellant's absence, the SBT will consider whether the appellant may not have attended because of a medical condition, such as a mental health condition, chronic pain or intellectual disability.[360] For example, the SBT took into account difficulties in communication which could explain a failure to attend, such as a language barrier and hearing impairment.[361]

Similarly, the SBT may allow an adjournment based on an appellant's personal circumstances. When an appellant did not appear at her hearing, the SBT member noted that her file documented homelessness and a tendency to lose touch with caseworkers and healthcare workers.[362] In the interest of fairness, the SBT gave the appellant an opportunity to explain why she was not able to attend.[363]

When the Tribunal does require medical evidence, it may take the time at a hearing to explain to the appellant, as well as any support person present, what information is needed from the doctor.[364] When the appellant is not able to obtain this information, the SBT is also mindful of the reasons why and is open to providing more time. For example, when an appellant was supposed to undergo a psychological assessment to determine how to accommodate her cognitive issues in the hearing process, the psychologist passed away.[365] The appellant tried her

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[359] *1711-09393 (Re), supra* note 351 at paras 3-10
[360] *1706-04867 (Re),* 2018 ONSBT 890 at paras 4-7 (depression and anxiety); *1702-01676 (Re),* 2017 ONSBT 4501 at paras 2-8 (intellectual disability and substance abuse); *1707-06223 (Re),* 2018 ONSBT 983 at paras 3-8 (chronic pain and depression, see also *1707-06211 (Re),* 2018 ONSBT 832 at paras 1-8); *1704-03022 (Re),* 2017 ONSBT 5519 at paras 3-8 (social anxiety with phobia and social isolation); *1804-02369 (Re),* 2018 ONSBT 5248 at paras 3-8 (borderline personality traits and obsessive compulsive disorder with paranoia); *1708-06430 (Re),* 2017 ONSBT 6274 at paras 3-8 (agoraphobia)
[361] *1703-01949 (Re),* 2017 ONSBT 5342 at paras 3-8
[362] *1610-07579 (Re),* 2017 ONSBT 4587 at para 5
[363] *Ibid* at paras 6-9
[364] *1412-13963 (Re),* 2018 ONSBT 364 at paras 4-6
[365] *1611-08690 (Re),* 2018 ONSBT 4783 at para 2

best, providing some information from the family doctor and asking for more time.[366] The SBT provided an adjournment to allow this assessment to take place with another psychologist.[367]

Similarly, the SBT does not request significant evidence or explanation for interpreter requests, and may allow interpreters to remain on stand-by even if the appellant may not always need them.[368] The SBT website explains that interpreters may be requested on the appeal form, or after submitting that form but before the hearing.[369]

Assistance from Counsel May Allow Additional Accommodations to be Adjudicated

While many appellants request accommodations on their own, assistance from their representative may be helpful.[370] For example, where counsel for the appellant was concerned that an appellant was not following the proceedings because of a cognitive impairment, the SBT took this concern seriously.[371] It granted an adjournment to receive medical information and assess any additional accommodations. In addition, the SBT granted an adjournment when a representative raised an issue about the quality of the interpretation at the hearing.[372]

Accommodations are Refused Where Continuing with the Hearing Process becomes Impossible

In some cases, despite the requests by appellants and their counsel, the SBT may conclude that further accommodation should not be provided. Under these circumstances, the SBT will consider whether the appellant cannot or refuses to participate in the hearing process at all, significant delay has been incurred, or the appellant is asking for something that is not reasonable or possible for the SBT to provide.

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[366] *Ibid* at para 3
[367] *Ibid* at para 4
[368] For example: *1511-10038 (Re),* 2017 ONSBT 3085 at para 2; *1511-10029 (Re), supra* note 309 at para 1; *1501-00005 (Re),* 2015 ONSBT 5647 at para 19; *1712-10282 (Re),* 2019 ONSBT 717 at para 3
[369] SBT, "Language Services", *supra* note 314. However, the website also explains that correspondence directed to the SBT must be in English or French, which may impose barriers in requesting interpretation and in requesting other accommodations prior to the hearing.
[370] However, if a represented appellant does not request accommodations within a reasonable time, the SBT may also be less patient than in the case of an unrepresented appellant: *1501-00228 (Re),* 2016 ONSBT 1019 at paras 3-5
[371] *1706-05104 (Re), supra* note 289 at paras 2-3
[372] *1806-03654 (Re), supra* note 351 at paras 2-4

For example, in one case, an appellant was not able to participate in the hearing process for over two and a half years, and requested that the SBT provide her with a representative.[373] In another case, the appellant still had not obtained medical information from a family doctor after two years had passed.[374] In other cases, the appellant engaged in disrespectful behaviour and refused to follow the SBT rules,[375] wanted to call witnesses whose evidence was in the file and who were no longer working at the ODSP office,[376] or requested a hearing in a municipality where there was no accessible location available.[377] While some of these cases may engage situations that demonstrate undue hardship under the *Code*, others may relate more to a frustration of the hearing process from the perspective of the SBT.

In Summary: Practical Decisions Informed by the Needs of Persons with Disabilities

The SBT's discretionary decision-making regarding accommodations in the hearing process is characterized by a practical, individualized approach, tailored to the particular disabilities, circumstances, and needs of appellants. The SBT is willing to provide a variety of accommodations at various points in the appeal process, and to look to the evidence on file to support them where possible. The SBT will take reasonable requests at face value and will arrange for interpretation or alter the hearing process to accommodate disabilities as needed, especially where there is little prejudice to the Director. Fairness to the opposing party may not be a significant concern in many cases, since the Director does not often oppose accommodation requests. However, in a few cases, the SBT acknowledges that the interest in

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[373] *1212-15758 (Re),* 2019 ONSBT 820 at paras 17-20. While the SBT will not provide an appellant with a lawyer, it may adjourn the hearing to allow the appellant to get legal advice or representation from a community legal clinic: *1712-10427 (Re), supra* note 287 at para 8; *1705-05222 (Re), supra* note 333 at paras 2-3; and *1612-09469 (Re), supra* note 330 at paras 2-3. In one case, the SBT ordered an adjournment upon finding that the appellant's sister, who was not a lawyer or paralegal, was not a competent representative: *1803-01682 (Re)*, 2018 ONSBT 5588 at paras 7-8.

[374] *1508-07792 (Re),* 2016 ONSBT 3516 at paras 15-19 (and related case *1508-07792 (Re),* 2016 ONSBT 3488 at paras 15-19). See also: request for third adjournment denied in *1404-03788 (Re),* 2016 ONSBT 971 at paras 3-9

[375] *1607-05236 (Re) 2018, supra* note 304 at paras 22-24

[376] *1402-01765 (Re) 2018, supra* note 295 at paras 12-21

[377] *1701-00513 (Re),* 2017 ONSBT 4883 at paras 1-2 (see also, the decision on the merits: *1701-00513 (Re),* 2017 ONSBT 5350 at para 2). While this case may raise other questions about how hard the SBT looked for an accessible location or accessibility more generally in certain areas of the province, it serves as a helpful example of how SBT members evaluate cases of undue hardship.

ensuring that the appeal proceed may outweigh an appellant's accommodation request where that request is unreasonable or impracticable, or where significant delay has already been incurred.

Human Rights Tribunal of Ontario

The HRTO hears applications regarding discrimination and harassment under the *Human Rights Code*. The HRTO's approach to discretionary procedural decisions regarding accommodations reflects its human rights mandate and its legally trained adjudicators. While the HRTO is mindful of the importance of accommodations and provides applicants with some information and time to make and support accommodation requests, it may occasionally take an overly technical view of what accommodations are reasonable, failing to account for access to justice concerns beyond the *Code*.

While discrimination claims at the HRTO arise in a variety of social areas,[378] the majority of claims arise in the workplace. Tribunals Ontario reports that, between 2016-2018, 69-70% of applications related to employment, 26-27% related to goods, services and facilities, and 8% related to housing.[379] Discrimination must also be connected to one or more *Code* grounds.[380] The most common ground reported in applications filed between 2016-2018 was disability, cited in 55-56% of applications.[381] Other more frequently cited grounds include race, ethnic origin, sex, family status, sexual harassment, and reprisal.[382]

Applicants often hold less power in their relationships with employers and landlords (who are often the respondents in these cases), and may also be less likely to understand HRTO

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[378] *Code*, *supra* note 121, s 1-9
[379] Linda P Lamoureux & Holly Moran, Tribunals Ontario, "Tribunals Ontario Annual Report 2018-19", (28 June 2019) at 47, online: <http://www.sjto.gov.on.ca/en/reports-plans-standards/> [Lamoureux & Moran, "Tribunals Ontario Annual Report"]
[380] *Code*, *supra* note 121, s 1-9
[381] Lamoureux & Moran, "Tribunals Ontario Annual Report", *supra* note 379 at 48. The Human Rights Legal Support Centre's 2018-2019 Annual Report also cites disability as the most common ground of discrimination in its cases, comprising 34% of its total caseload: HRLSC, "Annual Report", supra note 133 at 14
[382] Lamoureux & Moran, "Tribunals Ontario Annual Report", *supra* note 379 at 48

processes or to be able to afford a representative.[383] Furthermore, although some applications may arise out of ongoing interactions, Michelle Flaherty and Leslie Reaume have observed that parties "rarely draw on or seek to maintain longer-term relationships with one another."[384] Cases can often take months or years to resolve,[385] and even when applicants do win their HRTO cases, the quantum of damages they receive may be inadequate to redress the wrongs they have experienced.[386]

Statutory Mandate and Active Adjudication

The HRTO has more expansive procedural discretion than the SBT or the LTB. It is required to employ adjudicators with legal expertise as well as the ability to implement alternative procedures. The *Human Rights Code* explains that the *Code* and HRTO's Rules "shall be liberally construed to permit the Tribunal to adopt practices and procedures, including alternatives to traditional adjudicative or adversarial procedures that, in the opinion of the Tribunal, will facilitate fair, just and expeditious resolutions of the merits of the matters before it."[387] Adjudicators must have experience with human rights law, and an "aptitude for applying [these] alternative adjudicative practices and procedures".[388]

Active adjudication is a "hybrid" approach employed by the HRTO to achieve this mandate, falling between traditional, adversarial courtroom procedures and non-adversarial, inquisitorial

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[383] Some applicants receive free summary advice from or representation by community legal clinics or HRLSC. Over 14,000 people contacted HRLSC in 2018-2019 to seek legal advice about a potential case of discrimination. HRLSC provided in-depth legal services to 2725 people that year: HRLSC, "Annual Report", *supra* note 133 at 15-16
[384] Michelle Flaherty & Leslie Reaume, "Mediation-Arbitration in Ontario: Labour Relations, Human Rights, and Beyond?" (2017) 30 CJALP 351 at 364-365, 374-375 at 364
[385] Lamoureux & Moran, "Tribunals Ontario Annual Report", *supra* note 379 at 49
[386] Ryder and Ranalli criticize damage awards by the HRTO from 2000-2015 as being too low, taking into account the quasi-constitutional status of the Code, and not having kept up with inflation: Audra Ranalli & Bruce Ryder, "Undercompensating for Discrimination: An Empirical Study of General Damages Awards Issued by the Human Rights Tribunal of Ontario, 2000-15" (2017) 13 JL & Equality 91 at 137-139
[387] *Human Rights Code*, *supra* note 121, s 41. See also s 43 which gives the HRTO broad discretion to make its own Rules and conduct hearings.
[388] *Ibid*, s 32(3)

procedures.[389] During active adjudication, decision-makers guide the hearing process, in contrast to passively allowing the parties to present their cases.[390] Parties usually consent to active adjudication techniques, although adjudicators may proceed despite objections.[391] This "hybrid" approach may also include techniques that lead to the settlement of a case, such as mediation-adjudication.[392]

Active adjudication may modify the way the tribunal receives evidence, such as allowing witnesses to provide written statements rather than undergo direct examination, to testify in a non-traditional order, or to give their evidence over the telephone.[393] For example, in one case, an applicant was accommodated by allowing her to testify first, allowing documents into evidence to reduce the extent of her testimony, and to record the hearing so she could listen to it later, given her limited language proficiency and disability.[394] The adjudicator may intervene to ensure that parties are treated fairly and respectfully in sensitive cases, such as those relating to sexual harassment.[395]

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[389] Samantha Green & Lorne Sossin, "Administrative Justice and Innovation: Beyond the Adversarial/ Inquisitorial Dichotomy" in Laverne Jacobs & Sasha Bagley, eds, *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Surrey, UK: Ashgate, 2013) 71 at 71

[390] Michelle Flaherty, "Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law" (2015) 38:1 Dal LJ 119 at 130 [Flaherty, "Self-Represented Litigants"]

[391] David A Wright, "Implementing the New Ontario Human Rights Code: A Tribunal Perspective" (2014) 18:1 CLELJ 101 at 114

[392] The broad mandate of the HRTO to employ non-traditional procedures also supports its practice of mediation-adjudication. During mediation-adjudication, the adjudicator mediates the case on the understanding that if the parties do not reach a settlement, the hearing will proceed with the same adjudicator in the ordinary course. This practice, adapted from mediation-arbitration in the labour relations context, faces additional challenges at the HRTO where parties are self-represented, may be seeking vindication in a hearing or legal decision, do not choose their adjudicator, and may not wish to maintain an ongoing relationship. However, some adjudicators have successfully navigated these challenges by earning the trust of the parties, explaining to parties how confidential information will not be used if the matter proceeds to a final decision, and by taking a reflective approach, taking care not to take "advantage of vulnerable parties who are fed up with the cost and time associated with participating in a human rights application": Flaherty & Reaume, *supra* note 384 at 364-365, 374-375

[393] Wright, *supra* note 391 at 114

[394] *Taucar v University of Western Ontario*, 2015 HRTO 380 at paras 10-12 [*Taucar #1*]; *Pellerin v Conseil scolaire de district catholique Centre-Sud*, 2011 HRTO 1777 at paras 13-14 [*Pellerin*]

[395]Michelle Flaherty, "Best Practices in Active Adjudication" (2015) 28 Can J Admin L & Prac 291 at 295-296 [Flaherty, "Best Practices"]

A decision-maker may also direct parties to certain issues or dispense with procedural elements, such as opening statements, to focus in on what is important in an accessible, non-legalistic way.[396] In the Tribunal's words:

> In some cases the Tribunal may exercise its powers to narrow the issues, limit the scope of evidence or decide to hear issues in a particular order following a motion for a summary hearing or other request. Nonetheless, it is the exercise of [the] Tribunal's powers to control its process that is at the heart of the matter […] the Tribunal [must] ask what is the question that needs to be determined, what evidence is needed to determine that question, and what is the most fair, just and expeditious manner to proceed in the circumstances.[397]

For example, an adjudicator may decide certain issues on a preliminary basis[398] or consider summary dismissal at any point in the hearing.[399] Summary dismissal is typically considered near the beginning of hearing a human rights matter, and is meant to determine whether a hearing has a reasonable prospect of success.[400]

In *Aiken*, a case about summary dismissal, the court quoted the Supreme Court of Canada's statements regarding access to justice and proportionate procedures in *Hryniak*,[401] and applied them to the human rights context. The Divisional Court stated that proportionality may inform how the HRTO adapts its procedures in the context of active adjudication:

> What is true for the traditional civil trial system is even more applicable to the administrative tribunal system, which was designed to be a more expeditious and cost-effective process for the resolution of disputes. Even more compelling is the application of these principles to the human rights adjudication process in Ontario, a system that had been mired in backlogs and delays, which the new regime was designed to

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[396] Flaherty, "Self-Represented Litigants", *supra* note 390 at 130-131
[397] *JS v Dufferin-Peel Catholic District School Board*, 2018 HRTO 644 at para 20 [*JS*]
[398] *CAW - Canada Group of Employees v Presteve Foods Ltd*, 2012 HRTO 1365 at paras 54-55
[399] *Cybulsky v Hamilton Health Sciences*, 2019 HRTO 102 at para 9
[400] *Aiken v Ottawa Police Services Board*, 2015 ONSC 3793 at paras 35-36 (Div Ct), upholding the summary hearing procedure [*Aiken*]; *Pellerin supra* note 394 at paras 15-20
[401] *Hryniak v Mauldin*, 2014 SCC 7 at paras 1-6. In *Hryniak*, a case about summary judgment motions in the context of civil litigation, the Supreme Court stated that "[w]ithout an effective and accessible means of enforcing rights, the rule of law is threatened" and that courts must rethink conventional trial processes and adopt "proportional procedures tailored to the needs of the particular case" (paras 1-2).

> ameliorate. The recognition and enforcement of human rights principles go to the core of our values as a society. This is truly a situation in which justice delayed is justice denied […] Principles of natural justice and procedural fairness do not always require a full trial-like hearing.[402]

The Divisional Court has also acknowledged that the HRTO is empowered to modify its procedures based on proportionality in other ways, for example, by limiting the number of hearing days for a particular matter.[403]

While proportionality may be an effective way for a tribunal to resolve cases efficiently with a view to the limited resources of litigants and the tribunal itself, it could limit a party's participation and be abused by respondents. To properly apply *Hryniak* to the context of administrative tribunals, it is important to consider whether parties "have a meaningful opportunity to participate", as well as whether adjudicators can "be confident" in reaching a decision based on the relevant evidence.[404] It may sometimes be difficult to reconcile proportionality with meaningful participation, if an abridged process limits the opportunity for parties to tell their story. That said, at least in some situations, the HRTO may recognize that a summary hearing process might in itself create barriers. For example, an adjudicator concluded that a summary hearing was inappropriate where the self-represented applicant relied heavily on an interpreter and her anxiety and prior head injury made it difficult for her to testify.[405] In this case, the adjudicator specifically referred to the applicant's ability to tell her story.

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[402] *Aiken, supra* note 400 at paras 33-34. At paragraph 32, the Divisional Court quotes the Supreme Court of Canada decision in *Hryniak*.
[403] *Bart v McMaster University*, 2016 ONSC 5747 at paras 105-120 (Div Ct)
[404] Alton, *supra* note 42 at 167
[405] *Fan v Royal Ottawa Health Care Group*, 2015 HRTO 1018 at paras 19-20 [*Fan*]. At paragraph 20, the adjudicator stated that, "[i]n this case, I did not consider that process fair, just or expeditious because of the applicant's reliance on an interpreter, the fact that she was unrepresented, the heightened anxiety she displayed about the hearing process and the difficulties she was having organizing her thoughts and presenting her story, much of which she said was attributable to having a head injury."

Similarly, the HRTO discourages respondents from bringing requests for a summary hearing at multiple stages to repeatedly test the applicant's case.[406]

A Human Rights Approach to Exercising Procedural Discretion

The HRTO has adopted some approaches to deciding accommodation requests and receiving evidence to support them with principles of accommodation in mind. For example, if a party requests an extension of time, the Tribunal will usually grant it, "until [these requests] begin to substantially interfere with the Tribunal process, are unfair to the other parties or amount to an abuse of process."[407] Similarly, the HRTO will routinely grant the requests of parties to have access to a recording of the hearing.[408] In some instances, the HRTO may also accommodate unexpected barriers that may arise based on a party's lack of financial resources, for example, by allowing an applicant to attend at the HRTO to call in to a hearing because he did not have access to a telephone.[409]

If a party raises accommodation needs, adjudicators will explain the HRTO's accommodation process and provide them with time to make a request.[410] They will advise parties of the different options that they may have, such as explaining how a hearing by teleconference or video-conference will work.[411] The HRTO will also consider accommodation requests made at the hearing, even if they were not made through the proper process or using the proper form.[412]

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[406] *JS, supra* note 397 at para 19: "Thus, it is important to remember that the approach taken in *Pellerin* does not form the basis of a process that encourages or permits respondents to bring requests for summary hearings at any point in a proceeding, in order to test whether an application has a reasonable prospect of success."
[407] *Nahirny v Liquor Control Board of Ontario*, 2016 HRTO 648 at para 13 [*Nahirny*]
[408] *Taylor Estate v Royal Canin Canada Co*, 2017 HRTO 1600 at paras 20-22
[409] *Wang v Toronto (City),* 2019 HRTO 516 at para 4
[410] *Rose v Toronto Police Services Board*, 2015 HRTO 1716 at para 3 [*Rose*]; *Stor v Randstad Holding NV*, 2015 HRTO 963 at para 7 [*Stor*]
[411] *Fagan v Toronto Transit Commission*, 2017 HRTO 1226 at para 8 [*Fagan*]
[412] *DiFlorio v Nails For You*, 2017 HRTO 576 at para 4 [*DiFlorio*]

The HRTO grants a wide range of accommodations, including:

- Allowing an applicant to file a late application;[413]
- Recording the hearing;[414]
- Providing real time captioning;[415]
- Changing the method of hearing by holding it in person,[416] in writing,[417] by telephone,[418] or by videoconference;[419]
- Adjourning the hearing for reasons such as a medical condition,[420] to allow the applicant more time to get representation as a disability accommodation,[421] to address a misunderstanding on the part of an applicant with a language barrier,[422] or to adjudicate an accommodation request;[423]
- Altering the process regarding the adjudication of preliminary issues, such as hearing them in writing[424] or adjudicating them at least three weeks before each hearing day;[425]

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[413] *Kelly v CultureLink Settlement Services*, 2010 HRTO 977 at paras 70-72; *T (OP) v Presteve Foods Ltd*, 2015 HRTO 675 at para 90 [*Presteve*]. See also: *James v York University*, 2015 ONSC 2234 at paras 45-55 (Div Ct), leave to appeal to SCC refused, [2016] SCCA No 1

[414] *Leach v Ontario (Ministry of Community Safety and Correctional Services)*, 2018 HRTO 1113 at paras 12-13; *Sismon v Ottawa (City),* 2019 HRTO 432 at paras 50-10; *Atadero v Shoppers Drug Mart Inc*, 2017 HRTO 780 at para 88; *Fagan v Toronto Transit Commission*, 2017 HRTO 1323 at paras 8-9; *Dolny v College of Massage Therapists of Ontario*, 2016 HRTO 943 at para 5; *Davidson v Cummer Avenue United Church*, 2017 HRTO 1000 at para 6 [*Davidson*]. These cases refer to the HRTO's practice direction that explains that parties may be permitted to record the hearing to address *Code*-related needs: Human Rights Tribunal of Ontario, "Practice Direction on Recording Hearings", online: <http://www.sjto.gov.on.ca/documents/hrto/Practice%20Directions/Recording%20Hearings.html>

[415] *Armstrong v Workplace Safety and Insurance Board*, 2016 HRTO 1468 at paras 9-12 [*Armstrong*] (this case explains that this accommodation has been provided in other cases as well)

[416] *Leach v Ontario (Ministry of Community and Social Services)*, 2017 HRTO 1412 at para 7 [*Leach 2017*]; *Bilon v Niagara (Regional Municipality) Police Services Board*, 2019 HRTO 1628 at para 13

[417] *Searle v Peterborough Regional Health Centre*, 2019 HRTO 1243 at para 4; *Ihasz v Ontario (Minister of Revenue)*, 2015 HRTO 352 at para 20; *Coughlin v Brampton (City)*, 2018 HRTO 1352 at paras 11-14 [*Coughlin*]

[418] *Knight v Surrey Place Centre*, 2019 HRTO 482 at para 156; *Jenner v Waterloo (Regional Municipality)*, 2018 HRTO 788 at para 3

[419] *AB v Joe Singer Shoes Ltd*, 2016 HRTO 1105 at paras 4, 16-17 [*AB v Singer*]. See also *AB v Joe Singer Shoes*, 2016 HRTO 1083 at paras 17-20, which discusses the submissions of the applicant but not the respondent because of an administrative error.

[420] *Sprague v Yufest*, 2017 HRTO 1147 at paras 27-28 (regarding the respondent's medical condition); *Tahir v Toronto (City)*, 2018 HRTO 1841 at para 10-12 [*Tahir*] (to get medical treatment and representation); *McPherson v DeSilva*, 2016 HRTO 171 at paras 7-9 [*McPherson*]; *McAllister v Victorian Order of Nurses*, 2017 HRTO 1505 at paras 5-8 [*McAllister*]

[421] *Rooks v Park 'N Fly*, 2016 HRTO 1604 at paras 5-9 [*Rooks*]; *Tahir*, *supra* note 420 at paras 10-12

[422] *Ahmed v Extendicare West End Villa*, 2016 HRTO 802 at para 3 [*Ahmed*]

[423] *Weasner v St. John Ambulance Council of Ontario*, 2017 HRTO 1150 at para 7 [*Weasner*]

[424] *Dolinar v University of Waterloo*, 2017 HRTO 1671 at para 4

[425] *Marsden v Halton Condominium Corp No 41*, 2015 HRTO 907 at para 1.

- Altering the start time of the hearing;[426]
- Changing the venue of the hearing;[427]
- Limiting the hearing time for each hearing day;[428]
- Allowing a party to have a support person;[429]
- Allowing for breaks during the hearing;[430] and
- Language interpretation, including sign language interpretation, arranged by the HRTO at its own expense.[431]

Case Management and Accommodation Requests Prior to the Hearing

The HRTO informs applicants that they may request accommodations early on, and may decide requests for accommodations during procedural motions prior to the hearing on the merits.

The HRTO raises the possibility of accommodating applicants on the application form itself. The form explains, under the signature line, that applicants should contact the Registrar by telephone, fax, or e-mail to request accommodations if they require them.[432] Unfortunately, no further information is provided about the SJTO Accessibility and Accommodations Policy[433] or

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[426] *Matthews v Manufacturers Life Insurance Co*, 2016 HRTO 1112 at para 17
[427] *Ruffolo v Manulife Financial*, 2017 HRTO 282 at para 14 [*Ruffolo*]; *Schiller v Ontario (Ministry of Natural Resources and Forestry),* 2019 HRTO 563 at para 4 [*Schiller*]; *UM v York Region District School Board*, 2017 HRTO 1718 at para 2 [*UM*]; *Gonder v Durham Regional Police Services Board*, 2019 HRTO 1371 at para 5 [*Gonder*]; *Taucar v University of Western Ontario*, 2015 HRTO 515 at para 30 [*Taucar #2*]. See also *Pollock v Wilson,* 2017 HRTO 712 at para 29 [*Pollock*], where the HRTO suggested a change of venue closer to both parties, after granting an adjournment because of the appellant's medical condition.
[428] *Keane v CompuCom Canada Co*, 2018 HRTO 32 at para 6 (half days); *UM*, *supra* note 427 at para 2
[429]*AB v Singer, supra* note 419 at para 19; *DiFlorio supra* note 412 at para 4
[430] *AB v Singer, supra* note 419 at para 19; *Davidson, supra* note 414 at para 24
[431] *Ruffolo*, *supra* note 427 at paras 14-18 (tribunal explains the process); *Fan*, *supra* note 405 at para 20; Human Rights Tribunal of Ontario, "Practice Direction on Requests for Language Interpretation", online: <http://www.sjto.gov.on.ca/documents/hrto/Practice%20Directions/Language%20Interpretation.html> [HRTO, "Practice Direction on Language Interpretation"]; Human Rights Tribunal of Ontario, "Language Services", online: <http://www.sjto.gov.on.ca/hrto/language-services/> [HRTO, "Language Services"]
[432] Human Rights Tribunal of Ontario, "Form 1: Application", online: <http://www.sjto.gov.on.ca/hrto/forms-filing/> [HRTO, "Application Form"]
[433] Tribunals Ontario, "Accessibility and Accommodation Policy", *supra* note 277.

the other information about accommodations and interpretation, including sign language interpretation, available on the HRTO website.[434]

Accommodation requests may also be decided on a preliminary motion, a process which the HRTO is working to improve, and which is consistent with active adjudication practices.[435] In 2018, the HRTO began assigning an adjudicator to case manage each application until it is heard to improve efficiency in resolving preliminary matters.[436] When either party brings a request for an interim decision, accommodation issues may also be advanced, analyzed, and decided on a preliminary basis.[437] For example, an applicant who experienced major depression and PTSD as a result of the respondent's conduct provided medical evidence to support a request to testify by videoconference from another room. This request was allowed by interim decision,[438] and demonstrates an openness to altering the way the HRTO receives evidence. A preliminary motion is also an opportunity for the HRTO to discuss an accommodation request with an applicant, explain what documents may be needed to support it, or suggest alternative accommodations that may be reasonable.[439]

The HRTO may, in some cases, adapt how preliminary issues are heard in ways that are consistent with active adjudication. For example, adjudicators have altered preliminary hearing

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[434] Human Rights Tribunal of Ontario, "Accessibility and Accommodations", online: <http://www.sjto.gov.on.ca/hrto/accessibility-and-accommodations/> [HRTO, "Accessibility and Accommodations"]

[435] Active adjudication practices include preliminary rulings and case-management of applications prior to a hearing on the merits: *John v 1608271 Ontario Inc (cob Service Ontario 077),* 2017 HRTO 1588 at paras 54-55

[436] Lamoureux & Moran, "Tribunals Ontario Annual Report", *supra* note 379 at 46

[437] *Leach 2017, supra* note 416 at para 7 (request that summary hearing be held in person granted); *Mastromatteo v. Kenora (City)*, 2018 HRTO 42 at para 5 [*Mastromatteo*] (request to move the venue of the hearing denied); *Royeton v. Toronto District School Board,* 2017 HRTO 371 at paras 20-28 (rejecting the applicant's proposed accommodation pending the receipt of further medical information) [*Royeton*]; *Ruffolo, supra* note 427 at paras 14-18 (changing the venue of the hearing, requiring all communication to be sent by mail and e-mail, and explaining to the applicant how to request an interpreter); *Schiller, supra* note 427 at paras 4-6 (request to change the hearing venue allowed); *Yahya v Sigco Industries Inc*, 2015 HRTO 1555 at paras 5-17 [*Yahya*] (rejecting a requested change of venue, but suggesting a third venue that is reasonable for the parties to consider)

[438] *AB v Singer, supra* note 419 paras 4, 16-17. See also: *Taucar #1, supra* note 394 at paras 10-12 where the Tribunal granted an accommodation request to minimize the amount of time the applicant was required to testify and to attend the hearing. The adjudicator was willing to accept documentary evidence and to record the hearing to accommodate the applicant's disability and limited English proficiency.

[439] For example: *Kusinski v Marvin Basar Pharmacy Ltd*, 2017 HRTO 1277 [*Kusinski*]

procedures to accommodate self-represented applicants. In *Dolinar*, preliminary issues were addressed in writing,[440] while in *Marsden*, the applicant was given three weeks to prepare for each hearing day after all preliminary issues were resolved.[441]

Statistics gathered by Tribunals Ontario demonstrate a slight increase in HRTO interim procedural decisions in 2018.[442] This is encouraging, since better quality adjudication before the hearing may promote the resolution of accommodation issues earlier and more efficiently. It may also lessen pressures on adjudicators which are apparent in some interim decisions. For example, in one interim decision released in 2015, an adjudicator decided a variety of accommodation requests in writing.[443] The accommodation requests were made only a couple of weeks before the hearing, and the Vice-Chair was unable to schedule a teleconference based on her hearing schedule.

A Duty to Inquire: Accommodations Not Directly Raised by a Party

The Divisional Court has held that the HRTO may be required to consider accommodations that are not explicitly raised by a party, especially one who is self-represented. This is consistent with the Tribunal's human rights approach to procedural discretionary decisions, since it takes into account the duty to inquire. It is also consistent with active adjudication, which encourages adjudicators to play a role in "shaping the hearing and helping parties navigate the rules and processes", to "determine what is fair, appropriate, and proportionate in each case."[444]

The HRTO may have a duty to raise and consider accommodations where it is reasonably apparent that they may be needed, especially where a party is self-represented. In *Audmax*, an unrepresented party's main witness was not available. The Divisional Court concluded that rejecting the written evidence without considering alternatives, such as an adjournment,

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[440] *Dolinar, supra* note 424 at para 4
[441] *Marsden, supra* note 425 at para 1
[442] Lamoureux & Moran, "Tribunals Ontario Annual Report", *supra* note 379 at 47
[443] *AB v Western University*, 2015 HRTO 354 at para 3 [*AB v Western*]
[444] Flaherty, *supra* note 395 at 293, 299

breached procedural fairness.[445] This is consistent with the duty to inquire, which would require the HRTO to be on notice for potential accommodation issues, and to raise them in a sensitive way that does not reflect stereotypes.

Consistent with this ruling, the HRTO is prepared to suggest accommodation and particular approaches that may assist parties and witnesses in fully participating in the hearing. Sometimes, the HRTO will suggest accommodations on its own motion,[446] or alternative accommodations if the HRTO cannot allow the accommodation request a party has made.[447]

Supporting Applicants to Gather Medical Evidence to Determine Reasonable Accommodations

When an accommodation is requested for a disability, the HRTO often requires medical evidence to "assess options for accommodation that also take into account balancing the interests of other parties who may be directly affected by changes to the hearing process."[448] Medical evidence allows the HRTO to determine whether the accommodation specifically relates to a disability, rather than being a "preference" of a party.[449] However, the HRTO does not always require additional medical evidence to what the applicant has already provided,[450] and a short doctor's note may be sufficient.[451]

The HRTO does not require accommodation requests and associated medical evidence to be served on the opposing party, unless a party is seeking an accommodation, such as an adjournment, that has "a material impact on the opposing party."[452] This addresses a concern

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[445] *Audmax, supra* note 142 at paras 36-42. The Divisional Court's analysis relies solely on procedural fairness without reference to the *Code* or any *Code* grounds. However, the Divisional Court's approach to procedural fairness demonstrates an approach that is somewhat analogous to the duty to inquire under the *Code*.
[446] *Armstrong*, *supra* note 415 at paras 9-12
[447] *Kusinski, supra* note 439 at paras 3-12 where the HRTO denied an accommodation request for teleconference hearing and gave the applicant 21 days to request a hearing by videoconference with supporting documentation
[448] *AB v Singer, supra* note 419 at para 17
[449] *Ibid*
[450] *Davidson, supra* note 414 at para 6 (to allow personal recording device into the hearing)
[451] *Coughlin, supra* note 417 at paras 11-14
[452] *Taucar #2, supra* note 427 at para 30. See also: *Marsden v Ontario (Minister of Community Safety and Correctional Services)*, 2011 HRTO 30 at para 43

that parties may not want sensitive medical evidence to be disclosed when it is not related to the substance of the application.[453]

Where medical evidence is not available, or does not connect the accommodation to the disability, the Tribunal may provide the applicant with questions to give a doctor and time to obtain the answers.[454] For example, in *Royeton*, the applicant requested to be cross-examined by video-conference with permission to refer to her notes, or through a written statement.[455] However, her medical note was not specific about how these accommodations related to her disability.[456] The Vice-Chair gave the applicant 30 days to provide more medical information about giving "evidence verbally throughout the various stages of the hearing, including cross-examination, with or without some form of accommodation of her needs and the timeframe of when she is likely to reach this point in her recovery."[457] The adjudicator's suggestion of various options in this case demonstrates active adjudication in a way that attempts to balance the needs of the applicant with the respondent's right to cross-examine her.

Discussing the evidence required to support an accommodation request and providing time to obtain it allows the HRTO to tailor accommodations to the specific medical limitations of applicants in accordance with human rights principles. Although 30 days may not always be enough time to gather that information, other cases show that applicants may receive more

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[453] However, a recent constitutional challenge has led Tribunals Ontario to adopt a new Access and Privacy Policy in 2019. Based on this new policy, if a party does not request a confidentiality order, all information in the case file may be presumptively public: Tribunals Ontario, "Access and Privacy Policy", online: <http://www.sjto.gov.on.ca/documents/sjto/A2I-Policy-en.html> [Tribunals Ontario, Privacy Policy]
[454] *Noor v University of Ottawa*, 2018 HRTO 1295 at para 7 [*Noor*]; *Wolfe v Toronto Transit Commission*, 2018 HRTO 1791 at para 9 [*Wolfe*]; *Garisto v Aphria Inc*, 2019 HRTO 1477 at paras 21-22 [*Garisto*]. However, sometimes the Tribunal will simply state that there is no evidence at all to support an accommodation request: *Shackra v Basic Packaging Industries Inc*, 2019 HRTO 576 at paras 3-5.
[455] *Royeton, supra* note 437
[456] *Ibid* at paras 24, 26-28
[457] *Ibid* at para 33

time.[458] However, if months go by and new medical evidence is not received, the HRTO may eventually deny an accommodation request.[459]

The Limits of Active Adjudication and Procedural Fairness Interests of Respondents

The case law summarized above provides examples of how the HRTO has adapted case management processes, proactively identified accommodation issues, and altered how it receives evidence in ways that are consistent with active adjudication. However, "greater involvement of the adjudicator in the hearing process" must ensure the process is "fair and just for both parties."[460]

Notwithstanding the HRTO's broad procedural discretion, there are limits to the interventions available to an adjudicator to assist a self-represented party, since they cannot prejudice the opposing party.[461] The boundaries of an adjudicator's role to promote access to justice for one party relate to what is fair and what is seen to be fair by the other party.[462] In other words, an adjudicator cannot intervene in a way that may be perceived as taking one party's side, even if that party requires some form of accommodation.[463]

Some respondents consented to accommodations requested by applicants, even in some cases where the relevant accommodations could cause delay.[464] In two cases, respondents took no

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[458] *ATA v Houselink Community Homes*, 2016 HRTO 1357 at para 28 [*ATA*] (three months)
[459] *Garisto, supra* note 454 at paras 16-20 (the applicant asked for additional time to get medical evidence but the HRTO did not grant it because it asked for this medical evidence 8 months previously); *Armour v Threshold Homes and Supports Inc*, 2019 HRTO 1183 (about four months); *Vaney v Toronto Police Services Board*, 2017 HRTO 89 at paras 21-22, 35-41 (longer than a year, where the respondents requested that the application be dismissed for abuse of process)
[460] *Kassir v Del Property Management Ltd*, 2017 HRTO 149 at para 22
[461] Kristjanson & Naipaul, *supra* note 198 at 220-224
[462] *Ibid* at 206-207
[463] *Ibid* at 222-223. Flaherty, *supra* note 395 addresses some questions that adjudicators may ask in determining whether a departure from more traditional procedures is appropriate at 301-302: "(a) would the ruling or process unfairly or unreasonably interfere with either party's opportunity to prepare and present its case?; (b) would it unreasonably interfere with the opportunity to test the other party's evidence?; and (c) in all of the circumstances, does the ruling lead to a process that is proportionate?"
[464] *Dolny, supra* note 414 at para 3 (with respect to audio recording the hearing, and taking no position on the adjournment requested by the applicant); *Davidson, supra* note 414 at para 7 (with respect to recording the hearing); *Armstrong, supra* note 415 at paras 9-10 (with respect to asking questions more slowly and giving the

position on adjournments requested by the applicant.[465] In many decisions, the respondent's position is not mentioned in the decision.[466]

However, in a number of cases, the HRTO granted accommodation requests despite the objections of respondents. The concern of respondents was often delay caused by an adjournment, by additional time taken by the applicant to complete certain procedural steps, or by the applicant failing to appear at the hearing.[467] That said, in other cases, it was more difficult to discern the potential prejudice motivating the respondent's objections. For example, a respondent objected to an applicant's testimony by videoconference in another room,[468] and in another case, the respondent objected to a recording of the hearing.[469]

I also identified several cases where the HRTO agreed with the respondent that further delays or accommodation was not warranted. I elaborate further on these cases below in discussing accommodation requests that the HRTO rejected, noting cases where respondents advanced prejudice or argued abuse of process.

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applicant more time to respond to them, as well as using microphones at the hearing); *McAllister, supra* note 420 at para 4 (with respect to an adjournment request); *Ruffolo, supra* note 427 at para 14 (with respect to changing the hearing location); *Schiller, supra* note 427 at para 2 (with respect to changing the hearing location and rescheduling the hearing); *Keane, supra* note 428 at para 2 (with respect to an adjournment)

[465] *Rooks, supra* note 421 at para 8; *Cronier v Securitas Canada Ltd*, 2015 HRTO 57 at para 2, 5

[466] In one case, HRTO explicitly noted that it did not request the respondent's views on the accommodation request before denying the accommodation request: *Nahirny v. Liquor Control Board of Ontario*, 2016 HRTO 543 at para 7

[467] For example: *Presteve, supra* note 413 at para 66 (relating to delay in filing the application); *Kelly, supra* note 413 at para 5 (relating to delay in filing the application); *Tahir, supra* note 420 (opposing a second adjournment); *Pollock, supra* note 427 at para 23 (opposing a third adjournment); *Fagan, supra* note 414 at paras 2-5 (adjournment of second day of hearing); *Coughlin, supra* note 417 at para 13 (opposing a written hearing); *McPherson, supra* note 420 at para 4 (adjournment); *Bassis v Commissionnaires Great Lakes*, 2017 HRTO 479 at para 3 (adjournment); *Weasner, supra* note 423 at para 6; *Worrell v DiPietro's Meat and Groceries*, 2018 HRTO 739 at para 3 [*Worrell*]

[468] *AB v Joe Singer*, *supra* note 438 at paras 5-9. In this case, the respondent disputed the connection between the applicant's disability and the accommodations she requested, stating that "it is crucial for them to put documents to the applicant in an orderly and timely manner" and that parties should testify in person when credibility is at issue. The HRTO ordered the parties to exchange documents in advance to address some of these concerns.

[469] *Sismon, supra* note 414 at para 7. The respondent's objection was based on the fact that the applicant did not make the request in advance of the hearing.

The HRTO Denies Unreasonable Accommodation Requests

In denying a request for a procedural accommodation to the hearing process, the HRTO considers how and when those accommodations were raised and the reasonableness of the accommodations requested. Significant delay or lack of diligence on the part of the applicant requesting the accommodation may also provide a reason for the HRTO to deny it. As well, accommodations may be less likely to be reasonable if they impact the fairness of the proceedings or do not engage a *Code* ground.

Significant Delay and Lack of Diligence

The Tribunal also considers the amount of delay a party has incurred, or the delay an accommodation request may create, to determine whether an accommodation request should be granted.

If the HRTO denies an accommodation on the basis of the delay, the relevant time period is significant, usually spanning months or years.[470] In particular, when a party causes delay of this magnitude by failing to follow the HRTO's procedural directions, it may prejudice the opposing party's ability to present its case and place undue strain on the HRTO's own resources.[471] The Divisional Court has held that it is reasonable for the HRTO to dismiss an application without further accommodation after a party has breached its procedural orders.[472]

The HRTO acknowledges that both the applicant and the respondent have procedural fairness interests in having applications decided efficiently. As such, medical evidence is particularly

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[470] *Biondic v Intact Financial Corp*, 2017 HRTO 80 at para 99 [*Biondic*] (11 years). In this case, the respondents agreed to multiple adjournments of mediation and an extension of time for the applicant to provide disclosure. However, given the case history, the respondents finally took the position that the application should be dismissed for an abuse of process (at paras 16-18).

[471] *Park v University of Ontario Institute of Technology*, 2019 HRTO 1083 at paras 16-18, 48-50 [*Park*] (where the respondents took the position that the application should be dismissed as an abuse of process); *SG v Waterloo Cooperative Preschool Inc*, 2018 HRTO 1716 at paras 14, 22 [*SG*] (where respondents also advanced abuse of process). See also *Nahirny, supra* note 407 at para 10 (where no respondent position is noted).

[472] *Samra v Brennestuhl*, 2017 ONSC 1498 at paras 1-3 (Div Ct), leave to appeal to SCC refused, [2017] SCCA No 513. See also, regarding abuse of process: *Taucar v Ontario (Human Rights Tribunal),* 2017 ONSC 2604 at paras 109-118 (Div Ct), leave to appeal to the SCC refused, [2017] SCCA No 401

important to support long or indefinite adjournment.[473] Similarly, the Tribunal will be unwilling to delay for an indefinite period of time to search for accommodations. For example, after a delay of five years, the HRTO dismissed an application because there were no accommodations the Tribunal could provide that would enable the applicant to participate.[474]

In evaluating delay that has been or will be incurred, the HRTO considers whether parties were diligent or whether they faced obstacles outside of their control. For example, when a party requests accommodation in advance, the Tribunal is less likely to allow additional accommodation on the eve of hearing that could have been requested earlier.[475] In contrast, when applicants act diligently in response to an unexpected event,[476] the HRTO is more likely to grant an adjournment as compared to when they simply assume that the Tribunal will adapt to their school or work schedules.[477] Similarly, even if a party's representative has contributed to the delay, the HRTO may allow an adjournment if there was no way for the applicant to have acted reasonably, for example, because of a language barrier.[478]

Fairness of the Proceedings

Furthermore, the HRTO may deny accommodations because they are not warranted based on the underlying rationale for its procedures. Where there were factual matters in dispute, the HRTO refused to hear the application in writing. Instead, the Tribunal asked the applicant to

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[473] *Noor, supra* note 454 at paras 4, 8 (respondent opposed the applicant's adjournment request)
[474] *ATA, supra* note 458 at paras 7, 56-60 (respondents argued that the application should be dismissed). See also: *Murugesan v CIBC Mortgages Inc*, 2015 HRTO 1343 at para 9 where the HRTO rejected a request to amend an application given that it may take years for the applicant to appreciate certain information.
[475] *Gonder, supra* note 427 at paras 4-13 (respondent objected to a last-minute request advanced by the applicant to provide additional written submissions)
[476] *Worrell, supra* note 467 at paras 4, 6-7
[477] *Sokolowska v Nexonia Inc*, 2015 HRTO 164 at paras 10-11 (school schedule); *Borja v Bazos*, 2016 HRTO 1030 at paras 8-10 (work schedule)
[478] *Galoglu v A Wesley Paving Ltd*, 2015 HRTO 1723 at paras 9, 13-14, 21-22 (the HRTO allowed the adjournment even though respondent's counsel requested the case be dismissed). On judicial review, the Federal Court has also considered the reasonableness of accommodations provided by the Human Rights Commission in its investigation of a complaint**:** *Georgoulas v Canada (Attorney General),* 2018 FC 652 at paras 160-163

identify when she would be ready to participate in an in-person hearing.[479] The HRTO also has a very high threshold for excluding respondents from the hearing room, given that their presence is an "essential requirement" for an HRTO hearing.[480]

While these cases reflect relatively common views held by many adjudicative bodies, the action of tribunals, including the HRTO,[481] to hear some matters remotely during the current pandemic may demonstrate that this question is not a straightforward one. Sossin and Yetnikoff, writing on this subject years before COVID-19, asserted that the use of videoconference technology has the potential both to improve and to undermine access to justice.[482] According to them, videoconference hearings may require less travel by applicants and allow for high quality, recorded video.[483] Conversely, they may also undermine the ability of applicants to participate in complex matters and to have their credibility assessed because of poor quality, delayed sound and images, and the inability to exchange documents physically.[484]

Consequently, the HRTO's analysis of these requests on a case-by-case basis is sound. However, such an analysis should be informed by improvements in technology and innovations by other tribunals or courts. This will promote the use of remote hearings where it is fair and accessible, accounting for technological advancements.

Accommodations Must be Reasonable and Connected to a Code *Ground*

As well as measuring accommodations against the requirements of procedural fairness, the HRTO will analyze them for conditions necessary for accommodation under the *Code*. This framework accounts for whether an accommodation is "reasonable" and whether it is

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[479] *Kwan v Ontario (Ministry of Community Safety and Correctional Services)*, 2016 HRTO 486 at paras 5-9. The HRTO's decision is likely motivated by the respondent's position that they would be prejudiced without an opportunity to cross-examine the applicant.
[480] *McWilliam v Toronto Police Services Board*, 2016 HRTO 1413 at para 16
[481] Tribunals Ontario, Social Justice Division, "COVID-19 Updates on Tribunals Ontario Operations" (updated 9 July 2020), online: <http://www.sjto.gov.on.ca/en/covid-19/> [Tribunals Ontario, COVID-19]
[482] Lorne Sossin & Zimra Yetnikoff, "I Can See Clearly Now: Videoconference Hearings and the Legal Limit on How Tribunals Allocate Resources" (2007), 25 Windsor YB Access to Just 247
[483] *Ibid* at 257-259
[484] *Ibid* at 253-257, 259-262

connected to a *Code* ground. The underlying rationale of at least some of these cases may be that the applicant's reason for requesting accommodation is outweighed by other concerns, such as the HRTO's limited resources or the importance of moving the application forward in a timely way in accordance with the interests of respondents.

For example, the HRTO has decided that changing the hearing location a week prior to the hearing date is not reasonable, as compared to other reasonable accommodations, such as "having a support person attend the hearing with the applicant, allowing the applicant to have access to her therapist during the hearing breaks, and providing additional or longer hearing breaks."[485]

In a few cases, the HRTO denied requests to move the location of hearing,[486] and to hold a hearing in person,[487] because they were not supported by a *Code*-related ground.[488] More troubling, however, was that an applicant's lack of resources to get to the hearing location was deemed by the HRTO not to be a sufficient reason to change the venue of a hearing.[489] This may demonstrate that access to justice concerns may be overlooked if the Tribunal mechanically requires a *Code* ground to receive procedural accommodations at a hearing.[490]

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[485] *AB v Western*, *supra* note 443 at paras 17-19

[486] *Mastromatteo, supra* note 437 at para 5; *Yahya, supra* note 437 at paras 4-5, 12. In *Yahya*, the request to change the hearing location was initiated by the respondent. However, the applicant consented and asserted a hearing closer to where he lives would be more "financially and physically accessible" (at para 5). See also: *CV v Mount Sinai Hospital*, 2015 HRTO 1331 at paras 6-8, 11 [*CV*], the Tribunal refused to change the hearing location even though the applicant would have to travel to Toronto from Ottawa with her two children, including a newborn baby.

[487] *Bryczkowski v Sim & McBurney - Sim Lowman Ashton & McKay LLP*, 2016 HRTO 339 at para 10 [*Bryczkowski*]. In this case, an applicant's lack of comfort with technology did not warrant an in-person hearing. The respondent argued in favour of the teleconference hearing, and the applicant subsequently agreed to proceed.

[488] This rationale sometimes appears in other types of HRTO decisions as well. For example, in *Hum v Alma Mater Society of Queen's University Inc*, 2015 HRTO 1061 at para 6 where the HRTO denied a reconsideration request on the basis that the accommodations already provided were sufficient to address the relevant *Code* ground.

[489] *John v Ontario (Ministry of Community Safety and Correctional Services)*, 2017 HRTO 1451 at para 20 [*John*]: "As regards the request to change venue, the applicant asserted that he lacked the resources to attend the hearing. The Tribunal will consider requests to change venue when it is necessary to accommodate a Code related need. An alleged lack of resources is not a basis for such a request."

[490] "[R]eceipt of public assistance" is a *Code* ground with respect to discrimination in housing, and poverty may sometimes be captured through the intersection of other *Code* grounds. However, poverty is not a stand-alone

In Summary: A Human Rights Framework Applied in a Precise, Doctrinal Way

The HRTO applies a framework that brings human rights principles to the forefront of its analysis. Although it may not perfectly balance these principles with the interests of other parties and procedural fairness concerns, HRTO adjudicators are willing to raise accommodation issues on their own motion, consistent with a duty to inquire. They are also willing to discuss evidence to support accommodation requests and give applicants time to provide it. However, the HRTO may occasionally apply standards of fairness or legal requirements relating to specific *Code* grounds in a way which may not adequately address access to justice concerns brought forward by applicants that do not neatly fit within these legal concepts. These exercises of discretion may demonstrate that progressive legal frameworks may be helpful, but also have their limitations, as they may not account for all access to justice barriers that applicants may face.

Landlord and Tenant Board

Although the LTB offers a variety of accommodations to tenants, its mandate and institutional structure undermine the scope of individual adjudicators to address accommodation requests in a person-centred, evidence-based, and flexible way. The LTB differs from that of the SBT and the HRTO in a few significant ways. First, the LTB hears many more cases. Tribunals Ontario reports that the LTB received over 82,000 applications in 2018-2019,[491] as compared to about 4500 applications at the HRTO[492] and about 8700 at the SBT.[493] Second, almost 79,000 of these applications were brought by landlords,[494] although tenants can also bring applications as

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Code ground that applies to the tribunal context: *Code*, *supra* note 121, s 2; Ontario Human Rights Commission, "In the Zone: Housing, Human Rights and Municipal Planning" (2012), Appendix A: Poverty, social condition, and the *Human Rights Code*, online: <http://www.ohrc.on.ca/en/zone-housing-human-rights-and-municipal-planning> [OHRC, "In the Zone"]; *Kearney v Bramalea Ltd (No 2)*(1998), 34 CHRR D/1 at para 104 (Ont Bd Inq), rev'd on other grounds: *Ontario (Human Rights Commission) v Shelter Corp* (2001), 39 CHRRD/111, 103 ACWS (3d) 324 (Div Ct) [*Kearney*]

[491] Lamoureux & Moran, "Tribunals Ontario Annual Report", *supra* note 379 at 50

[492] *Ibid* at 46

[493] *Ibid* at 56

[494] *Ibid* at 51

well.[495] This means that a typical application before the LTB is much less likely to reference or provide any information about the basis for any accommodations a tenant may be seeking.

Both landlords and tenants have much at stake in the outcome of LTB proceedings. Sixty-two percent of landlord applications in 2018-2019 were for eviction for non-payment of rent, while 19% were for eviction for other reasons, including persistent late payment of rent, committing an illegal act, or damaging the rental unit.[496] Landlords have a significant financial interest in resolving these applications as soon as possible.

However, tenants before the LTB have their housing at stake, are often marginalized, and may face barriers in navigating the LTB process. During the 2016 Tenant Duty Counsel Program Review, researcher Emily Paradis interviewed 212 tenants who accessed tenant duty counsel services at eight locations across the province.[497] While 44% of tenants were racialized, black and Indigenous tenants were particularly overrepresented.[498] Many tenants also reported a disability: "[m]ore than one-third said that they or someone in their household have a disability; 29 percent of tenants reported mental health or cognitive disabilities, including frequent responses of anxiety, depression, attention deficit, post-traumatic stress, and addiction."[499]

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[495] Tenants can bring their own applications against landlords for a variety of reasons, including maintenance, illegal rent, bad faith termination of their tenancies, or other tenant rights. Tenant rights applications may allege that the landlord changed the locks, illegally entered the unit, or withholds a vital services, such as heat, electricity, gas, or hot or cold water: *Residential Tenancies Act, 2006*, SO 2006, c 17, s 29(1) [*RTA*]; Landlord and Tenant Board, "Tenant Rights: Interpretation Guideline 6", online: <http://www.sjto.gov.on.ca/documents/ltb/Interpretation%20Guidelines/06%20-%20Tenants%20Rights.html>

[496] Lamoureux & Moran, "Tribunals Ontario Annual Report", *supra* note 379 at 51; *RTA, supra* note 495, ss 58, 60-68

[497] Emily Paradis, "Access to Justice: The Case for Ontario Tenants, Final Report of the Tenant Duty Counsel Review" (October 2016) Advocacy Centre for Tenants Ontario, online: <https://www.acto.ca/production/wp-content/uploads/2017/07/TDCP_Report_2016.pdf> [Paradis, "Tenant Duty Counsel Review"]. Paradis also interviewed Tenant Duty Counsel, legal clinic staff, community service providers, municipal programs, tenant organizations, and members and mediators of the LTB as noted at 27.

[498] *Ibid* at 32-33

[499] *Ibid* at 33

Furthermore, about half of tenants had experienced discrimination in prior searches for housing and almost two thirds had a history of homelessness.[500]

Upon receiving a notice of eviction, tenants are drawn into a process that may not appear to be accessible to them and that may undermine their agency. The Tenant Duty Counsel Review commented on the "major imbalances in power, resources, legitimacy, social capital, and risks between landlords and tenants."[501] Community service providers explained that tenants view the LTB process as "frightening, intimidating and disempowering."[502] Tenants may be intimidated by notices of eviction and may not attend the LTB at all.[503] Sometimes, landlords may take advantage of tenants' limited understanding of their rights, lack of trust in the LTB process, or fear of being homeless again, pressuring them to leave their housing without any process at all.[504]

To mediate between the conflicting interests of landlords and tenants, LTB's statutory mandate accounts for both procedural fairness and efficiency. The *Residential Tenancies Act, 2006* (*RTA*) provides that "[t]he Board shall adopt the most expeditious method of determining the questions arising in a proceeding that affords to all persons directly affected by the proceeding an adequate opportunity to know the issues and be heard on the matter."[505] To achieve this mandate, decisions must be made at the institutional level to determine general procedures that balance the interests of landlords and tenants that are at stake.

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[500] *Ibid* at 34. This review defines homeless broadly: "For 36 percent, this was visible homelessness, such as staying in a shelter, outside, or in a place not fit for human habitation, while 62 percent had experienced hidden homelessness, such as having to stay with friends or family because they had no place of their own, or not being able to remain in their home because it was not safe."
[501] *Ibid* at 49
[502] *Ibid*
[503] *Ibid* at 57-59
[504] *Ibid* at 57-58
[505] *RTA*, *supra* note 495, s 183.

LTB Hearing Procedures: Institutional Procedural Decisions and "Superblocks"

The LTB must decide a high volume of applications across the province in an efficient manner. To do this, LTB offices often schedule eviction applications for unpaid rent in large blocks or "superblocks" with many applications scheduled on one docket.[506] However, according to the Tenant Duty Counsel Review, this method of scheduling hearings may interfere with the procedural rights of tenants.[507]

The Review quoted a Tenant Duty Counsel who said, "It seems like the LTB is procedurally stacking the cards against tenants' interests. We are seeing huge dockets – 62 hearings. There is no way a member can hold 62 fair hearings, and no way TDC can advise even a third of tenants."[508] Some community participants inferred that the large dockets were created on the assumption that some tenants would not show up to their hearings at all, "essentially institutionalizing the exclusion of 'no-shows' from access to justice."[509]

Nonetheless, taking into account only the tenants who do show up, adjudicators are often overwhelmed by the volume of cases to be resolved within these blocks.[510] Sometimes matters cannot be heard by the end of the block. Consequently, tenants may become frustrated when their case is adjourned after taking time off work and waiting hours at the LTB.[511]

In deciding accommodation requests within this institutional structure, individual LTB members must balance the interest in resolving cases quickly with the duty to accommodate.[512] In other words, "the Board must consider the public interest in resolving cases in an efficient fashion, as

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[506] Paradis, "Tenant Duty Counsel Review", *supra* note 497 at 21
[507] The Tenant Duty Counsel Program provides free legal advice, resources and referrals to tenants on the day of their hearing, prioritizing tenants who are facing eviction: Advocacy Centre for Tenants Ontario, "Tenant Duty Counsel", online: <https://www.acto.ca/our-work/tenant-duty-counsel/>
[508] Paradis, "Tenant Duty Counsel Review", *supra* note 497 at 87
[509] *Ibid*
[510] One Tenant Duty Counsel reported being told by an LTB member that, "Superblock days are just a factory": *ibid*
[511] *Ibid*
[512] *File No TNL-90527-17-IN3,* 2017 LNONLTB 473 at para 27, 2017 CanLII 47408

well as the right to a fair hearing."[513] As the cases reviewed below will demonstrate, when minor modifications of the hearing process are supported by evidence, LTB members are more likely to grant accommodations. However, the institutional structures within which individual LTB members must make procedural decisions may mean that it is more difficult to meaningfully exercise discretion with respect to accommodations.

Guideline 17 and Accommodations Offered by the LTB

The LTB's procedural guideline on human rights states that the Board must accommodate parties before it pursuant to the *Human Rights Code*. Even though the LTB has already attempted to design accessible processes, when those processes do not meet *Code*-related needs of parties, the LTB must accommodate.[514] This guideline provides examples of how the Board's usual procedures may be modified to accommodate certain personal circumstances, such as scheduling the hearing around religious holidays, allowing a party with diabetes to eat or drink during the hearing, or allowing a person with a disability to bring a support person.[515] The guideline specifically explains that accommodations must respect the party's dignity.[516]

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[513] *File No TSL-72414-16-IN,* 2017 LNONLTB 409 at para 8, 2016 CanLII 104353
[514] Landlord and Tenant Board, "Human Rights: Interpretation Guideline 17", s 1, online: <http://www.sjto.gov.on.ca/documents/ltb/Interpretation%20Guidelines/17%20-%20Human%20Rights.html> [LTB, "Guideline 17"]
[515] *Ibid*, s 1a
[516] *Ibid*

The vast majority of the cases identified in my research related to accommodation needs of tenants.[517] In these cases, the accommodations the LTB granted to tenants included:

- Adjournments, for reasons related to a medical condition,[518] to give the tenant more time to get legal representation,[519] or to arrange for a telephone hearing instead;[520]
- Giving the tenant time to get advice from duty counsel;[521]
- A hearing in writing[522] or by telephone;[523]
- Adjusting the start time of the hearing;[524]
- Providing additional hearing time;[525]

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[517] Although I identified a few cases where landlords requested accommodation, these cases were rare. In one case, a landlord received an adjournment to obtain medical evidence to support accommodations for hearing loss and to bring any assistive devices or a support person he needed. However, when the landlord did not bring medical evidence, an assistive device, or a support person to the next hearing date, the hearing proceeded without any accommodations: *File No TST-69380-15*, 2016 LNONLTB 1970 at paras 5-6, 2016 CanLII 88322. In another case, also relating to hearing loss, the LTB member allowed the landlord's agent to assist him at the hearing: *File No NOT-29533-17-AO*, 2017 LNONLTB 2117 at para 7, 2017 CanLII 93883. It is notable that the LTB's failure to provide interpreters may affect landlords differently. Given the financial pressures they face, they may not want to adjourn a hearing to arrange for an interpreter: *File No SWL-00134-17*, 2017 LNONLTB 194 at paras 4-5, 2017 CanLII 28797. In addition, where the landlord's chosen interpreter was not impartial, the LTB questioned the credibility of the landlord and his agent: *File No CET-76526-18*, 2018 LNONLTB 3112 at paras 26, 34, 2018 CanLII 88592. I did not find any cases where credibility findings were drawn in this way against tenants and it is possible that landlords may be held to a higher standard in this respect.

[518] For example, the LTB adjourned because of the tenant's unnamed medical condition in *File No TEL-70970-16,* 2016 LNONLTB 2024 at paras 4-7, 2016 CanLII 89023. Similarly, in *File No CEL-80413-18-IN,* 2018 LNONLTB 4598 at paras 14-15, 2018 CanLII 143785, the LTB granted an adjournment for the tenant's generalized anxiety disorder. In *File No TSL-88141-17,* 2018 LNONLTB 2654 at paras 5-7, 2018 CanLII 42655, the LTB granted a first adjournment for the tenant's anxiety disorder, but refused a second adjournment for lack of evidence.

[519] For example, in *File No TSL-71184-16-IN2,* 2016 LNONLTB 2236 at paras 4-6, 9, 2016 CanLII 71317, the tenant needed to get a new lawyer and was provided with an adjournment to retain one. The tenant had a demonstrated mental health condition, based on a psychological report, and had not prolonged the proceedings. See also: *File No TEL-51969-14-SA,* 2015 LNONLTB 362 at para 3, 2015 CanLII 111068; *File No SWT-94108-16,* 2016 LNONLTB 2091 at para 3, 2016 CanLII 100344

[520] *File No SOL-53942-14,* 2015 LNONLTB 16 at para 2, 2015 CanLII 2900

[521] *File No SWT-84446-16,* 2016 LNONLTB 810 at paras 10-11, 2016 CanLII 44317; *File No EAL-62570-17,* 2018 LNONLTB 2956 at para 5, 2018 CanLII 86111

[522] *File No TSL-63981-15,* 2016 LNONLTB 557 at para 4, 2016 CanLII 39872; *File No TET-75706-16-IN,* 2017 LNONLTB 2627 at paras 5-6, 2017 CanLII 145866; *File No TST-47443-13-RV,* 2016 LNONLTB 603 at para 4, 2016 CanLII 39772; *File No TST-44900-13,* 2018 LNONLTB 2673 at paras 8-10, 2018 CanLII 42669

[523] *File No TSL-67570-15-RV-IN2,* 2016 LNONLTB 1221 at para 4, 2016 CanLII 71323; *File No TST-62872-15-IN,* 2015 LNONLTB 872 at paras 5, 13, 2015 CanLII 69373; *File No EAL-61451-16,* 2017 LNONLTB 2602 at para 4, 2017 CanLII 142939

[524] In *File No TSL-60910-15,* 2016 LNONLTB 1853 at para 5, 2016 CanLII 88388, the start time of the hearing was later than usual. Similarly, in *File No TSL-91342-17,* 2018 LNONLTB 4072 at paras 4-5, 2018 CanLII 120936, the hearing was held in the afternoon.

[525] *File No SOL-68892-16,* 2016 LNONLTB 923 at paras 12-15, 2016 CanLII 47983

- Limiting the hearing time and holding hearings over multiple days;[526]
- Allowing for regular breaks during the hearing;[527]
- Permitting a tenant to testify in another room by telephone;[528]
- Ensuring that people at the hearing speak slowly and clearly;[529]
- Allowing additional time to prepare submissions;[530]
- Allowing a service dog at the hearing;[531]
- Allowing a support person to attend the hearing;[532]
- Allowing a notetaker to transcribe the proceedings;[533]
- Providing parties with a recording of the hearing;[534]
- Holding a private hearing;[535]
- Sending Board communications by email for access by assistive reader and/or large font print;[536]
- Providing an interpreter to address a language barrier;[537] and
- Providing a quiet room to accommodate the tenant's children.[538]

Guideline 17 instructs that parties should request accommodations early, in writing.[539] The LTB has a form that parties may use to make an accommodation request.[540] However, they may also contact the LTB by telephone or speak to LTB staff in person to ask for accommodation.[541]

Even though requests are often answered and arranged in advance, this does not always happen. In one case, a tenant with depression and anxiety asked, one month in advance, for a

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[526] *File No TSL-60910-15, supra* note 524 at para 5
[527] See, for example: *File No SWC-00391-15-AM,* 2015 LNONLTB 1150 at para 6, 2015 CanLII 86445
[528] *File No TSL-91342-17, supra* note 524 at paras 4-5
[529] *File No SWL-17187-18*, 2018 LNONLTB 4357 at para 7, 2018 CanLII 141504
[530] *File No TSL-67570-15-RV-IN2, supra* note 523 at paras 13-16
[531] *File No SWL-17187-18*, *supra* note 529 at paras 4-8
[532] *File No EAL-62570-17, supra* note 521 at para 7
[533] *File No SWT-84446-16, supra* note 521 at para 5
[534] *File No EAL-62570-17, supra* note 521 at para 6
[535] *File No SWL-32001-19,* 2019 LNONLTB 457 at para 5, 2019 CanLII 89687; *File No TST-92725-18,* 2018 LNONLTB 4204 at para 4, 2018 CanLII 123275
[536] *File No TST-07548-19-RV*, 2019 LNONLTB 651 at para 6, 2019 CanLII 134546
[537] *File No TEL-88814-18-RV,* 2019 LNONLTB 7 at paras 7-11, 2019 CanLII 35238
[538] *File No TET-81423-17,* 2017 LNONLTB 1607 at para 18, 2017 CanLII 70469
[539] LTB, "Guideline 17", *supra* note 514, s 1
[540] Landlord and Tenant Board, "Forms", Forms for Tenants, Request for French-Language Services or Request for Accommodation, online: <http://www.sjto.gov.on.ca/ltb/forms/>
[541] *File No TSL-22820-11-RV,* 2015 LNONLTB 175 at para 22, 2015 CanLII 15595

social worker to come to the hearing with him.[542] The LTB never followed up with him to explain that it does not provide social workers and to discuss other accommodations. At the hearing, the LTB member learned that the tenant's own support worker was on vacation and unavailable to attend.[543] The member reasoned that accommodation must be "reasonable", with reference to Supreme Court of Canada case law. The member decided that a reasonable accommodation in this situation was to give the tenant an hour to contact a support person and to allow for frequent breaks in the hearing.[544] The tenant refused both of these options and the hearing went ahead without any accommodation at all.[545]

This case demonstrates two failures in the LTB's accommodation processes. First, if tenants request accommodations in advance, staff should follow up with them if those accommodations are not possible. Second, the LTB member took a very narrow, legal view of accommodation in exercising discretion in this situation, which appeared to ignore the tenant's circumstances – namely, that his existing support person was not available at an hour's notice and it was unreasonable to think support was so fungible that someone else could step in within an hour. Disregard for the tenant's own situation meant that the alternative accommodation was not meaningful and the tenant was not really accommodated at all.

That said, at times the LTB will allow accommodations at the hearing itself if parties "do not have an adequate opportunity to participate in the proceeding".[546] For example, a tenant who arrived at the LTB in error for a telephone hearing was provided a mediation room with a telephone to attend.[547]

Requesting an accommodation may be more difficult at the hearing. However, since Guideline 17 specifies that some accommodation requests "may require the party to provide sufficient

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[542] *File No CEL-58530-16-SA,* 2016 LNONLTB 1332 at paras 6-10, 2016 CanLII 72161
[543] *Ibid* at paras 11-12
[544] *Ibid* at paras 13-16
[545] *Ibid* at para 17
[546] LTB, "Guideline 17", *supra* note 514, s 1. See also: *File No TSL-22820-11-RV, supra* note 541 at para 22
[547] *TET-95985-18-RV (Re),* 2019 CanLII 87755 at para 5 (Ont LTB)

evidence to establish that they are covered under section 1 of the *Code* and need accommodation."[548] In the case of a disability, medical evidence must not only establish the barrier to participation, but must also connect it to the accommodation requested.[549] If a party is making an accommodation request in the moment at the hearing, after becoming aware of a barrier to participation, it is possible that supporting medical evidence may not be available for the LTB member to review.

Medical Evidence and Accommodation Requests

When supportive medical evidence is not available, the LTB is more likely to deny accommodation requests.[550] Sometimes, tenants may have included evidence of medical conditions as part of a tenant application, which the LTB can also consider in the context of an accommodation request. For example, in one case, an LTB member referred to medical evidence of the tenant's mental health and physical health conditions on file, and allowed an accommodation pursuant to Guideline 17.[551] However, in the context of eviction applications brought by landlords (and recalling that the vast majority of applications are brought by them, not tenants), it is much less likely for there to be evidence in the LTB file which may be relevant to an accommodation request.

Similarly, even where there is some evidence of a tenant's medical condition, it may not be clear what the tenant's limitations are and how they are connected to the tenant's accommodation request. In cases where medical evidence is insufficient, LTB decision-makers have denied accommodation requests rather than seek to clarify the tenant's situation.

For example, the LTB denied an accommodation request when the tenant did not appear at the hearing but previously submitted a doctor's letter describing a period of total disability,

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[548] LTB, "Guideline 17", *supra* note 514, s 1
[549] *File No TSL-91342-17-IN,* 2017 LNONLTB 2671 at para 4, 2018 CanLII 143783
[550] *File No TSL-71596-16-SA,* 2016 LNONLTB 1004 at paras 7-8, 2016 CanLII 52810
[551] *File No TST-71175-16-IN,* 2016 LNONLTB 1974 at paras 12-16, 2016 CanLII 88772

including the hearing date.[552] Rather than asking the tenant to provide more information or inquiring whether this was an adjournment request, the Board proceeded with the matter in the tenant's absence.[553] The LTB member's rationale for going ahead with the hearing was the lack of specific details in the medical letter and the lack of a formal accommodation request before the LTB. This would appear to demonstrate a failure to properly appreciate the tenant's circumstances, even though the tenant had not raised the issue in the most preferred way.

The LTB Holds Tenant Accommodation Requests to a High Standard

Furthermore, the information the LTB requires to adjudicate accommodation requests relating to disability or language interpretation may, on some occasions, be flawed and may set a standard that is too high.

For example, an LTB member rejected an undated medical letter regarding a possible concussion. The member reasoned that the letter "does not provide any identification of her medical condition or specifics of what her restrictions on participation in the hearing might be."[554] While "specifics of what her restrictions on participation in the hearing" are relevant, the tenant's diagnosis is not necessary. Requesting irrelevant information that a tenant may wish to keep confidential may raise barriers to access to justice, rather than address them.

Similarly, tenant requests for language interpretation may be held to an inappropriate standard. The LTB's website explains that the Board will provide services in French or sign language interpretation upon request.[555] However, interpretation for languages other than French or English is not presumptively provided, and the Board's website instructs parties to bring someone they know or hire their own interpreter.[556] This is different than the SBT and the

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[552] *File No TNL-99817-17,* 2018 LNONLTB 4575 at para 5, 2018 CanLII 48257, upheld on internal review on this point, *File No TNL-99817-17*, 2018 LNONLTB 4618 at para 8, 2018 CanLII 48253
[553] *Ibid* at para 6
[554] *File No TSL-85905-17,* 2017 LNONLTB 2463 at para 14, 2017 CanLII 142780
[555] Landlord and Tenant Board, "Language Services", online: <http://www.sjto.gov.on.ca/ltb/language-services/> [LTB, "Language Services"]
[556] *Ibid*

HRTO's policies described above to provide interpretation, at the tribunal's expense, upon request. In contrast, LTB's policy may undermine the fairness of the proceedings or mean that interpretation may be inaccessible to some tenants.

Furthermore, at a hearing, the LTB has questioned whether interpretation is required rather than taking requests by tenants at face value, absent any indication that the request was not made in good faith.[557] That said, parties may be able to get an adjournment if their chosen interpreter does not arrive,[558] or if the interpreter does arrive but does not meet the appropriate standard.[559] In the latter case, the Board agreed to arrange for the interpreter itself.[560]

Reasonable Accommodation and Undue Hardship

In denying accommodations, the LTB provides some insight regarding how its members view the reasonable accommodation and the threshold of undue hardship. Members exercise their discretion taking into account the interest of the landlord in resolving the case quickly, but may not understand the meaning of accommodation to the point of undue hardship or that this duty rests on the LTB.

The LTB considers the procedural fairness interest of the landlord in refusing accommodations. For example, tenants are less likely to get an adjournment if they have received prior adjournments and are breaching an interim order of the LTB, which often requires them to pay their rent into the Board.[561] In these cases, the LTB will conclude that the delay and prejudice to

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[557] *File No TSL-56575-14,* 2015 LNONLTB 128 at paras 8-10, 2015 CanLII 9132

[558] *Ibid* at para 9: "Although I was not particularly convinced that there was any language barrier preventing the Tenant from fully participating in a hearing, or that he was completely without understanding of the interim order, he was given the benefit of the doubt and his adjournment request was granted."

[559] *File No TEL-88814-18-RV, supra* note 537 at paras 7-11

[560] This case explains that the interpreter was provided by the LTB. There is no mention of the tenant being required to pay for this service. It is also notable that this case is a request for review where interpretation at the initial hearing had already been raised as an issue: *Ibid* at paras 10-11

[561] *File No TSL-67570-15-RV2*, 2017 LNONLTB 55 at para 17, 2017 CanLII 9472; *File No CEL-62600-16-RV,* 2017 LNONLTB 112 at paras 22-27, 2017 CanLII 28739; *File No HOL-00395-16,* 2016 LNONLTB 127 at paras 7-23, 2016 CanLII 37514, upheld on internal review on this point, *File No HOL-00395-16-RV,* 2016 LNONLTB 273 at paras 12-

the landlord outweigh the duty to accommodate,[562] that the tenant should have tried harder to get a representative more quickly,[563] that the tenant should have appeared at the hearing,[564] or that the tenant is unfairly prolonging the proceedings.[565] The LTB may also consider the amount of any arrears of rent owing to determine the extent of prejudice to the landlord.[566]

In addition, some LTB members suggest that the landlord,[567] or the landlord and the LTB,[568] have a duty to accommodate a tenant to the point of undue hardship. This reasoning demonstrates that some LTB members may not understand what undue hardship means, or that the duty to accommodate rests on the LTB. First, at least some LTB members appear to misunderstand that the duty to accommodate is the responsibility of the Board, not the landlord. Second, some LTB members may not know the meaning of undue hardship in the context of human rights law. "Undue" hardship does not mean that any financial hardship is sufficient.

In contrast, the Divisional Court has correctly stated that the LTB's role is "ensuring that the tenant's interests are properly put before the Board so a just determination of the underlying issues may be rendered on the merits […] [T]he accommodation must accord the tenant full

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19, 2016 CanLII 37511. The Divisional Court has held that a party's procedural fairness interest may be less if they are breaching an interim order of the LTB: *Regan v Latimer*, 2016 ONSC 4132 at para 24 (Div Ct), motion to set aside refused, 2016 ONSC 4351 (Div Ct); *Shields v Lancelotte*, 2016 ONSC 4433 at paras 24-25 (Div Ct)

[562] *File No CEL-62600-16-RV, supra* note 561 at paras 26-27; *File No HOL-00395-16*, *supra* note 561 at paras 12-19

[563] *File No TSL-81945-17,* 2017 LNONLTB 285 at paras 5-7, 2017 CanLII 28770

[564] *File No SWL-18807-18,* 2018 LNONLTB 4361 at paras 21-24, 2018 CanLII 141494; *File No TSL-07606-19,* 2019 LNONLTB 723 at paras 4-9, 2019 CanLII 134502, upheld on internal review on this point, File No TSL-07606-19, 2019 LNONLTB 675 at paras 8-10, 2019 CanLII 134575

[565] *File No TSL-67570-15-RV2, supra* note 561 at para 17

[566] *File No TSL-81945-17, supra* note 563 at para 5

[567] *File No TSL-67570-15,* 2017 LNONLTB 55 at para 18, 2016 CanLII 39862, upheld on this point on internal review, *File No TSL-67570-15-RV2*, 2017 LNONLTB 55 at para 17, 2017 CanLII 9472: "I am satisfied that the Landlord will suffer undue hardship if the Tenant's request for an adjournment is granted. This matter has been adjourned twice previously. The Tenant has not paid rent since September 2014. When the Tenant was ordered to pay her rent into the Board, she failed to do so. Any further delay in the proceedings causes the Landlord financial hardship which increases with each passing month."

[568] *File No SOL-57813-15,* 2015 LNONLTB 1111 at para 126, 2015 CanLII 85078: "The Board acknowledges that the duty to accommodate this Tenant's health needs did create an extra burden on both the Board and the Landlord. However, the duty to accommodate is to the point of 'undue hardship' and the Landlord did not demonstrate that the Landlord's accommodation reached the level of undue hardship."

and fair participation in the process to the point of undue hardship."[569] In failing to appreciate this, LTB members deviate from established human rights principles, Divisional Court case law, and their own Guideline 17.

Practical Obstacles to Fulfilling the Duty to Inquire

While Guideline 17 acknowledges that parties must participate in their own accommodation process, it also anticipates that parties may not always recognize when they need accommodations. The Guideline references a duty analogous to a duty to inquire on the part of members conducting a hearing:

> Members must be attentive to indications which suggest a party may require accommodation in order to participate in the hearing, even if the party does not request any accommodation from the Board. Pursuant to section 201 of the *RTA*, the Member may on their own initiative ask questions and request submissions from both sides to determine if the party requires accommodation.[570]

Furthermore, in deciding accommodation requests, LTB members also recognize that, "a Board Member may raise the issue of accommodation on their own motion at a hearing because something they see or hear raises some concern that accommodation may be necessary in order for there to be a fair hearing."[571] The Divisional Court also acknowledged that members may be required to recognize a situation where an accommodation may be needed, pursuant to procedural fairness and Guideline 17.[572]

However, when an issue of accommodation arises in the middle of a hearing, it may be difficult for an LTB Member to respond, given the need to make decisions quickly and to maintain efficiency in a fast-paced environment. For example, an LTB member failed to investigate the reasons for a request for an adjournment when the tenant did not volunteer these details on

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[569] *Beaux Properties, supra* note 142 at para 2
[570] LTB, "Guideline 17", *supra* note 514, s 1
[571] *File No TSL-22820-11-RV, supra* note 541 at para 22
[572] *Arsenault v Thevathurai,* 2015 ONSC 5357 at paras 23-27 (Div Ct) where this part of Guideline 17 was referenced, but did not form the basis for a reviewable error.

his own and appeared to be participating in the hearing.[573] Similarly, when a tenant cited fever and back pain as a basis for her adjournment, the LTB member denied the request because "[t]he tenant appeared capable of participating in the hearing".[574] Since it may be difficult to objectively observe either of these conditions, it is concerning that the Member did not, at minimum, ask how these conditions were affecting the tenant's ability to participate.

Similarly, LTB members may attempt to solve problems with interpretation quickly during hearings in ways that may fall short of appropriate accommodation. In one case, the tenant's friend was supposed to interpret, but he did not attend.[575] The LTB member proceeded with the hearing, asking the tenant to speak up if he did not understand.[576] This solution is not much of an accommodation at all, and may be less meaningful if a tenant, intimidated by the hearing process, is reluctant to interrupt frequently. In a second case, the Member attempted to interpret on her own using computer translation.[577] The quality of this interpretation is concerning (to say the least) and may not meet the requirements of procedural fairness. Furthermore, the Divisional Court recently upheld a decision to hear a landlord's preliminary motion to dismiss the tenants' applications in writing as an accommodation for a language barrier on the part of the tenants.[578] However, the Divisional Court's analysis fails to discuss whether this solution accommodated the needs of the tenants, or whether the tenants were asked what their needs were at all.

The Tenant Duty Counsel Review highlights how tenants felt after their needs and circumstances were not meaningfully considered at hearings. One tenant expressed her

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[573] *File No NOL-31086-18,* 2018 LNONLTB 4617 at para 22, 2018 CanLII 143810, upheld on internal review on this point, *File No NOL-31086-18* at para 7, 2018 LNONLTB 4616, 2018 CanLII 143784
[574] *TSL-97940-18 (Re),* 2019 CanLII 87578 at paras 1-2 (Ont LTB)
[575] *File No TEL-90179-18,* 2018 LNONLTB 3524 at para 4, 2018 CanLII 113123
[576] *Ibid* at para 5
[577] *File No TEL-93663-18-AM,* 2018 LNONLTB 3559 at paras 5-6, 2018 CanLII 113232
[578] *Zhou v Cherishome Living*, 2020 ONSC 500 at paras 56-60 (Div Ct) [*Zhou*]

frustration with a "lack of understanding of my low-income situation and mental health problem. I felt a lack of humanity."[579]

Reviews Sought by Tenants after a Hearing

Some tenants may not understand they can request accommodations at a hearing or may be reluctant to do so. They may later request review based on this lack of accommodation. However, these requests are not likely to be successful and may demonstrate the lack of knowledge on the part of the tenant of the LTB's accommodation processes at the relevant time.

Tenant Duty Counsel play an important role in supporting tenants with disabilities and human rights issues in explaining their cases.[580] However, tenants sometimes do not know they can consult Tenant Duty Counsel, or they may be reluctant to disclose disabilities unless they are asked.[581] That said, Tenant Duty Counsel do not have the capacity to provide additional services to each tenant with accommodation needs.[582] This demonstrates that, for one reason or another, some tenants may not be aware they can ask for accommodations in the context of the hearing process.

Where a tenant does not make an explicit accommodation request at the hearing, they are unlikely to be successful on a subsequent review premised on lack of accommodation.[583] For example, a tenant unsuccessfully sought review of an LTB decision, denying his request to adjourn mid-proceedings to get legal representation. The tenant argued that his difficulty in

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[579] Paradis, "Tenant Duty Counsel Review", *supra* note 497 at 60
[580] *Ibid*
[581] *Ibid* at 60, 62-67. The Tenant Duty Counsel Review recommends many reforms that may increase awareness of duty counsel services at 99-100. These changes range from employing better signage, to using clearer language that explains that tenant duty counsel services are free, to providing information to tenants verbally and in writing.
[582] *Ibid* at 60
[583] *File No TSL-99900-18-RV,* 2018 LNONLTB 4284 at paras 12-13, 2018 CanLII 140438; *File No SWL-79934-15-RV,* 2015 LNONLTB 1191 at paras 24-28, 2015 CanLII 91976, citing the decision of the Divisional Court in *Matechuk v Raamco International Properties*, 2015 ONSC 1196 at para 7 (Div Ct); *File No SWL-15072-18-RV,* 2018 LNONLTB 2984 at paras 29-34, 2018 CanLII 86109; *File No HOL-03632-18-RV,* 2018 LNONLTB 4257 at paras 8-10, 2018 CanLII 140407

staying on topic and remembering the directions of the Member should have alerted the Member to his disability.[584] However, the tenant had not submitted any medical evidence at the time of the hearing to demonstrate that disability and the need for accommodation.[585] The tenant later submitted medical evidence of his schizophrenia from his family doctor and psychiatrist when he requested a subsequent review.[586] Nonetheless, the LTB denied the review on the basis that it was a delay tactic.[587] The LTB's reasoning does not appear to take into account the fact that many tenants may not be able to predict their accommodation needs in advance, especially if they have never appeared before the LTB.

This perfunctory approach is inconsistent with Divisional Court jurisprudence. The Divisional Court has stated that the relevant factor is whether the tenant was reasonably unable to participate.[588] While the LTB may consider the fact that a party did not raise an accommodation at the time, this may not be as significant if evidence is provided later on and the party explains why a request was not made earlier.[589]

In Summary: The Challenges of Balancing Efficiency and Fairness in a Fast-Paced System

The LTB's approach to accommodation requests is informed by its high volume of cases and its statutory mandate to ensure efficient resolution of those cases. However, at times, the LTB's institutional approaches may limit the ability of individual Members to properly appreciate the circumstances of tenants and to proactively and sensitively identify and address accommodation needs. Furthermore, LTB members may conflate the procedural fairness interest of landlords with the LTB's own duty to accommodate tenants, which undermines the legitimacy of their exercises of procedural discretion.

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[584] *File No TSL-93303-18-RV,* 2019 LNONLTB 271 at para 40, 2019 CanLII 87087
[585] *Ibid* at para 39
[586] *Ibid* at paras 41-47
[587] *Ibid*
[588] *Brewer v Landlord and Tenant Board Southern RO*, 2018 ONSC 1006 at paras 39-50 (Div Ct) [*Brewer*]; *Hasan v Taylor*, 2017 ONSC 102 at paras 39-50 (Div Ct) [*Hasan*], where an LTB Member improperly refused an adjournment request and the matter was remitted to the LTB based on evidence the tenant was not able to attend.
[589] *Delanty v Gloucester Housing Corp*, 2019 ONSC 5286 at para 13 (Div Ct)

Conclusion

The trends in procedural decision-making across these three tribunals are informed by the statutory mandate of each tribunal, institutional practices created to effect that mandate, conflicting interests of parties with varying degrees of power, and available evidence that may support accommodations.

As I will discuss in Chapter 3, these trends provide insights regarding what access to justice may require to provide meaningful access to tribunal procedures, as measured against theories of discretionary decision-making. In addition, some of the legal, institutional, and practical obstacles evident from this doctrinal analysis also shed light on the limitations of dialogue theory.

Chapter Three: Procedural Discretion in Theory and in Practice

Introduction

The final chapter of this thesis compares the theoretical understanding of exercises of procedural discretion, introduced in Chapter 1, to the body of case law from the SBT, HRTO and LTB, discussed in Chapter 2. It highlights practices that encourage and foster access to justice, through dialogue and engagement. It also discusses practices that fall short, demonstrating real world limitations and imbalances of power that are more difficult, or perhaps impossible, to address based on the theoretical frameworks advanced by Lorne Sossin, Geneviève Cartier, and Jennifer Raso.

Exercises of procedural discretion by the SBT, HRTO and LTB demonstrate positive practices that encourage meaningful dialogue and engagement, and negative practices that frustrate meaningful communication and understanding. Positive practices are consistent with an approach that accommodation and meaningful participation comprise a necessary part of the statutory mandate of these tribunals. Following this approach, at least some tribunal decision-makers have taken the time to discuss and understand the needs of parties, demonstrated flexibility in meeting those needs, and provided transparent information about requests for accommodation. In the first part of this chapter, I will review these positive practices, outlining how they promote human rights values, dialogue and engagement.

In contrast, the failures of tribunals to achieve these ideals demonstrate a significant need for reform, as well as the limitations of applying ideal theories to the real world. Sometimes, despite the good intentions of a tribunal decision-maker, power imbalances between opposing parties and between a party and the decision-maker may mean accommodation requests are never made or have no reasonable prospect of succeeding. In addition, narrow statutory mandates that balance efficiency with fairness may limit the information that is available to tribunal decision-makers and the range of procedural options that are practical for them to implement. As such, individual decision-makers may be limited both by the institutional framework in which they work and by their own conception of what their statutory mandate

requires. As well, matters of resources and staffing may influence procedures that are adopted at the level of institutional and individual decisions.

Finally, I will address judicial review as an accountability measure to address some of these negative practices. Courts have provided helpful principles that may guide each of these tribunals in specific situations. Nonetheless, judicial review may not be an effective mechanism to address systemic inequities or whether meaningful engagement has occurred. In fact, the new *Vavilov* framework for judicial review may reflect foundational administrative law doctrine that may obscure procedural decision-making and undermine its potential to be transparent and authentic.

Positive Practices: Theories of Engagement, Dialogue, and Human Rights Values in Action

Positive practices displayed in some SBT, HRTO and LTB procedural decisions convey an overall approach that accommodation and access to tribunal decision-making is a part of the tribunal's statutory mandate. This approach is essential to tribunal engagement and intimacy, as advanced by Cartier and Sossin, because these theories require commitment to mutual understanding and open communication.

According to Cartier, administrative discretion should be subject to implied limits imposed by the statutory purpose and the perspective of the party whose rights are at stake.[590] She illustrates this approach, which underlies her theory of discretion as dialogue, by analyzing the judgment of Justice Rand in *Roncarelli*.[591] In the words of Justice Rand, "there is no such thing as absolute and untrammelled 'discretion'" and "there is always a perspective within which a statute is intended to operate."[592] Cartier does not directly address legislative schemes of tribunals that often serve low-income people. However, her reasoning may be logically

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[590] Cartier, "Dialogue", *supra* note 90 at 635-639. As noted in Chapter 1, Cartier contrasts this approach she terms "discretion as dialogue" with an opposing approach, "discretion as power", which she describes at 638 as a "one - way projection of authority."
[591] *Ibid* at 639
[592] *Roncarelli v Duplessis*, [1959] SCR 121 at 140, 16 DLR (2d) 689

extended to require decision-makers to consider how procedural decisions may further or frustrate the social welfare purpose of these statutory schemes in determining the content of the duty of fairness.

Taking this analysis further, Sossin considers statutory purposes relevant to decisions regarding vulnerable people. By delineating statutory powers, legislatures communicate to decision-makers how their mandate relates to the interests of vulnerable parties and why that mandate has been given to them.[593] Administrative decision-makers are meant "to develop institutional and social strategies for suffusing rights with meaning" -- in other words, to realize the high level policy goals expressed by the legislature through both institutional and individual exercises of discretion.[594] It may therefore be possible to hold decision-makers accountable if their disrespect or lack of consideration for vulnerable people obviously undermines statutory objectives.[595]

Some procedural decision-making at SBT, HRTO and LTB appears, at least on its face, to facilitate or provide accommodations that are appropriate to the tribunal context and the specific circumstances of parties. I group these positive strategies into four different categories: transparent information about procedural accommodations; responsive pre-hearing practices including preliminary motions and case management; flexibility in adapting tribunal processes to the situations and needs of parties at the hearing itself; and a duty to inquire about accommodations not raised by parties themselves.

Transparent Information about Accommodation Practices

Institutional practices provide parties with information about procedural decision-making and may facilitate parties in making accommodation requests. Both Sossin and Cartier view the exchange of information and perspectives as a crucial starting point to meaningful

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[593] Sossin, "Intimate Approach", *supra* n note 62 at 840-841
[594] *Ibid* at 855
[595] Sossin, "Homeless," *supra* note 85 at 686

engagement.[596] Sossin also asserts that power imbalances may be addressed, at least in part, by providing parties with information about tribunals and tribunal decision-makers.[597] Knowing how decisions are made and how decision-makers understand their role may assist in "[l]evelling the playing field of knowledge", allowing more effective mutual understanding by parties and by decision-makers about each other's perspectives.[598]

Consistent with this approach, all three tribunals provide information about how to request accommodations and what accommodations may be available that is reasonably easy to locate on their websites.[599] Most of the information about accommodations conveyed by all three tribunals is generally positive.[600] These web pages explain, for the most part in plain language, how to contact the tribunal about accommodations[601] and sometimes offer concrete examples of accommodations to which parties may be able to relate.[602] Some of this information may be more effectively communicated, consolidated and displayed in a more accessible and prominent way.[603] Nonetheless, providing such a resource at all is a helpful first step.

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[596] Sossin, "Intimate Approach", *supra* note 62 at 841-843; Cartier, "Dialogue", *supra* note 90 at 644-645

[597] Sossin, "Intimate Approach", *supra* note 62 at 844-845

[598] *Ibid* at 845. Welsh observes that providing information to marginalized parties online, in the context of mediation, "would provide some degree of transparency and contribute to trust in the procedural and substantive fairness of mediation and the avoidance of systemic but under-the-radar discrimination": Welsh, *supra* note 111 at 759

[599] SBT, "Accessibility and Accommodation", *supra* note 277; SBT, "Videos and FAQs", *supra* note 278; HRTO, "Accessibility and Accommodations", *supra* note 434; Landlord and Tenant Board, "Accessibility and Accommodations", online: <http://www.sjto.gov.on.ca/ltb/accessibility-and-accommodations/> [LTB, "Accessibility and Accommodations"]. See also: Tribunals Ontario, "Accessibility and Accommodation Policy", *supra* note 277

[600] However, communication by the LTB about its practices regarding arranging for and paying for interpreters is a flawed practice I will address later in this chapter.

[601] For example, LTB, "Guideline 17", *supra* note 514, s 1

[602] For example, the SBT's Accessibility and Accommodate web page is separate from their Videos and Frequently Asked Questions page, and interested parties may not immediately find both of them. Similarly, the LTB's Guideline 17 is not linked to its Accessibility and Accommodations page.

[603] For example, SBT's information about accommodation is located on one web page, while additional information regarding the specific examples of transportation to hearings and having a support person present may be found under frequently asked questions. A preferable approach could be to consolidate all information regarding accommodations on one web page that is prominently linked on the tribunal's home page: SBT, "Accessibility and Accommodation", *supra* note 277; SBT, Videos and FAQs, *supra* note 278

More proactively, the SBT and HRTO raise the issue of accommodations in the initial forms to start a proceeding. The SBT asks appellants about accommodations and interpretation requests on the appeal form and provides space to explain what is required.[604] This approach conveys that accommodation requests are part of the SBT's regular practice and provides an early opportunity for appellants to make an accommodation request. It then places the onus on the tribunal to address it. Meanwhile, the HRTO explains at the end of its application form that applicants may contact the Registrar by telephone, fax or e-mail to request any necessary accommodations.[605] Both tribunals might improve these processes by providing some of the information about procedural accommodations conveyed on their websites within these initial forms. That said, the proactive nature of these practices demonstrates an attempt at informational transparency consistent with legal theories of participation and engagement.

Pre-hearing Practices: Preliminary Motions and Case Management

In addition to providing parties with information and opportunities to begin a discussion about potential accommodations, some tribunal practices recognize that meaningful, authentic communication may take time and tribunal resources to exchange information and promote trust. To truly appreciate one another's perspectives in a transparent and authentic way,[606] decision-makers may need to discuss and exchange information with a party, sometimes on multiple occasions. While this goes beyond what accommodation may require under the *Code*, HRTO and SBT decision-makers displayed some of these practices in conducting case management and making preliminary decisions.

A preliminary motion is an opportunity for the decision-maker to discuss what evidence may be required to support an accommodation request and to give parties time to gather that evidence.[607] It also allows an adjudicator to discuss alternative accommodations that the party

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[604] SBT, "Appeal Form", *supra* note 283 at 2
[605] HRTO Application Form, *supra* note 330
[606] Cartier, "Dialogue", *supra* note 90 at 644-646; Sossin, "Intimate Approach", *supra* note 62 at 811-812
[607] *1611-08690 (Re), supra* note 318 at paras 2-5; *1412-13963 (Re), supra* note 364 at paras 4-6; *Kusinski*, *supra* note 439

may wish to request, in the event that accommodations are denied, or prior to the submission of request in the first place.[608]

Procedural motions held prior to a hearing on the merits may be an efficient method of resolving accommodation requests without adjournments, delay, and potential prejudice to the opposing party. These decisions may set the venue for an in-person hearing or resolve whether a matter will be heard by telephone, by videoconference, or in person.[609] If these requests were made at a hearing, an adjournment would likely be necessary to grant them. In contrast, when these accommodations are determined ahead of time, they do not need to be balanced against potential delay and resulting prejudice to the opposing party.

As well, the HRTO's new practice of assigning one adjudicator to case manage an application has the potential to encourage trust to develop between a party and an adjudicator who may interact on multiple occasions.[610] A party may be reluctant to request accommodations at the first case management conference. However, they might be more likely to do so later on if the decision-maker is even-handed, receptive to ideas, and respectful.[611] In addition, a party may be more comfortable making a request if one decision-maker, who is familiar with their case, will make all case management decisions. This institutional practice could overcome attitudinal barriers to disclosing accommodation needs, such as mental health disabilities or hardships

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[608] *Kusinski*, *supra* note 439; *Yahya*, *supra* note 437 at paras 5-17

[609] Regarding setting a venue: *1703-02128 (Re), supra* note 313 at paras 3-11 and related case *1703-01860 (Re) #2, supra* note 308 at paras 15-19; *Mastromatteo, supra* note 437 at para 5; *Ruffolo, supra* note 427 at paras 14-18; *Schiller, supra* note 427417 at paras 4-6. Regarding setting a venue and method of hearing: *1705-03640 (Re), supra* note 311 at paras 2-6. Regarding method of hearing: *Leach 2017, supra* note 416 at para 7

[610] Regarding the HRTO's case management practices, see Lamoureux & Moran, "Tribunals Ontario Annual Report", *supra* note 379 at 46

[611] This point may be supported by the procedural justice literature's discussion of trustworthy consideration, described above. Furthermore, Welsh asserts, in the context of mediation, that "pre-mediation and early caucusing" may, in some cases, "encouraging the productive expression of voice and providing evidence of trustworthy and respectful consideration by the mediator": Welsh, *supra* note 111 at 755, see also 752-754, 756

relating to poverty.[612] Such an approach is consistent with Sossin's view that "less formal confrontations" may assist in establishing trust with vulnerable parties.[613]

Nonetheless, these institutional practices do not work well in every individual case. The SBT has recognized that some parties may not be able to easily or quickly obtain supportive medical evidence if they do not have a family doctor.[614] Furthermore, in the case of more complex accommodation requests, the pre-hearing process may become so prolonged that it becomes a burden on the party – in quantitative terms of passage of time, and also in qualitative terms of navigating a complex procedure and interacting frequently with administrative decision-makers.[615] I will address these limitations later on. However, on the whole, these practices appear to promote transparency on the part of the SBT and HRTO which may lead to early adjudication of accommodation requests.

Flexibility in Adapting Tribunal Processes to the Situations and Needs of Parties

While it may be preferable to resolve some accommodation issues prior to the hearing on the merits, some tribunal practices at the hearing stage also demonstrate flexibility consistent with theories of engagement and dialogue. On some occasions, the SBT and HRTO adjudicators provide information about accommodations at the hearing for parties to consider.[616] Similar to the discussions held at pre-hearing conferences, transparency may promote a meaningful conversation about what accommodations will serve a particular party's needs. As well, at least

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[612] On attitudinal barriers, see Lepofsky & Graham, *supra* note 144 at 139-140
[613] Sossin, "Homeless," *supra* note 85 at 656, 665-666
[614] *1808-05527 (Re), supra* note 345 at paras 11-14. The deadlines to provide this medical evidence information vary: *Royeton, supra* note 437 at paras 24, 26-28, 33 (thirty days provided to provide more detailed medical evidence); *ATA, supra* note 458 at para 28 (accommodation request denied when medical evidence was not received within three months); *1508-07792 (Re), supra* note 374 at paras 15-19 and related case *1508-07792 (Re), supra* note 374 at paras 15-19 (appeal dismissed after medical evidence was not provided within two years). An adjudicator might grant more time if delay is outside of a party's control: In *1611-08690 (Re), supra* note 365 at paras 2-4, where the appellant's psychologist passed away, and the SBT granted an adjournment to allow for the assessment to take place with a new psychologist.
[615] *1703-02128 (Re), supra* note 313 at para 7
[616] *Rose, supra* note 410 at para 3; *Stor, supra* note 410 at para 7; *Fagan, supra* note 411 at para 8; *1704-02853 (Re), supra* note 289 at para 10

some adjudicators respond and adapt to circumstances as they develop in the hearing process and take a more active role in ensuring fair procedures.

The HRTO's active adjudication techniques provide adjudicators with powers to adapt the hearing process in response to accommodation needs at the hearing itself, to narrow the issues, to change the order of witnesses, to admit documentary evidence that reduces the scope of witness testimony, or to adapt to the sensitive nature of certain cases, such as sexual harassment applications.[617] These techniques focus on the particular circumstances of the applicant, and dispense with mechanical application of legalistic processes. They have been used by the HRTO to fashion proportionate procedures that also reflect accommodation needs and circumstances of applicants.[618]

As noted above, the HRTO employs active adjudication to raise accommodation needs that parties do not identify, case manage applications, adapt processes for hearing preliminary issues, and alter processes for receiving the applicant's evidence.[619] These practices are consistent with Sossin's theory of intimacy and engagement, which emphasizes a more personal and flexible process, rather than a standardized, legalistic process.[620] In other words, the HRTO's expansive procedural discretion provides it with greater scope, as compared to tribunals with more traditional mandates, to meet applicants where they are, in a way that promotes inclusion.

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[617] *JS, supra* note 397 at para 20; Flaherty & Reaume, *supra* note 384 at 364-365, 374-375; *Taucar #1, supra* note 394 at paras 10-12; Flaherty, "Best Practices", *supra* note 395 at 295-296; *Pellerin, supra* note 394 at paras 13-14

[618] *Aiken, supra* note 400 at paras 33-36; *Fan, supra* note 405 at paras 19-20

[619] Andrew Pinto was critical of the HRTO's limited application of active adjudication in 2012, explaining that the use of these techniques "is quite adjudicator dependent and very much along a spectrum" (Pinto, *supra* note 132). I observed several examples of active adjudication, as noted in chapter 2. That said, I cannot conclude whether the HRTO has embraced these techniques on a more consistent basis in more recent years. This is because of the limited scope of my case law search, and that I did not compare cases released around the time of his report to cases released more recently. However, Pinto's statement that "it may be worthwhile for the Tribunal to maintain an internal practice to require adjudicators to explain why active adjudication could not be employed in a hearing" is relevant to a discussion of engagement and dialogue. This practice would have the potential to promote transparent communication and to require adjudicators to explicitly consider active adjudication in each case.

[620] Sossin, "Homeless", *supra* note 85 at 656-657, 663-664, 680-681

SBT members have a lesser scope to adapt elements of the hearing process, as compared to HRTO adjudicators. However, SBT members are willing to modify the hearing process on the day of the hearing in certain ways: to convert the proceeding to a telephone hearing;[621] to make physical changes to the hearing room;[622] to simplify language;[623] to respond to technical problems;[624] or to address flaws in interpretation.[625] When appellants may not be aware they can request accommodations or interpretation services, SBT members may raise accommodation issues on their own motion, explain these processes, and adjourn the hearing.[626] Therefore, at least some individual decision-makers are willing to do what they can, within the limitations of their procedural discretion, to address specific needs of appellants.

Even though the LTB's institutional processes may undermine the ability of individual adjudicators to allow procedural accommodations – a topic that will be addressed at length later in this chapter – the case law does demonstrate some examples where accommodations were granted. Where the accommodation is simple or the supporting evidence is already available, it is easier for LTB adjudicators to allow them despite institutional constraints. For example, a tenant was provided with a telephone upon appearing in person for a telephone hearing.[627] Similarly, an adjudicator allowed disability-related accommodation where medical

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[621] *1506-06006 (Re), supra* note 294 at para 1; *1511-10029 (Re), supra* note 309 at para 1

[622] *1706-05023 (Re), supra* note 300 at para 2 (dim lights); *1607-05236 (Re) 2018, supra* note 304 at para 19 (door open); *1408-08806 (Re), supra* note 292 at para 6 (door open); *1511-10141 (Re), supra* note 305 at para 7 (seating arrangement)

[623] *1706-05023 (Re), supra* note 300 at para 2

[624] *1712-10308 (Re), supra* note 309 at paras 4-5 (appellant and representative had problems using speakerphone during a telephone hearing); *1409-09769 (Re), supra* note 332 at paras 4-5 (SBT member had difficulties accessing the teleconference line)

[625] The SBT will intervene when the interpreter does speak the correct language or dialect: *1705-04550 (Re), supra* note 334 at paras 3-5; *1610-07745 (Re), supra* note 334 at paras 3-5*; 1609-06560 (Re), supra* note 334 at paras 4-9; *1802-01285 (Re), supra* note 334 at paras 3-4. In addition, the SBT will address potentially inaccurate interpretation: *1610-07270 (Re), supra* note 335 at paras 3-4; *1810-06568 (Re), supra* note 335 at paras 3-8; *1803-01927 (Re), supra* note 335 at paras 3-7; *1711-09798 (Re), supra* note 335 at paras 5-7

[626]*1704-02853 (Re), supra* note 289 at para 10; *1612-09469 (Re), supra* note 330 at paras 2-3; *1807-04766 (Re), supra* note 330 at paras 1-5; *1711-09229 (Re), supra* note 330 at paras 1-2; *1703-02308 (Re), supra* note 330 at paras 2-3; *1304-04164 (Re), supra* note 337 at para 3; *1709-07977 (Re), supra* note 338 at paras 3-4; *1702-01113 (Re), supra* note 288 at para 7

[627] *TET-95985-18-RV (Re), supra* note 547 at para 5

evidence was already on file.[628] This case included both a landlord and a tenant application.[629] This may have been significant, since tenant applications are more likely to include detailed information about a tenant that supports an accommodation request.[630] Thus, there are indications that, despite some significant limitations, some LTB adjudicators may try to grant accommodation requests where time and resource pressures allow.

Duty to Inquire about Accommodations not Raised by Parties

At the hearing, adjudicators, as well as parties, may raise potential procedural accommodations. In one case, an SBT member asked a party whether her disability could be accommodated in the hearing process,[631] and in two other cases, SBT members asked whether parties required an interpreter arranged and funded by the tribunal.[632] SBT members may also adjourn if they believe, based on the information they already possess, that a party did not appear at a scheduled hearing because of a disability.[633] Similarly, the HRTO has also raised the possibility of accommodations with parties in two cases that I identified.[634] It is impossible for me to conclude how pervasive these approaches are from the case law I have examined. Nonetheless, these limited examples demonstrate that at least a few adjudicators view their role as including some limited duty to inquire about procedural accommodations.

This approach is consistent with Divisional Court case law regarding procedural fairness. The Divisional Court held that the HRTO was required to raise and consider procedural options on its own motion when a witness for the respondent employer was not available to testify in

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[628] *File No TST-71175-16-IN, supra* note 551 at paras 12-16
[629] *Ibid* at para 1
[630] It is also possible that tenants who make tenant applications are more likely to understand they have a right to accommodation and to assert that right at the hearing.
[631] *1304-04164 (Re), supra* note 337 at para 3
[632] *1702-01099 (Re), supra* note 339 at paras 2-4. See also: *1609-06411 (Re), supra* note 339 at paras 1-2
[633] *1706-04867 (Re), supra* note 360 at paras 4-7; *1702-01676 (Re), supra* note 360 at paras 2-8; *1707-06223 (Re), supra* note 360 at paras 3-8; *1707-06211 (Re), supra* note 360 at paras 1-8; *1704-03022 (Re), supra* note 360 at paras 3-8; *1804-02369 (Re), supra* note 360 at paras 3-8; *1708-06430 (Re), supra* note 360 at paras 3-8
[634] *Armstrong*, *supra* note 415 at paras 9-12; *Kusinski, supra* note 439 at paras 3-12

person.[635] The court explained that, in this situation, the adjudicator must be mindful of "other options that might be available to ensure that the unrepresented parties had a fair opportunity to present their defence."[636] The self-represented applicant testified before the Divisional Court that she would have sought an adjournment had she known that this request might have been granted.[637] The Divisional Court also held that the adjudicator should have considered changing the order of witnesses or receiving this particular witness's evidence by video-conference or by telephone.[638]

While this case does not turn explicitly turn on human rights or access to justice principles, these underlying values may implicitly inform what procedural fairness requires.[639] When self-represented parties are unaware that hearing procedures may be adapted so that they may meaningfully participate, the Divisional Court's decision requires HRTO adjudicators to raise these options with the parties and to consider them. This parallels the duty to inquire under the *Code*, which requires a respondent, often an employer, to raise the issue of accommodation in a respectful way, on their own initiative.[640] However, this reasoning is not limited to specific human rights grounds and may apply to a variety of barriers to access to justice that self-represented litigants may face. In addition, the Divisional Court does not explicitly refer to the more expansive procedural discretion of the HRTO in determining the content of procedural fairness. This leaves open the possibility that this reasoning may apply to other tribunals that serve vulnerable parties who are often self-represented.

The Limits of Procedural Discretionary Decision-making

In concluding this section, it is important to reflect on procedural accommodation processes and measure them against actual outcomes. All three tribunals provided a variety of accommodations to parties before them. However, it is highly unlikely that the cases I have

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[635] *Audmax, supra* note 142 paras 36-42
[636] *Ibid* at para 41
[637] *Ibid* at para 40
[638] *Ibid*
[639] Raso, "Human Rights", *supra* note 28 at 100-101
[640] OHRC, "Ableism", *supra* note 140 at 43-43

reviewed reflect all the accommodation needs of all parties before each tribunal. Some adjudicators may not record accommodations provided for privacy or other reasons, some may state accommodations provided using wording outside of my search parameters, and some tribunal decisions may not be publicly available at all.

In addition, it is also possible that parties may not understand they can ask for accommodations or feel comfortable requesting them. Even at the HRTO and SBT, where the issue of accommodation is raised as early as the initial forms, accommodations are still frequently requested at the hearing itself. Parties may be concerned about disclosing detailed medical information about their disability to respondent employers or landlords, or even members of the public who request their tribunal file.[641] Meanwhile, at the SBT, some income support recipients may be reluctant to request accommodations if they previously had negative interactions with front-line staff that left them feeling less than a person.[642]

This problem may be particularly apparent in the LTB context, where there is often little information relating to accommodation requests for adjudicators, with limited time, to rely upon at the hearing. Some tenants request accommodations on review, which they assert were necessary at the hearing on the merits, after that hearing has been concluded.[643] In addition, the Tenant Duty Counsel Review states that many tenants, sometimes up to fifty percent, do not appear on the scheduled hearing date at all.[644] Tenants may be intimidated by LTB forms they receive, pressured by their landlords into leaving within days, or wary of a legal system that was built on and reinforces colonial structures.[645] If they have had previous involvement with child welfare agencies or the criminal justice system, tenants may also be

[641] Based on Tribunals Ontario's policy, if a party does not request a confidentiality order, all information in the case file is presumptively public: Tribunals Ontario, Privacy Policy, *supra* note 453
[642] ODSP Action Coalition, *supra* note 265 at 11-12
[643] *File No TSL-99900-18-RV, supra* note 583 at paras 12-13; *File No SWL-79934-15-RV, supra* note 583 at paras 24-28; *File No SWL-15072-18-RV, supra* note 583 at paras 29-34; *File No HOL-03632-18-RV, supra* note 583 at paras 8-10; *File No TSL-93303-18-RV, supra* note 584 at paras 39-40
[644] Paradis, "Tenant Duty Counsel Review", *supra* note 497 at 57
[645] *Ibid* at 57-59

mistrustful of the LTB, as part of the larger legal system.[646] Tenants with language barriers or limited literacy may be coerced into signing documents they do not understand.[647] Women facing violence or sexual exploitation from a landlord may not want to confront him at the LTB.[648] Tenants may also be precariously employed and may not be comfortable with, or may not know, that they need to book a full or half day off work.[649] This barrier may become even more significant if a tenant's case is adjourned because too many matters were scheduled in one hearing block.[650] Even if they attend the LTB, tenants with disabilities may not express their accommodation needs unless specifically asked: "[t]he irony is, the province has a duty to accommodate, but if people cannot even identify that need, then how do they access that right?"[651]

The questions that these cases raise about imbalances of power between parties and between a party and the tribunal decision-maker relate to systemic inequities that may not be remedied by adopting theoretical approaches of engagement and dialogue. Sossin states that "[d]iscretion reflects and reproduces assumptions about power"[652] and, in some circumstances, dialogue may expose power imbalances that would otherwise be masked by legal fictions.[653] He presents engagement as an alternative to more traditional approaches to discretion that are detached, technical, and do not reflect the issues most important to parties.[654]

That said, he acknowledges that the capability of engagement and dialogue to make a difference may be limited. Consequently, his model of intimacy may be more difficult to achieve "where vulnerable groups are affected and where individuals may be dependent on a

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[646] *Ibid* at 58-59
[647] *Ibid* at 62
[648] *Ibid*
[649] *Ibid* at 104
[650] *Ibid* at 87
[651] *Ibid* at 60
[652] Sossin, "Homeless", *supra* note 85 at 663-665, 679-680
[653] Sossin, "Redistributing Democracy", *supra* note 75 at 40-41
[654] Sossin, "Homeless", *supra* note 85 at 683

favourable administrative decision for their welfare (as in public housing or refugee setting)."[655] In other words, "[w]hen a family's shelter or individual's health is at stake and there is nowhere to turn, […] good intentions of an open and honest official may not be enough."[656] According to Sossin, this problem may be addressed by providing "an advocate, guardian or intermediary" such as a social worker, doctor, state-funded lawyer, or other person who has a fiduciary obligation to protect the vulnerable person's interests.[657] He asserts that an administrative decision-maker could owe a similar type of obligation, reflecting the public trust with which they have been bestowed.[658] In this way, the vulnerability of a party could, in some cases, restrict the scope of that decision-maker's discretion.[659]

Cartier analyzes the problem of power imbalances and vulnerable parties to a lesser extent, but she does address it. She recognizes that vulnerable parties may not be able to deliberate mutually with a decision-maker in the way the law student did in the example she analyzed.[660] She also affirms that "the administrative state has a responsibility to resist both imposing norms on vulnerable people and having norms imposed upon it by a powerful stakeholder."[661] That said, she questions whether this imperative can be meaningfully achieved when tribunals have a high volume of cases, impose guidelines and directives upon adjudicators, and require adjudicators to provide justifications that reflect formal requirements of procedural fairness that may not be genuinely responsive to a vulnerable party's needs.[662]

Furthermore, there are factors that may enhance dialogue and engagement when imbalances of power exist that go beyond accommodations. For example, Sossin refers to more diverse appointments of decision-makers,[663] a practice that Welsh endorses in the context of

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[655] Sossin, "Intimate Approach", *supra* note 62 at 849
[656] *Ibid* at 850
[657] *Ibid*
[658] *Ibid* at 851-853
[659] *Ibid*
[660] Cartier, "Spirit of Legality", *supra* note 87 at 332
[661] *Ibid*
[662] *Ibid* at 332-333
[663] Sossin, "Homeless", *supra* note 85 at 682-683

mediation. She states that increasing the number of mediators from "underrepresented demographics" may act to "signal greater inclusivity and safety for all."[664] Welsh also refers to institutional efforts to address unconscious bias and to encourage mediators to practice reflective listening to promote trust and communication.[665] While these factors are not addressed by my research, they are nonetheless relevant to the theories of discretion advanced by Sossin, Cartier and Raso.

That said, to the extent that accommodations implemented through procedural decision-making are implicated, I will address these questions regarding systemic inequities below. These inequities undermine the capacity of engaged decision-making to lead to meaningful procedural accommodations. I will explore restrictions imposed by tribunal statutory mandates, institutional decisions, and individual decisions in the next section of this chapter.

Barriers to Access to Justice: The Gap between Ideal Theory and Reality

The ideal theories presented by Sossin and Cartier present limitations, as applied in the real world, when dialogic process may obscure and even reinforce existing structures and power imbalances, at the expense of the interests of marginalized groups.[666] Under these circumstances, a tribunal's own statutory mandate, institutional processes, overly technical approach, or resource limitations undermine engagement between parties and tribunal decision-makers. This dialogue may not be transparent or meaningful, especially to vulnerable or marginalized parties. I will address these factors as they relate to the SBT, HRTO and LTB, how they limit the achievement of these ideal theories, and how they demonstrate systemic obstacles to procedural decision-making that undermine access to justice.

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[664] Welsh, *supra* note 111 at 750-751
[665] *Ibid* at 751-752, 756-757
[666] Jennifer Nedelsky & Craig Scott, "Constitutional Dialogue" in Joel Bakan & David Schneiderman, *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) 59 at 63-64

A decision-maker's statutory mandate to resolve a specific question and dispose of matters efficiently may limit its ability to consider a party as a whole person and the barriers that party faces. First, all three tribunals have narrow tasks to accomplish and issues to resolve that may only engage with part of a litigant's circumstances. Michael Gottheil, formerly the chair of Social Justice Tribunals Ontario, stated that "the administrative justice landscape, built without any official plan, coherent jurisdictional zoning, or common design elements, has led to an uncomfortable community of structures, of varying shapes and sizes, which are difficult to service, and even more difficult for citizens to navigate."[667]

Consequently, upon experiencing discrimination on the basis of disability in the workplace, a person might lose their job, apply unsuccessfully to ODSP, and be unable to pay rent, engaging the mandates of all three tribunals. Based on the tribunal file, and the information that a self-represented party may disclose to any one of these tribunals without prompting, it could be difficult for adjudicators to meaningfully respond to potential barriers this person may face.

This fragmented structure imposes additional burdens on parties. They may be required to explain and prove details relating to their circumstances on multiple occasions, before different decision-makers, who may not have the time to hear this information and may prematurely decide it is not relevant. Lorne Sossin and Jamie Baxter observed that a person with concurrent social benefits and rental housing proceedings "is forced to navigate a set of institutional silos which impose high financial and informational costs and likely impede the overall quality of justice services that the tribunals can offer."[668]

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[667] Michael Gottheil, "Clustering in Ontario: The DIY Tribunal" (2012), presented at the Canadian Institute for the Administration of Justice 2012 Annual Conference, "The Courts and Beyond: The Architecture of Justice in Transition" 195 at 198, online: <https://ciaj-icaj.ca/en/library/papers-and-articles/annual-conferences/>

[668] Lorne Sossin & Jamie Baxter, "Ontario's Administrative Tribunal Clusters: A Glass Half-Full or Half-Empty for Administrative Justice?" (2012) Osgoode Hall Law School Working Paper No 28 at 11, online: < https://digitalcommons.osgoode.yorku.ca/all_papers/28/>

While this issue is recognized in administrative law literature and may be particularly apparent in the context of legal proceedings affecting low-income people,[669] the main focus of existing scholarship is the evaluation of specific reforms that have been or could be implemented. One of these reforms is tribunal clustering, which can permit tribunals to cross-appoint and cross-train adjudicators, to co-locate tribunals, and to develop harmonized processes that apply to multiple tribunals addressing similar situations.[670] For example, as part of Social Justice Division of Tribunals Ontario, the SBT, LTB, and HRTO have a set of common rules.[671] However, litigants must read these rules together with tribunal-specific rules and policies created by each of these tribunals separately. In this way, although tribunals in Ontario may share some resources and standardize some processes, they continue to operate in many ways as separate rather than integrated entities. Therefore, further reforms may be required to truly address the fragmentation of tribunal structures.[672]

Second, all three tribunals are delegated the responsibility to balance efficiency with fairness.[673] The HRTO has an expansive grant of procedural discretion, which may have played a role in the development of some positive practices detailed above. However, the SBT and the LTB do not have as explicitly broad powers to create processes and adapt them to the circumstances of

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[669] Michael Trebilcock has recognized this problem on even wider scale in the context of evaluating legal aid services. He concluded that "multiple problems will cluster in definite patterns" which may engage social services, the health care system, and different elements of the legal system: Michael J Trebilcock, *Legal Aid Review* (Toronto: Ministry of the Attorney General, 2008), online: Ministry of the Attorney General, Ontario, <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock>. See also: Kent Roach & Lorne Sossin, "Access to Justice and Beyond" (2010) UTLJ 373 at 391-392.

[670] Michael Gottheil & Doug Ewart, "Lessons from ELTO: The Potential of Ontario's Clustering Model to Advance Administrative Justice" (2011) 24 CJALP 161 at 169-170. See also: Lorne Sossin & Jamie Baxter, *supra* note 668, which analyzes tribunal clustering in Canada, the United Kingdom, and Australia. Baxter and Sossin view clustering as a step toward addressing tribunal fragmentation, but not an entire answer to this problem.

[671] SJTO, "Common Rules", *supra* note 279

[672] Sossin and Baxter concluded in 2012, long before the formation of Tribunals Ontario, that "[i]f you take the problem with administrative justice to be fragmentation, a lack of accessibility, duplication of resources, complexity of mandates and rules, and the lack of structural protections of independence or requirements of accountability, then clusters seem a half-measure at best […] Clusters appear to mitigate rather than solve the problem of tribunals being caught up in ministerial silos, unable to coordinate, learn from each other or engage in economies of scale with respect to accessibility initiatives (like a common pool for translation and interpretation services)": Sossin & Baxter, *supra* note 668 at 47

[673] *Code*, *supra* note 121, s 40; *RTA*, *supra* note 495, s 183; *Ontario Works Act*, *supra* note 271, s 65(1)

parties. This issue is compounded by a large volume of cases and limited resources that decision-makers must consider in striking the difficult balance delegated to them.

Both of these factors may lead to institutional processes and decisions by individual decision-makers that limit the engagement or dialogue that can occur between one or more parties and a decision-maker about a procedural issue. Tribunals may adopt procedures that appear to promote engagement but fail to meaningfully foster transparent decision-making that takes into account the party as a whole person. Failures to promote access to justice may be masked by constraining individual decision-makers within restrictive institutional processes, or by a technical, legalistic view of what procedural fairness or accommodation may require. I will address each of these two concerns in turn.

The LTB and the Tension Between Institutional and Individual Decisions

The case study of the LTB most starkly demonstrates the tension between institutional processes meant to promote efficiency and individual decision-makers whose discretion is significantly limited as a result. In this difficult position, an individual decision-maker's ability to ensure fairness and access to justice may be limited in a way that is troubling. Sossin and Raso have commented on challenges facing individual decision-makers with a dual mandate to balance fairness with efficiency, who work within a system that is designed to constrain them. Their analyses demonstrate why, in certain cases, the LTB may be able to provide accommodations that are responsive to the needs of tenants, while at other times, procedural decision-making is much less meaningful.

As described in chapter 2, the LTB schedules large dockets in the ordinary course, a problem that is exacerbated on "superblock" days, when many landlord applications for unpaid rent are scheduled.[674] The Tenant Duty Counsel Review criticized this practice for two reasons. First, it builds the assumption that many tenants will not appear on their scheduled hearing dates into

[674] Paradis, "Tenant Duty Counsel Review", *supra* note 497 at 21

the LTB's scheduling practices.[675] Second, adjudicators are overwhelmed by the number of matters they are required to hear, even though many tenants do not attend.[676]

Scheduling of hearings at the LTB serves efficiency at the expense of access to justice and fairness. In contrast to the SBT, where at least some adjudicators consider whether appellants have not appeared because of their disability,[677] the LTB appears to have simply written off many tenants who do not show up.[678] Instead of taking the time to determine why some tenants do not appear for their hearings and to address these barriers, LTB policymakers have built these failures into the system itself. Furthermore, even if a tenant does appear, the LTB member may not have enough time to properly discuss and adjudicate accommodations to the hearing process with such a large docket. The dual nature of the LTB's statutory mandate may pull decision-makers in opposing directions -- while fairness might require taking more time to raise and to adjudicate issues of accommodation, efficiency might require placing a greater onus on a tenant to minimize the time and effort required from the decision-maker.

Sossin addresses this tension inherent in the role of many administrative decision-makers. Tribunals may assign some decision-makers to determine overall program and policy questions and other decision-makers to interact with individual litigants.[679] This separation means that policy decisions are made by people who have little or no contact with parties before the tribunal.[680] Conversely individual administrative decision-makers are confronted with both

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[675] *Ibid* at 87
[676] *Ibid*
[677] *1707-06287 (Re) supra* note 280 at para 5; *1707-06145 (Re), supra* note 286 at paras 2-8; *1708-06625 (Re), supra* note 286 at paras 3-8; *1704-03035 (Re), supra* note 286 at paras 3-9; and *1611-08205 (Re), supra* note 286 at paras 3-7, citing *Miller, supra* note 142
[678] This practice is contrary to binding Divisional Court case law. In *Hasan, supra* note 588 at paras 39-50, the Divisional Court held that an LTB Member improperly refused an adjournment request. The matter was remitted to the LTB based on evidence the tenant was not able to attend.
[679] Sossin, "Homeless", *supra* note 85 at 663
[680] *Ibid*

institutional pressures and vulnerable people who require their time and attention, and have difficulty reconciling these competing goals.[681]

Sossin described this duality, stating that individual decision-makers must, "at the same moment act as individuals confronting a person in need and as agents of the state dealing with a file."[682] He illustrates this dilemma through the example of a shelter worker:

> For example, I spoke with one welfare official who regularly gave spare change to a homeless man on his way home from the subway. One afternoon, the homeless man was not at his regular street corner. The official asked around, concerned for the man's well-being. He confessed that he almost never displayed this sort of personal attention for a recipient at the office who failed to show up for an appointment. Bureaucratic settings, he added, are not conducive to relationships of care.[683]

Sossin asserts that, as they find themselves in a position where they are able to help some people but not everyone, decision-makers may begin to feel compassion fatigue and may begin to blame parties before them for their circumstances.[684] Sossin refers to the work of Michael Lipsky,[685] who asserts that street-level bureaucrats, such as police officers, welfare workers, or court administrators, are faced with the dissonance created by "ideal service models" that do not account for real world circumstances.[686] Lipsky argues that, confronted with these pressures, officials may "reject personal responsibility for agency performance."[687] Demanding ideals may, paradoxically, lead to markedly less than ideal conduct.

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[681] *Ibid* at 670
[682] *Ibid*
[683] *Ibid* at 670-671
[684] *Ibid* at 647
[685] Michael Lipsky, *Street Level Bureaucracy: Dilemmas of the Individual in Public Services,* (New York: Russell Sage Foundation, 1980) at xi
[686] Sossin, "Homeless", *supra* note 85 at 671. Sossin reproduces the following quotation by Lipsky: "To deliver street-level policy through bureaucracy is to embrace a contradiction. On the one hand, service is delivered by people to people, invoking a model of human interaction, caring and responsibility. On the other hand, service is delivered through a bureaucracy, invoking a model of detachment and equal treatment under conditions of resource limitations and constraints, making care and responsibility conditional."
[687] Lipsky, *supra* note 685 at 142-143, as cited in Sossin, "Homeless,", *supra* note 85 at 671. This may be more likely to occur where administrative decision-makers are assigned a high volume of cases with limited training and pathways to promotion: Sossin, "Homeless,", *supra* note 85 at 671.

This behaviour may be explained by institutional compromises that have already been made and how decision-makers may deny responsibility for the system of which they are only a small part. Robert Cover theorizes that the separation of policy and individual decisions acts to dilute responsibility between these different levels of decision-makers. He explains that this happens when "the act of interpretation—of understanding what ought to be done— [is separated] from the carrying out of this 'ought to be done' through violence."[688] Under these circumstances, decision-makers who would not ordinarily exercise their discretion to dominate and control a more vulnerable party, acting alone, may participate in a system that does so.

This situation may be analogous to the introduction of a new computer system, SAMS, that automated and narrowed the discretion of Ontario Works caseworkers.[689] Jennifer Raso's interviews with caseworkers demonstrated that it was difficult for these decision-makers to adapt the decisions that this computer system generated to the circumstances of individuals. Caseworkers were assigned a high volume of cases, had limited information available to them about how SAMS processed information, and needed to check the system frequently or enlist more senior decision-makers to circumvent or override it.[690] Raso observed that, at least some of the caseworkers learned to work around SAMS in limited ways to respond to the needs of at least some income support recipients.[691] That said, even if a caseworker wanted to make these changes to each income support recipient for which they were responsible, it was not possible. In other words, "[g]iven their large caseloads, caseworkers cannot tweak the system for every client and must selectively ration their efforts."[692]

Whether a decision-maker took the time to adjust SAMS in any particular case related to that caseworker's view of their mandate and the time available:

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[688] Robert Cover, "Violence and the Word" (1986) 95 Yale LJ 601 at 1627. See also: Martha Minow, "Interpreting Rights: An Essay for Robert Cover" (1987), 96 Yale LJ 1860 at 1895
[689] Raso, "Displacement as Regulation", *supra* note 51 at 83-88
[690] *Ibid* at 86-87
[691] *Ibid* at 88-91
[692] *Ibid* at 86

> The lengths to which caseworkers will go in their creative responses to SAMS seem to depend on their commitment to social work norms (such as preventing hardship, or reaching client-centred decisions), but an equally important determinant is the limited time that workers have available for each client, especially as any deviation from a SAMS-imposed decision requires that caseworkers undertake more onerous data entry tasks, diverting their attention away from their other clients.[693]

Furthermore, even if some caseworkers continued to be motivated to respond to client needs pursuant to social work norms, they were required to focus on the computer system and its language.[694] This took time away from the interactions of caseworkers with income support recipients themselves.[695] Therefore, Raso concluded that the freedom of these caseworkers to make decisions was significantly restricted and "SAMS continues to function as a uniquely powerful institutional force governing their everyday decisions."[696]

This tension is also reflected in the procedural decision-making of the LTB. While in some cases, LTB members provided a range of accommodations, in other cases, they did not engage meaningfully with tenants. In deciding whether to engage meaningfully with a party, LTB decision-makers may be considering their dual statutory mandate and, perhaps more often, the limited time they have available. LTB members may be more likely to allow accommodation requests that can be adjudicated quickly, where there is sufficient medical evidence already available.[697] Meanwhile, they will deny other requests outright where there is little or no evidence, rather than determining whether more evidence may be available.[698] In contrast to the HRTO and SBT, where decision-makers do occasionally inquire with parties about accommodations the parties themselves did not raise,[699] LTB decision-makers do not.

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[693] *Ibid* at 92
[694] *Ibid*
[695] *Ibid*
[696] *Ibid* at 88
[697] *File No TSL-71596-16-SA, supra* note 550 at paras 7-8
[698] *File No TNL-99817-17, supra* note 552 at paras 5-6; *File No TSL-85905-17, supra* note 554 at para 14
[699] *1304-04164 (Re), supra* note 337 at para 3; *1712-10011 (Re), supra* note 343 at paras 3-6; *1712-10271 (Re), supra* note 343 at para 1; *1711-09155 (Re), supra* note 343 at para 3; *1705-03849 (Re), supra* note 344 at para 1

Similarly, LTB decision-makers may quickly evaluate barriers to access to justice on their own rather than engaging with tenants about how that situation affects them. When a tenant appeared to be participating in the process, an LTB member did not inquire about the reasons why he wanted an adjournment.[700] Similarly, a member denied an adjournment request because the tenant, mentioning her fever and back pain, "appeared capable of participating in the hearing."[701] In a third case, when a tenant's support worker was not available on the scheduled date and the tenant made a request in advance that was completely ignored by the LTB, the adjudicator gave him one hour to call a support person.[702] It is possible that these LTB members decided that, in the name of efficiency, they were required to proceed with the hearing and could not engage with the tenant further regarding an adjournment or other accommodations.

The LTB also exhibits similarly flawed practices with respect to interpretation provided at the hearing. Although the HRTO and the SBT provide and pay for interpreters to address both language and disability-related barriers,[703] the LTB might only do this in certain limited circumstances, such as sign language or real-time captioning[704] or when a party's own interpreter cannot interpret to the required standard.[705] However, based on the body of case law I have reviewed, the LTB does not always intervene to provide an interpreter when one is needed. In one case, when a tenant's own interpreter failed to appear on two occasions, the LTB simply went ahead with the hearing, questioning the tenant's need for an interpreter in the first place.[706] LTB members have also asked the tenant to identify anything he did not understand[707] or used computer translation to facilitate communication[708] rather than

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[700] *File No NOL-31086-18, supra* note 573 at para 22
[701] *TSL-97940-18 (Re), supra* note 574 at paras 1-2
[702] *File No CEL-58530-16-SA, supra* note 542 at para 17
[703] SBT, "Language Services", *supra* note 314; HRTO, "Practice Direction on Language Interpretation", *supra* note 431; HRTO, "Language Services", *supra* note 431
[704] LTB, Language Services, *supra* note 555
[705] *File No TEL-88814-18-RV, supra* note 537 at paras 7-11
[706] *File No TSL-56575-14, supra* note 557 at paras 8-10
[707] *File No TEL-90179-18, supra* note 575 at para 5
[708] *File No TEL-93663-18-AM, supra* note 577 at paras 5-6

adjourning the hearing to arrange interpretation. These solutions are insufficient to address the meaningful and fair participation of parties at the hearing and undermine the ability of these tenants to testify credibly and participate fully.

In summary, LTB procedural decisions demonstrate patterns of decision-making that reflect the tensions described by Sossin and Raso. LTB members find themselves working in a system which already inherently strikes a particular balance between efficiency and fairness that they have little power to change. In that system, many tenants to do not appear at hearings at all and decision-makers do not have the opportunity to meaningfully interact with all tenants who do attend. Furthermore, while some LTB members may attempt to engage with some tenants about barriers in the hearing process this inevitably takes time away from other cases. This may motivate them to focus on easier accommodations to grant, or ones that are obviously supported by evidence they already have. In contrast, where there is little evidence supporting an accommodation request, decision-makers may shift responsibility onto tenants. In doing so, the decision-makers reason that these tenants did not meet their onus, while failing to investigate the situation themselves. In this way, through the combination of institutional and individual decisions, some tenants may not be able to participate meaningfully in eviction hearings.

Statutory Mandate, Expertise of Adjudicators, and Positions Taken by Opposing Parties: A Comparison of Decision-making at the SBT and HRTO

While the SBT and the HRTO may not be quite as limited as LTB decision-makers with respect to time pressures, differences in their statutory mandates, the expertise of adjudicators, and the positions taken by respondents may explain why they strike a balance between fairness and efficiency in different ways. Access to justice concerns may relate to a wide variety of barriers to the hearing process. However, my review of tribunal procedural case law in chapter 2 demonstrates that decision-makers at the SBT have interpreted their mandate as incorporating a greater scope of these concerns, especially as they relate to poverty, as compared to the HRTO. This may be attributable to the differences in the statutory mandates and expertise of

decision-makers at these two tribunals, and what those differences mean for the balance these tribunals must strike between efficiency and fairness at both institutional and individual levels.

The SBT is governed by remedial legislation that decision-makers should interpret "broadly and liberally and in accordance with its purpose of providing support to persons with disabilities", since many income support recipients have a disability.[709] Consequently, as the Ontario Court of Appeal has clearly stated, decision-makers should resolve any ambiguities in favour of the income support recipient.[710] In addition, the SBT may order interim assistance for appellants who meet all other criteria for ODSP or OW, aside from those at issue on appeal, who would otherwise "suffer financial hardship during the period needed for the Tribunal to complete its review and give notice of its decision."[711] Furthermore, the SBT is empowered by statute to pay for travelling and living expenses to allow parties and witnesses to attend a hearing.[712]

The SBT's mandate of serving the needs of low-income people and persons with disabilities informs how it balances competing concerns of fairness and efficiency. In particular, this mandate may require the tribunal to take special care to understand the entirety of an appellant's circumstances to ensure fairness in some situations. This is apparent both in the way accommodations are built into appeal forms, and also the way that some SBT adjudicators approach procedural accommodations.

The SBT inquires about procedural accommodations on its appeal form, in a way that allows appellants to raise the issue of language interpretation and disability accommodations while filling out documents they must complete in any event.[713] By filling out one or two boxes, an appellant is able to start a process that becomes the SBT's responsibility to continue. This may

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[709] *Gray v Ontario (Disability Support Program, Director)* (2002), 59 OR (3d) 364 at para 9, 212 DLR (4th) 353 (CA)
[710] *Ibid* at para 10
[711] *Ontario Disability Support Program Act, 1997*, SO 1997, c 25, Sch B, s 25(1)-(2); *Ontario Works Act*, *supra* note 271, s 30(1)-(2)
[712] *Ontario Works Act*, *supra* note 271, s 66(5): "If a request for a hearing has been made and the Tribunal is satisfied that there will be financial hardship to a party or witness attending the hearing, the Tribunal may pay the party or witness travelling and living expenses necessary to enable his or her attendance at the hearing."
[713] SBT, "Appeal Form", *supra* note 283 at 2

reflect considerations of universal design, informed by the SBT's mandate to serve persons with disabilities.[714] In other words, the application form meets the needs of the greatest number of people, including those with disabilities or language barriers, who may find it more difficult to make a separate, formal request. Rather than requiring them to initiate an additional process, the SBT accessibly builds procedural accommodation requests into a process that already exists, consistent with Raso's theory of human rights values.[715]

Similarly, at least some SBT members consider whether an appellant may not be able to participate in or to attend a hearing based on that appellant's situation as a whole, including factors that may not be directly related to a disability. For example, in one case, an adjudicator considered an appellant's mental health condition in the context of her circumstances, including the death of her mother and her recent move.[716] Meanwhile, in another case, the adjudicator took notice of an appellant's documented homelessness and a tendency to lose touch with caseworkers and healthcare workers.[717] In addition, some SBT adjudicators account for the intersection of multiple disabilities,[718] as well as disabilities and language barriers.[719]

In this context, appellants often propose accommodations without opposition, and sometimes with consent, from the Director. Consequently, the scope of SBT adjudicators to grant these accommodations may be greater, as compared to the HRTO, where the respondent is a private party who is more likely to object.

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[714] OHRC, "Ableism", *supra* note 140 at 31-33

[715] Raso explains that "regulatory tools such as guidelines, forms and social services offices may be designed in ways that favour those social assistance recipients who are able-bodied, possess advanced literacy and numeracy skills, or lack significant caregiving responsibilities": Raso, "Human Rights", *supra* note 28 at 99.

[716] *1506-06244 (Re), supra* note 294 at paras 6-7

[717] *1610-07579 (Re), supra* note 362 at para 5

[718] *1706-04867 (Re), supra* note 360 at paras 4-7 (depression and anxiety); *1702-01676 (Re), supra* note 360 at paras 2-8 (intellectual disability and substance abuse); *1707-06223 (Re), supra* note 360 at paras 3-8 (chronic pain and depression, see also *1707-06211 (Re), supra* note 360 at paras 1-8); *1704-03022 (Re), supra* note 360 at paras 3-8 (social anxiety with phobia and social isolation); *1804-02369 (Re), supra* note 360 at paras 3-8 (borderline personality traits and obsessive compulsive disorder with paranoia)

[719] *1703-01949 (Re), supra* note 361 at paras 3-8

This approach may reflect Sossin's concept of special care taken by decision-makers with a statutory mandate to serve vulnerable people that reflects public trust.[720] As Sossin suggests, income support recipients are vulnerable and the social welfare legislation that creates the SBT should be interpreted in their favour, such that, in Sossin's words, they receive "the fullest possible benefit."[721] Adjudicators may be open to ameliorating a wide range of barriers that many income support recipients face, as well as denouncing disrespectful conduct and failures to accommodate by regional offices.[722]

Nonetheless, the approach of SBT adjudicators in every case may not always reflect this level of heightened care. For example, one appellant's request for an in-person hearing was denied because she required a hearing on the ground level, based on a combination of physical and mental health disabilities.[723] The SBT member determined that no accessible location existed in the municipality where the appellant lived, concluded that the accommodation was not reasonable, and scheduled the matter to be heard by telephone.[724] It may not be reasonable for all SBT offices to have ground level hearing rooms. However, the SBT might have the resources to arrange to use another location without undue hardship.[725] The reasoning employed by the member resembles rationales that are more often adopted by HRTO adjudicators, reflecting their legal training and human rights expertise. Justifications of procedural discretion using this kind of legal language may mask compromises favouring efficiency, the conservation of limited resources, and the procedural fairness entitlements of opposing parties.

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[720] Sossin, "Intimate Approach," *supra* note 62 at 850-855. In addition, Welsh recommends that, in the context of mediation, mediators should be required to question outcomes which are "unconscionable or patently unfair": Welsh, *supra* note 111 at 760-761. This approach in the context of procedural justice literature, may be similar to Sossin's concept of special care, and could be informed by the purpose of the tribunal's enabling statute.
[721] Sossin, "Intimate Approach," *supra* note 62 at 853
[722] *1808-05527 (Re), supra* note 345 at paras 11-14; *1312-12902RR (Re), supra* note 294 at paras 17-22
[723] *1701-00513 (Re),* supra note 377 at paras 1-2
[724] *Ibid*
[725] In contrast, the LTB explains on its website that, in more remote communities, "hearings may be held in municipal halls, community centres, hotels, or other public buildings": LTB, "Accessibility and Accommodations", *supra* note 599

The *Code* has quasi-constitutional status and, similar to income support legislation, must be given "a broad and liberal interpretation" because "the protections afforded by human rights legislation are fundamental to our society."[726] That said, in contrast to the SBT's enabling legislation, the *Code* creates a hybrid system that provides scope for non-adversarial, inquisitorial procedures, while also balancing the opposing interests of private parties. Although the *Code* does not empower the HRTO to award costs against applicants,[727] applicants also cannot receive costs if they are successful.[728] The *Code* does not specifically direct the HRTO to take any positive actions to address barriers of financial hardship. However, the *Code* does require adjudicators, with legal training and training "in alternative adjudicative practices",[729] to balance departures from traditional procedure with the interests of and prejudice to respondents.

As noted in chapter 2, the HRTO uses active adjudication to raise and explain accommodation needs, to assist parties in obtaining relevant medical evidence to support accommodation requests, to case manage applications, to depart from typical processes for hearing preliminary issues, and to adapt the way they receive the applicant's evidence during a hearing. As well, the HRTO is willing to grant accommodation requests, even for multiple adjournments, despite the objections of respondents.[730] In this regard, Flaherty explains that, "active adjudicators take on some additional measure of responsibility for the outcome of the proceeding."[731] Therefore,

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[726] *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62 at para 31
[727] Based on the Supreme Court of Canada's decision in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 (also known as *Mowat*), Pinto concluded that the HRTO does not have the power to award costs to successful parties "without a clear grant of legislative authority": Pinto, *supra* note 132
[728] This may protect applicants with limited means whose applications are unsuccessful. That said, if successful applicants cannot receive costs, this may also limit their ability to retain counsel or pay other expenses related to their applications. On this point, see Kerri Froc, "Costs Breakdown: What Mowat Means for Access to Justice in Human Rights Regimes" (2014) 18 CLELJ 253 at 267-271, regarding the Canadian Human Rights Tribunal context. Froc asserts that access to justice could be advanced by allowing applicants to receive costs while insulating them from costs awarded against them (275-276).
[729] *Code, supra* note 121, s 32(3)
[730] *Tahir, supra* note 420 (second adjournment); *Pollock, supra* note 427 at para 23 (third adjournment)
[731] Flaherty, *supra* note 395 at 287

HRTO adjudicators may, in some situations, exercise their discretion consistent with Sossin's concept of special care, similar to the SBT.

However, in a few cases, HRTO adjudicators denied accommodation requests because there was no *Code* ground. These cases required the HRTO to address requests to change the hearing location[732] or to have a hearing in person.[733] In one case, this strict human rights framework allowed an adjudicator to deny a request to move a hearing location when an applicant asserted that he could not afford to travel to the hearing location.[734]

This limited interpretation of access to justice as requiring only the rights guaranteed *Human Rights Code* may undermine the ability of the HRTO to address financial barriers to participation. "[R]eceipt of public assistance" is a *Code* ground with respect to discrimination in housing,[735] and poverty may sometimes be captured through the intersection of other *Code* grounds.[736] However, poverty is not a stand-alone *Code* ground that applies to the tribunal context. This technical approach may therefore disregard barriers to accessing the hearing process in a way that may undermine access to justice.

Sossin describes decision-making characterized by legal formalism, and this approach is part of his motivation for reframing discretion in a more personal, informal and humane way. In his analysis, Sossin addresses two types of morality. He argues that one view of morality might provide a technical answer based on legal rules while another may attempt to apply the rules more purposively to fit the circumstances of a particular person.[737] In this example, HRTO adjudicators must decide whether to strictly apply *Code* requirements to determine the content of procedural fairness, or whether to view fairness in a more flexible way.

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[732] *Mastromatteo, supra* note 437 at para 5; *Yahya, supra* note 437 at para 12
[733] *Bryczkowski, supra* note 487 at para 10
[734] *John, supra* note 489 at paras 18-21
[735] *Code*, *supra* note 121, s 2; OHRC, "In the Zone", *supra* note 490, Appendix A: Poverty, social condition, and the *Human Rights Code*
[736] For example: *Kearney, supra* note 490 at para 104
[737] Sossin, "Homeless", *supra* note 85 at 679, citing Pierre J Schlag, "Normativity and the Politics of Form" (1991) 139 U PA L Rev 801, 881-882

The strict application of human rights law in the cases cited above may reflect the need to balance fairness to opposing private parties, the legal training of adjudicators, the limited resources of the tribunal, and a statutory scheme that does not specifically address financial hardship. Legally trained adjudicators faced with limited resources, a mandate to balance fairness to both parties and, more generally, fairness with efficiency of tribunal processes, may be motivated to provide a technical, legal justification for their decisions that will withstand court scrutiny. Nonetheless, these legal fictions might undermine meaningful dialogue about accommodations, obscuring rather than illuminating how the interests of opposing parties and issues of resources are considered.

For example, the HRTO is more likely to grant a request to change the hearing venue when respondents consent and the request is made well in advance of the hearing. In three of the five cases I identified where the HRTO changed the hearing location, the respondent consented, and in the other two cases, no position from the respondent is described.[738] In contrast, only one of the requests that was denied was on consent from both parties.[739] This request was initiated by the respondent, although the applicant raised physical and financial accessibility issues upon agreeing to it. It is possible that the HRTO did not view this request as sufficiently important to the applicant. Furthermore, the HRTO denied two requests to change the venue that were advanced shortly before the hearing date, even though one of these requests was based on disability, a *Code* ground.[740] While the adjudicator was open to other accommodations to address the applicant's disability, she decided it was unreasonable to move the hearing at such short notice. Therefore, while the explicit reasoning animating some of

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[738] *Ruffolo, supra* note 427 at para 14; *Schiller, supra* note 427 at para 4; *UM, supra* note 427 at para 2. In *Gonder, supra* note 427 and *Taucar #2, supra* note 427, the respondent's position on the change of venue is not specified.
[739] *Yayha, supra* note 437 at paras 4-5. In another case, where the issue of *Code* grounds was not explicitly mentioned, but the change of venue was denied, the respondent objected to moving the hearing: *CV, supra* note 486 at paras 6-11
[740] *AB v Western*, *supra* note 443 at paras 14-18 (with respect to disability, opposed by the respondent); *John, supra* note 489 at para 20 (with respect to lack of resources to attend the hearing, also opposed by the respondent). In *John*, the applicant also requested an adjournment on other grounds. Based on the adjudicator's analysis of those other grounds, he may not have found the applicant's request to change the venue to be credible, although this is not explicitly stated beyond noting an "alleged" lack of resources.

these decisions may relate to *Code* grounds, it is possible that the outcomes also account for the positions taken by respondents and prejudice to them.

In addition, holding in-person hearings and changing their locations can implicate significant resource considerations. In denying one request to change the location of the hearing, the adjudicator stated that "the Tribunal has to consider not only the interests of the parties in a particular case, but also the institutional and public interest in having the Tribunal make the best possible use of its limited resources."[741] While these are valid concerns, it is possible that, upon receiving such a general statement, the parties in this case may not have felt that their needs were specifically addressed.

In summary, the statutory mandates and expertise of adjudicators at the HRTO and SBT may explain some of the similarities and differences in their procedural discretionary decision-making. Social assistance legislation specifically addresses financial hardship of income support recipients, is often meant to benefit persons with disabilities, and should be interpreted in favour of the recipient where ambiguity exists. Consequently, institutional and individual decision-makers may take notice of these statutory signals that suggest that special care must be taken to ensure fairness.

Meanwhile, the HRTO has greater procedural discretion that may allow adjudicators an even broader scope to address the needs and circumstances of applicants in ways that are also consistent with special care. However, respondents to human rights applications are more likely to object to accommodation requests than the Director in the context of SBT proceedings. In some cases, prejudice to the respondent may motivate HRTO adjudicators to provide more careful, technical justifications for their decisions to grant or to reject accommodation requests. While these decisions may be individually justified in their particular context, the reasons provided by adjudicators may mask inclusive dialogue that is meant to expose systemic

[741] *Yayha, supra* note 437 at para 10

inequities and resource allocations – an ironic result given the overall human rights purpose of the *Code* and its consistent interpretation with substantive equality.

Limited Resources, Understaffing of Tribunals, and Undue Hardship

While decision-makers may not always address undue hardship, in the context of the *Code*, trends in procedural discretionary decisions and information about tribunal resources shed some light on potential limitations facing the SBT, HRTO, and LTB. Most tribunal decisions that explicitly reference undue hardship are actually about frustration of the hearing process from the perspective of the institution and not about undue hardship to a party in that process. Moreover, situations when tribunals place the onus on potentially vulnerable parties may demonstrate even further the limits of tribunal resource allocations.

It may be difficult to reach the undue hardship standard under the *Code* in respect of any individual case before the SBT, LTB or HRTO. All three tribunals belong to the Social Justice Division of Tribunals Ontario.[742] This smaller cluster, which includes five other tribunals, was projected to receive a budget of 48 million dollars in the 2019-2020 fiscal year.[743] The LTB also collects money from filing fees of about 11.6 million dollars a year.[744] In addition, Tribunals Ontario and the Ontario government as a whole have significant resources that must be taken into account, since undue hardship is measured against the resources of the provincial government as a whole.[745] This may explain why individual procedural decisions by adjudicators from all three tribunals do not refer explicitly to matters of resources in evaluating undue

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[742] The Social Justice Division of Tribunals Ontario includes the Child and Family Services Review Board (CFSRB), the Criminal Injuries Compensation Board (CICB), the Custody Review Board (CRB), and the Ontario Special Education Tribunals (English and French) (OSETs): Tribunals Ontario, "Business Plan", *supra* note 138. Last year, the Ontario government decided to replace the CICB with an administrative, rather than tribunal process. The CICB will process all applications received by September 30, 2019 before winding down its operations: Tribunals Ontario, "CICB Update", *supra* note 71

[743] Tribunals Ontario, "Business Plan", *supra* note 138

[744] *Ibid*

[745] The Supreme Court of Canada has stated that, in evaluating costs of accommodations, the whole organization's financial situation must be evaluated, rather than a small part: *Moore, supra* note 2 at paras 50-54. See also: OHRC, "Ableism", *supra* note 140 at 54

hardship. The threshold of undue hardship is high, and costs would have to be particularly prohibitive to reach it.

Nevertheless, resource issues may implicitly drive institutional decisions made by all three tribunals and approaches they take on a much larger scale which places the burden on parties requesting accommodations. For example, while the SBT and HRTO clearly communicate that they will arrange and pay for interpreters for languages that are not French or English,[746] the LTB's website states that it "does not usually" do this.[747] The website explains that parties "are expected to arrange for someone to interpret" for them, either by bringing someone they know to the hearing or by hiring a professional interpreter.[748] This policy may be influenced by a lack of resources, since the LTB hears many more cases than the SBT and the HRTO.[749] Although the LTB may arrange for interpretation in rare circumstances, on a case-by-case basis, it does not explain any criteria or provide any further guidance on its website.[750]

This lack of transparency reinforces power imbalances, since parties are less likely to request an interpreter without any reason to believe that request will be successful. Tenants may not be able to pay a professional interpreter. Even if they can bring a friend or relative, a non-professional interpreter is not likely to be as impartial or competent as a professional, or to be viewed that way by an adjudicator. As well, a language barrier could also dissuade tenants from appearing for their hearings altogether, reinforcing their systemic exclusion from the adjudication process.

Notably, the LTB's practice of scheduling a large number of matters, on the assumption that many tenants will not appear, may create delays and consume more resources than it initially appears. If tenants did not attend a hearing date or did not feel that they were properly

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[746] SBT, "Language Services", *supra* note 314; HRTO, "Practice Direction on Language Interpretation", *supra* note 431; HRTO, "Language Services", *supra* note 431
[747] LTB, "Language Services", *supra* note 555
[748] *Ibid*
[749] Lamoureux & Moran, "Tribunals Ontario Annual Report", *supra* note 379 at 50
[750] See *File No TEL-88814-18-RV, supra* note 537 at paras 7-11 as an example where the LTB arranged for interpretation.

accommodated, they may bring a request for review. Even though these requests, as they relate to access to justice concerns, are rarely granted,[751] they still must be addressed using the time and resources of adjudicators and other tribunal staff.[752] Rather than holding two proceedings for some cases, it may be more efficient and more legitimate to address barriers to tenant attendance before the LTB on a systemic basis.

At all three tribunals, when it becomes apparent that an accommodation may be necessary in the midst of a hearing, a frequent response is to grant an adjournment to reschedule to another day or to give a party time to make an accommodation request or support it with evidence.[753] While an adjournment may be responsive to the needs and circumstances of a party under some circumstances, it becomes less meaningful if a proceeding continues to be adjourned because the appropriate accommodation is difficult to pinpoint or arrange, or because an adjudicator does not have time to engage with a party about the issue.

Repeated adjournments create more process, which in itself may create barriers for certain parties. At some point, parties may find that it is not worth negotiating about accommodations further.[754] As well, many decisions that do engage the concept of undue hardship do so after significant delay has occurred.[755] Where tribunals add to this delay, they may be adding to the

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[751] *File No TSL-99900-18-RV, supra* note 583 at paras 12-13; *File No SWL-79934-15-RV, supra* note 583 at paras 24-28; *File No SWL-15072-18-RV, supra* note 583 at paras 29-34; *File No HOL-03632-18-RV, supra* note 583 at paras 8-10

[752] Where a tenant may not have been able to reasonably participate in the initial hearing, the LTB must conduct a review and consider evidence from that tenant regarding why they were unable to participate: *Brewer, supra* note 588 at paras 39-50

[753] *1704-02853 (Re), supra* note 289 at para 10; *1612-09469 (Re), supra* note 330 at paras 2-3; *1807-04766 (Re), supra* note 330 at paras 1-5; *1711-09229 (Re), supra* note 330 at paras 1-2; *1703-02308 (Re), supra* note 330 at paras 2-3: *Rooks, supra* note 421 paras 5-9; *Tahir*, *supra* note 420 at paras 10-12; *Ahmed, supra* note 422 at para 3; *Weasner, supra* note 423 at para 7; *McPherson, supra* note 420 at paras 7-9; *McAllister, supra* note 420 at paras 5-8; *File No TEL-70970-16, supra* note 518 at paras 4-7; *File No CEL-80413-18-IN, supra* note 518 at paras 14-15; *File No TSL-88141-17, supra* note 518 at paras 5-7; *File No TSL-71184-16-IN2, supra* note 519 at paras 4-6, 9; *File No TEL-51969-14-SA*, *supra* note 519 at para 3; *File No SWT-94108-16, supra* note 519 at para 3

[754] In one case, when the SBT struggled find a venue that accommodated an Appellant's multiple chemical sensitivities and physical limitations, eventually the appellant expressed an unwillingness to engage in further negotiations around the accommodation of these conditions: *1703-02128 (Re), supra* note 313 at para 7

[755] *1508-07792 (Re), supra* note 374 at paras 15-19 (and related case *1508-07792 (Re), supra* note 374 at paras 15-19); *Biondic, supra* note 470 at para 99; *Park, supra* note 471 at paras 48-50; *Nahirny, supra* note 407 at para 10;

potential prejudice to the other party or to the frustration of the tribunal process which may ultimately lead to denial of the accommodation request.

In addition, accommodation needs are more likely to be addressed where the tribunal already has some relevant evidence -- in an appeal of ODSP benefits, a human rights application premised at least in part on disability, or a tenant application before the LTB. However, where a human rights application is made on other grounds, or where a proceeding is initiated by the opposing party, as in the majority of cases before the LTB, this information may not be available.

Under these circumstances, all three tribunals have decided, at least in some situations, to restrict their role to assist applicants in gathering additional evidence that may be needed. While SBT adjudicators may explain the accommodation process and let parties know what information they need,[756] and while the HRTO may even draft questions for a doctor,[757] it is then left to the party to ensure that this information is submitted to the tribunal promptly. Meanwhile, parties may not have a family doctor or specialist to prepare the report, it may be difficult for a party to schedule an appointment with that doctor, or the doctor may charge fees for preparing reports. By placing the onus only on parties to obtain this information themselves, at their own expense, tribunals may be implicitly creating new barriers to accessing the hearing process. They may also build these barriers into the process by subsequently dismissing accommodation requests for failing to follow procedural orders, such as payment of rent into the LTB, which may be a condition of receiving an adjournment.[758] These practices reflect the tension, discussed earlier, between promoting efficiency and agency performance and engaging with a party in need.

SG, supra note 471 at para 22; *ATA, supra* note 458 at paras 56-60; *File No TSL-67570-15-RV2, supra* note 561 at paras 8-17; *File No CEL-62600-16-RV, supra* note 561 at paras 22-27; *File No HOL-00395-16, supra* note 561 at paras 12-19

[756] *1412-13963 (Re), supra* note 364 at paras 4-6; *1611-08690 (Re), supra* note 318 at paras 2-5; *1704-02853 (Re), supra* note 289 at para 10

[757] *Noor*, *supra* note 454 at para 7; *Wolfe*, *supra* note 454 at para 9; *Garisto*, *supra* note 454 at paras 21-22

[758] *File No TSL-67570-15-RV2, supra* note 561 at paras 8-17; *File No CEL-62600-16-RV, supra* note 561 at paras 22-27; *File No HOL-00395-16, supra* note 561 at paras 7-23

Furthermore, practices of addressing accessibility problems with adjournments and placing a significant onus on parties may be further exacerbated by a shortage of adjudicators. As of May 2020, Tribunal Watch Ontario reports that the SBT, LTB and HRTO have significantly fewer adjudicators as compared to only two years prior.[759] Esi Codjoe, a former Vice-Chair at the HRTO, reports that the tribunal complement of Vice-Chairs has recently decreased by nine and its complement of Members has recently decreased by fourteen.[760] The ratio of Vice-Chairs to Members has also decreased, despite the more limited responsibilities of Members.[761] Tribunal Watch Ontario infers that the Ontario government rejected appointment and re-appointment recommendations from Chairs and observes that reappointment terms are shorter, sometimes as brief as 6 months.[762]

If pressures on adjudicators increase significantly, this may create a situation which, at some point, becomes untenable. In early January, the Ontario Ombudsman began investigating delays at the LTB, attributed, at least in part, to shortages of adjudicators.[763] In addition, parties at the HRTO have experienced delays in scheduling hearings and mediations.[764] Understaffing may mean that there is less time for adjudicators to engage with litigants and that some positive practices may be less effective, such as case management of each HRTO application by

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[759] Tribunal Watch Ontario is co-founded by Ron Ellis, Doug Ewart, Alec Farquhar, Naomi Overend, Niki Carlan, and others who cannot be publicly identified. According to Tribunal Watch Ontario, the HRTO, SBT, and LTB have lost several adjudicators as compared to their adjudicator complements in 2018: Tribunal Watch Ontario, "Statement of Concern" (17 May 2020), online: <https://tribunalwatch.ca/statement-of-concern/>; Ron Ellis, "Tribunal Watch Ontario: New Sheriff in Town" (25 May 2020), online: <https://administrativejusticereform.ca/tribunal-watch-ontario/>

[760] According to Esi Codjoe, there are currently 5 Vice-Chairs, 8 part time Vice-Chairs, 4 full time Members and 12 part time Members at the HRTO. Prior to the decrease in tribunal appointments, the adjudicator complement at the HRTO was 22 full time Vice Chairs and 30 part time Members: Esi Codjoe, "What's New at the Human Rights Tribunal of Ontario?" Ontario Bar Association, Annual Update on Human Rights Conference (20 May 2020), accompanying written materials at 1-2

[761] *Ibid*; Human Rights Tribunal of Ontario, "Member Position Description", online: <http://www.sjto.gov.on.ca/documents/sjto/Member%20Position%20Description%20EN.html; Human Rights> Human Rights Tribunal of Ontario, "Vice Chair Position Description": <http://www.sjto.gov.on.ca/documents/sjto/Vice-Chair%20Position%20Description%20EN.html>

[762] Tribunal Watch Ontario explains that the Ontario government may be pressuring tribunals to accept alternate candidates the government proposes: Tribunal Watch Ontario, *supra* note 759 at 3.

[763] Cardoso, *supra* note 69; Spurr, *supra* note 69

[764] Esi Codjoe, *supra* note 760 at 2

a dedicated adjudicator. As well, adjournments to arrange accommodations may create more prejudice to the opposing party, and may be less likely to be granted, where significant delay has already occurred.

In summary, although issues of resources are rarely addressed directly in tribunal procedural decisions, they may operate in the background to animate how adjudicators exercise their discretion and to limit their ability to act in individual cases. All three tribunals may not have the resources to take on a more proactive role to investigate and arrange for accommodations. However, the unintended consequence is that parties are more likely to receive accommodations when requests are more closely related to evidence and documents previously filed with the tribunal. In addition, the large number of cases the LTB hears each year may explain why it does not consistently arrange for and fund interpretation and why they schedule high volumes of cases to be heard, especially on certain days. Finally, the recent trend of understaffing tribunals in Ontario, including the SBT, LTB and HRTO, has the potential to significantly undermine the ability of adjudicators to take additional time to address and to arrange accommodations as needed.

Accountability and Judicial Review

Having identified some negative practices, it is important to consider when and how tribunals may be held accountable if they undermine full and fair participation in the hearing process. Cartier and Sossin take somewhat opposing views with respect to the efficacy of judicial review in promoting engagement and dialogue.[765] Cartier states that there may be a role for judicial review in supervising dialogue between decision-makers and parties. In contrast, Sossin asserts that judicial review, at least in the way it is currently undertaken, may undermine authentic and transparent communication and engagement.

[765] Raso emphasizes decision-making at the tribunal level rather than external accountability mechanisms, but does not address this issue directly: Raso, "Human Rights", *supra* note 28 at 101

In my view, principles articulated in Divisional Court case law, binding on all three tribunals, have promoted or have the potential to promote positive decision-making practices. Nonetheless, there are limitations to what a court can do without observing the interaction between the decision-maker and the party, and especially if reviewing courts invariably take a legalistic view of the bases on which it can intervene. This demonstrates that there may be a role for other, more informal accountability mechanisms, which are beyond the scope of this paper.

Cartier suggests that courts are in a position to evaluate administrative decisions with reference to dialogue, while also taking on a role consistent with the autonomy of administrative bodies.[766] This responsibility, according to Cartier, would be two-fold. First, courts must determine whether dialogue took place between the administrative decision-maker and the party.[767] If not, a court may impose a procedural fairness requirement to address this deficiency -- for example, by stating that the administrative decision-maker should hold a hearing or give reasons.[768] Second, if dialogue did take place, a court must decide whether the decision is "authentic and responsive to that dialogue."[769] While there may be a range of possible outcomes that a decision-maker can reach, only some, or even one, of these outcomes may be responsive to the dialogue that actually took place.[770] In Cartier's words, "dialogue does not so much restrict the margin of manoeuvre of the decision maker but positively indicates the way in which the appropriate decision can be reached."[771]

Consistent with Cartier's approach, the Divisional Court has outlined some broad principles that tribunals could use, or have used, to facilitate engagement regarding accommodation processes. For example, in several cases, SBT adjudicators cited a Divisional Court holding that they must consider whether an appellant did not appear at a scheduling hearing date because

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[766] Cartier, "Dialogue", *supra* note 90 at 649
[767] *Ibid*
[768] *Ibid*
[769] *Ibid*
[770] *Ibid*
[771] *Ibid*

of a disability.[772] In these cases, based on the medical evidence already available to them, these adjudicators decided to adjourn to provide appellants with opportunity to explain why they were not able to attend. There is also a Divisional Court decision, described above, which instructs HRTO adjudicators to raise and to consider procedural alterations to the hearing process even if self-represented parties do not raise them.[773] Based on this case, HRTO adjudicators may be required to inquire, respectfully and without reference to stereotypes, into accommodation needs and other procedural changes that self-represented parties may not raise on their own.

Finally, the Divisional Court has also outlined in the LTB context what the duty to accommodate requires and that it is the responsibility of the Board.[774] In two cases I identified, adjudicators who were concerned about prejudice to the landlord stated in error that the duty to accommodate rests in whole or in part on the landlord.[775] In *Beaux Properties*, the Divisional Court laid out the relevant distinction succinctly and clearly:

> The tenant suffers from mental illness. As a matter of common sense, this disability affects her conduct as a tenant and as a litigant […] [T]he landlord does have a duty to accommodate the tenant to the point of undue hardship.
>
> So too does the Landlord and Tenant Board in ensuring that the tenant's interests are properly put before the Board so a just determination of the underlying issues may be rendered on the merits. This the Landlord and Tenant Board did not do. It should have granted the second adjournment. What other steps may be required to accommodate the tenant in the Landlord Tenant Board process is for the Landlord and Tenant Board to decide, but the accommodation must accord the tenant full and fair participation in the process to the point of undue hardship.[776]

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[772] *1707-06287 (Re) supra* note 280 at para 5; *1707-06145 (Re), supra* note 286 at paras 2-8; *1708-06625 (Re), supra* note 286 at paras 3-8; *1704-03035 (Re), supra* note 286 at paras 3-9; and *1611-08205 (Re), supra* note 286 at paras 3-7, citing *Miller, supra* note 142. See also, in the LTB context, *Hasan v Taylor*, 2017 ONSC 102 at paras 39-50 (Div Ct), where an LTB Member improperly refused an adjournment request and the matter was remitted to the LTB based on evidence the tenant was not able to attend.
[773] *Audmax*, *supra* note 142 at paras 36-42
[774] *Beaux Properties*, supra note 142 at paras 1-5
[775] *File No TSL-67570-15-RV2, supra* note 561 at para 18; *File No SOL-57813-15, supra* note 568 at para 126
[776] *Beaux Properties, supra* note 142 at paras 1-3

In addition, the LTB member in one of these cases ignored the "undue" element of undue hardship, asserting that any financial hardship was sufficient.[777] Judicial review may be an appropriate forum to correct obvious errors of law of this type and to outline general principles tribunals must follow to grant procedural accommodations.

However, Cartier acknowledges that her analysis, based on a few Supreme Court of Canada cases, may not account for the way adjudicators decide run-of-the-mill cases in a much different context.[778] She questions that judicial review could motivate decision-makers to provide transparent reasons, or, conversely "to take formal but hollow steps--that is, to hide their real motivations and write down reasons that appear to comply with the substantive requirements of fairness."[779] This more skeptical view is adopted by Sossin, who illustrates some of the limitations and incentives that may be created by judicial review.

Sossin criticizes the characterization of procedural fairness and, specifically, the duty to give reasons, in the law governing judicial review. In Sossin's words, "[i]ntimacy begins with honesty, law, by contrast, begins with fiction."[780] He conceives of procedural fairness more broadly as what is required for a transparent, mutual exchange of "inward knowledge" between a party and a decision-maker.[781] According to Sossin, courts could require more than just a "boiler-plate" justification, and could interrogate decisions to understand "the individual values or systemic assumptions" the decision-maker considered.[782] However, current principles of judicial review are premised on a more adversarial relationship, where an administrative decision-maker must provide the minimum process required to fairly deny the positions, claims, and rights of parties.[783]

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[777] *File No TSL-67570-15-RV2, supra* note 561 at para 18
[778] Cartier, "Spirit of Legality", *supra* note 87 at 332
[779] *Ibid* at 333
[780] Sossin, "Intimate Approach", *supra* note 62 at 833, see also: 827
[781] *Ibid* at 826
[782] *Ibid* at 837
[783] *Ibid* at 836-838

The Supreme Court of Canada endorsed this traditional approach in *Vavilov*. The Court referred to leading cases on procedural fairness to explain why the reasonableness of a decision must be evaluated against a standard of "responsive justification" and how reasons are essential to this analysis.[784] The Court later explained that:

> Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.[785]

This characterization of reasons, as justifying the act of taking rights away, may motivate decision-makers to be less authentic and to shore up decisions as much as they can.

A recent Ontario Divisional Court decision, referencing *Vavilov*, demonstrates one facet of this problem.[786] This case was brought by a foreign-trained dentist, Dr. Irinie Mattar, who failed an examination to become accredited in Canada by the National Dental Examining Board.[787] The court required the Board to address an argument advanced by Dr. Mattar about her mental state during her examination.[788] Dr. Mattar asserted that, when she was treated unfairly by an invigilator, she had "a nervous breakdown", "couldn't stop crying", and "was panicking until the end of the exam".[789] After receiving the Board's negative decision, she also explained she had chronic migraines and wanted to provide further medical evidence.[790] The Board refused to receive this additional information.[791]

However, in its decision on judicial review, the court did not confront the obvious possibility that the Board did not want to explicitly state whether it believed Dr. Mattar. The court listed a

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[784] *Vavilov, supra* note 20 at paras 76-86
[785] *Ibid* at para 133
[786] *Mattar v The National Dental Examining Board of Canada*, 2020 ONSC 403 (Div Ct) [*Mattar*]
[787] *Ibid* at para 2
[788] *Ibid* at paras 45-52
[789] *Ibid* at para 19
[790] *Ibid* at para 27
[791] *Ibid*

number of possible rationales the administrative body could have offered, [792] appearing to have no interest in scrutinizing the Board's chain of reasoning and whether it reflected the dialogue that occurred. In other words, the court did not require transparent or authentic reasons – any rationale that could be supported by the evidence was good enough.

In contrast, Sossin recommends that courts could ask whether a decision meets a "standard of meaningfulness, truth and honesty."[793] On judicial review, judges could determine the values the decision-maker considered based on the reasons provided, and whether these norms were explained accessibly in the decision.[794] According to Sossin, judges could prefer "fuller, clearer, more comprehensive, genuine reasons" that flow from the dialogue between the decision-maker and the parties.[795] This would require more than simply any justification that is logical and flows from some evidence within the record.[796]

Returning to *Mattar*, applying such a standard could require the Board to make an explicit finding of credibility. This finding would be based on the evidence provided by Dr. Mattar and the invigilators of the examination, rather than stereotypes about immigrants to Canada or persons with disabilities. To make this finding, the Board could have received the medical evidence that Dr. Mattar wished to provide, engaged with her more meaningfully, and made a more transparent decision that responded to her arguments. This process would have the potential to uncover, rather than veil, the power imbalances that the Divisional Court referenced but never explicitly addressed.[797]

In practical terms, however, Sossin's standard for administrative reasons may be difficult for courts to apply without observing and understanding the interactions between the decision-

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[792] *Ibid*
[793] Sossin, "Intimate Approach", *supra* note 62 at 836-837
[794] *Ibid* at 829-830
[795] *Ibid* at 838
[796] *Ibid* at 829-830
[797] On judicial review, Dr. Mattar's evidence was that she had no other way of becoming a dentist in Canada. She was not accepted into any Canadian dental schools. She also spent approximately $120,000-$150,000 to pass the National Dental Examining Board's equivalency examinations. This left her with no financial resources for further training: *Mattar, supra* note 786 at para 9

maker and the parties. It may not be workable for decision-makers responsible for the volume of cases at the LTB, SBT and HRTO to outline, in detail, every interaction, argument, or piece of evidence in each case. Even if they could, Sossin questions whether such a decision would reflect the entirely uncensored views of a decision-maker when an adversarial judicial review process exists.[798] That said, he does concede that more detailed reasons "would begin to illuminate the gap between the stated and unstated justifications for decision-making" that courts could then analyze.[799] Finally, the ultimate decision will not always accurately describe a party's own experience of the administrative process, even if it describes the essential interactions that took place.

For example, in *Zhou*, the Divisional Court refused to find a breach of procedural fairness when tenants did not understand the oral submissions provided by the landlord's lawyer at the hearing, despite having access to an interpreter.[800] The LTB Member adjourned the oral hearing and gave the tenants over two months to have the landlord's written submissions translated into Mandarin, presumably at their own expense.[801] However, when the Divisional Court decided that the hearing was fair, after the tenants raised the written hearing as an issue, it did not address whether this solution enabled the tenants to meaningfully understand and reply to the landlord's submissions.[802] It was sufficient that this was an attempt at accommodation, for the tenants benefit, whether or not it was actually responsive to the tenants' needs and circumstances.

Since doctrines of procedural fairness and the duty to give reasons may not be responsive to a party's actual experience of the administrative process and the actual barriers a vulnerable party may experience, other accountability mechanisms may be necessary. Recommendations regarding specific solutions fall outside the manageable scope of research for this thesis, as

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[798] Sossin, "Intimate Approach", *supra* note 62 at 837-838
[799] *Ibid*
[800] *Zhou, supra* note 578 at para 12. Based on the Divisional Court's decision, it is unclear whether this interpreter was a professional interpreter or a friend or relative brought by the tenants.
[801] *Ibid* at paras 13-14
[802] *Ibid* at paras 59-60.

they should be informed by the experiences and views of marginalized communities. This would require particularly time-consuming additional research. However, I do recognize that there are other options that are less formal and potentially more accessible than judicial review.

For example, the Workplace Safety and Insurance Board (WSIB) has an independent Fair Practices Commission. This Commission communicates informally with parties and with WSIB upper level management to investigate and resolve issues relating to unreasonable delays, inappropriate or biased behaviour and decision-making, decisions communicated without clear reasons, and decision-making that ignores the evidence of a party or Board policies and guidelines.[803] In addition, upon receiving complaints from many parties regarding the same issue, it may also observe and address systemic issues. A more informal process like this one could have the potential to mediate power imbalances, improve communication, and provide a measure of accountability that may be inaccessible to vulnerable parties.

The Commission's mandate includes building relationships between WSIB staff and the employers and workers who they serve, by facilitating communication and offering creative solutions.[804] For example, in 2019, the Commission received a complaint from an injured worker who was hospitalized during her return to work.[805] The worker believed that her worsening condition was directly related to her accepted PTSD claim, but the WSIB initially disagreed.[806] The Commission made inquiries with a manager and then a director.[807] These inquiries eventually led to a WSIB-sponsored psychological assessment and a new course of action with respect to return to work.[808] This solution was reached informally without the injured worker having to launch a formal appeal while participating in a process that was

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[803] Fair Practices Commission, "2019 Annual Report" at 6-7, online: <https://fairpractices.on.ca/wp-content/uploads/2020/06/FPC_2019_AR_EN.pdf>
[804] *Ibid* at 9
[805] *Ibid* at 17-18
[806] *Ibid*
[807] *Ibid*
[808] *Ibid*

negatively affecting her health. Meanwhile, in another case, a worker and the WSIB had a miscommunication about the termination of his employment, and the WSIB cut his benefits abruptly.[809] The worker needed this decision reversed quickly so that he could pay his rent and avoid eviction.[810] The Fair Practices Commission raised the issue with a manager who corrected the WSIB's decision much more quickly than a formal appeal ever could.[811] In both of these examples, promoting meaningful communication led to an efficient solution that was responsive to the worker's circumstances.

While judicial review provides some level of accountability and allows courts to outline broad principles regarding the minimum requirements of procedural fairness, it may not be an appropriate forum to consider whether dialogue or engagement took place and to measure the quality of that communication. As already noted, accountability structures are beyond the scope of this paper. However, other more informal models may exist or may be developed that can address power imbalances and structural inequities in a more accessible and meaningful way.

Conclusion

The comparison of ideal theories of engagement and dialogue with actual decision-making practices of tribunals in exercising their procedural discretion demonstrates some troubling trends. A few positive tribunal practices may foster engagement and dialogue by providing transparent information or proactively addressing accommodations and promoting engagement. However, other practices may undermine meaningful interactions or mask a tribunal's abdication of responsibility for certain matters. Some of these problems may be amplified by the division of responsibility between institutional and individual decision-makers, and the justification of decisions using technical rationales informed by legal training of the adjudicator and the prospect of judicial review. These circumstances might place a difficult or

[809] *Ibid* at 18-19
[810] *Ibid*
[811] *Ibid*

impossible onus on vulnerable parties to successfully request the accommodations that they need to meaningfully participate in the hearing process.

Although all three tribunals have limited resources and a difficult mandate to balance efficiency with fairness, excluding parties from the hearing process cannot be consistent with that mandate. In the words of Patricia Williams, "[s]ome structures are the direct products of people and social forces who wanted them that way."[812] These tribunal systems are inevitably informed by legal traditions which have historically ignored and alienated many of the vulnerable populations who are meant to access them.[813] Future research may build on my findings by analyzing potential reforms that are supported by the lived experiences of members of marginalized groups who interact with these tribunal systems.

[812] Patricia Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22:2 Harv CR-CLL Rev 401 at 423
[813] *Ibid* at 424

Some Final Observations

After analyzing the theoretical basis of discretionary decision-making and comparing it to tribunal case law, a logical next step would be to recommend specific reforms to both institutional and individual decision-making practices. I will address how future work may build on my findings and how external factors, such as the current pandemic, also have the potential to motivate change.

My research findings may be extended through conducting interviews with tribunal adjudicators and front-line staff, participants in the hearing process who support litigants, such as lawyers, social workers, doctors and advocacy organizations, and, most importantly, a diverse group of vulnerable parties, who face a variety of barriers to accessing the hearing process. These interviews may also address factors identified in the procedural justice literature relating to what extent parties feel that they have a meaningful voice in the proceeding, such as whether they have received trustworthy consideration, and how they perceived any imbalances of power. Interviews with tribunal staff could also address factors analyzed by procedural justice scholars, such as the recruitment and training of adjudicators.

This work might also be informed by changes made by other tribunals serving low-income parties and opinions of litigants regarding whether these reforms have been successful.[814] For example, the Social Security Tribunal (SST), which adjudicates disputes relating to federal social assistance programs such as Employment Insurance and Canada Pension Plan-Disability benefits, recently implemented reforms to improve accessibility and address long delays.[815] It removed the requirement for a lawyer and engaged an expert in plain language to improve written decisions.[816] It interpreted its regulations to allow it to obtain documents directly from

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[814] Jordan Press, "Social Security Tribunal turns to people in the system to help cut wait times", *National Post* (25 January 2020), online: <https://nationalpost.com/pmn/news-pmn/canada-news-pmn/social-security-tribunal-turns-to-people-in-the-system-to-help-cut-wait-times>
[815] *Ibid*
[816] *Ibid*

Employment and Social Development Canada, rather than requiring litigants to submit them.[817] It also recently assigned tribunal staff to call litigants in advance of their hearings to explain the tribunal's process.[818] Some of these changes have the potential to bring the SST closer to adopting a process where fewer accommodations are required in the first place, where opportunities to request accommodations are built into that process, and where the tribunal could support litigants in making these requests. The experiences of litigants who have engaged with these new processes may demonstrate positive practices and further improvements that could be implemented in other tribunal settings.

While changes at the SST were motivated by delays and flawed processes, sometimes change is triggered by events and pressures external to tribunal performance. As COVID-19 swept across the world and businesses and government offices began to close, new solutions were needed to accommodate the new reality of social distancing. The Ontario government quickly halted evictions to ensure that tenants who found their incomes reduced would not lose their housing.[819] Meanwhile, the HRTO and the SBT continued to hear at least some matters in writing and by teleconference.[820] The HRTO has stated that litigants who cannot participate in a hearing remotely may contact the Registrar to have the date rescheduled.[821] In contrast, the SBT presumes that hearings will proceed remotely, though they are willing to grant adjournments on a case-by-case basis.[822]

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[817] *Ibid*
[818] *Ibid*
[819] *Attorney General for Ontario v Persons Unknown*, *supra* note 65
[820] Tribunals Ontario, COVID-19, *supra* note 481
[821] *Ibid*
[822] *Ibid*. This may be a fair process if it takes into account the situation of litigants who may not have access to a telephone or to a private place in their home where they can provide honest, transparent testimony. At this point, it is too early to tell whether any additional access issues have arisen as a result of this new policy.

For litigants who would find a remote hearing to be more accessible, the normalization of these practices may demonstrate to tribunals that this request is not as onerous as it may have seemed. Justice Myers of the Ontario Superior Court recently issued a ruling addressing video hearings, opining that:

> In my view, in 2020, use of readily available technology is part of the basic skillset required of civil litigators and courts. This is not new and, unlike the pandemic, did not arise on the sudden. However, the need for the court to operate during the pandemic has brought to the fore the availability of alternative processes and the imperative of technological competency. Efforts can and should be made to help people who remain uncomfortable to obtain any necessary training and education.[823]

Adapting to the use of these technologies to address the COVID-19 pandemic could mean that accommodation requests that require them may be more likely to be accepted even after in-person hearings resume. However, it is difficult to predict for certain what will happen once the pandemic is over, and when these adapted processes are not needed for everyone.

As time passes, many systemic problems that have been highlighted in the last few months may be addressed, or the status quo may continue to reinforce existing inequities. For example, in response to the pandemic, ODSP recipients received only a small increase to their benefits, which each person or family had to individually request.[824] Meanwhile, even with this top up, their total monthly benefits continued to be much less than the Canada Emergency Response Benefit.[825] Disability advocates raised concerns about the Ontario government's medical triage

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[823] *Arconti v Smith*, 2020 ONSC 2782 at para 33 (SCJ)

[824] An individual person could receive an additional monthly payment of $100 while a family could receive a monthly payment of $200: Ontario Ministry of Children, Community and Social Services, "Ontario Disability Support Program COVID-19 key information" (updated 25 June 2020), online: <https://www.mcss.gov.on.ca/en/mcss/programs/social/odsp/odsp-covid-fact-sheets.aspx>. The federal government also recently announced a single payment of $600 for persons with disabilities: Government of Canada, "One-time payment to persons with disabilities" (updated 5 August 2020), online: < https://www.canada.ca/en/services/benefits/covid19-emergency-benefits/one-time-payment-persons-disabilities.html>. See also: Omar Dabaghi-Pacheco, "CERB 'a slap in the face' for Ontarians scraping by on disability payments" *CBC News* (3 May 2020), online: <https://www.cbc.ca/news/canada/ottawa/covid19-odsp-wage-benefits-1.5552060>

[825] Government of Canada, "Questions and Answers on the Canada Emergency Response Benefit" (updated 6 July 2020), online: <https://www.canada.ca/en/services/benefits/ei/cerb-application/questions.html>

protocol and whether it protects the interests of persons with disabilities.[826] The institution of enforcement measures to promote social distancing raised criticisms and concerns about racial profiling.[827] Furthermore, Toronto communities with higher proportions of low income and racialized people have experienced comparatively higher rates of COVID-19 infection, a trend that has also been observed in Montreal, and in other parts of the world.[828]

Who receives support, who is targeted by enforcement efforts, and who suffers the most during a crisis can reflect fundamental inequities built into governmental systems and programs. The response to these failings, including the recent protests and demands for action regarding racism against Black people, highlight the need for systemic change in many areas, including tribunals that adjudicate matters of discrimination.[829]

These overarching inequities may also demonstrate the importance of focusing on both processes and outcome in the context of future research and in recommending reforms. While a fair outcome may not be possible without a fair procedure, seemingly "fair" and "accessible" procedures may be relied upon to justify flawed outcomes. The best appellate procedures cannot increase ODSP benefits. The most effective protections at the LTB cannot create affordable housing. And the most accessible and efficient HRTO processes would not be required as frequently with more effective systemic efforts to combat discrimination.

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[826] ARCH Disability Law Centre, "Open Letter: Ontario's COVID-19 Triage Protocol" (8 April, 2020), online: <https://archdisabilitylaw.ca/wp-content/uploads/2020/04/April-8-2020-Open-Letter-Ontarios-COVID-19-Triage-Protocol-PDF.pdf>

[827] Canadian Civil Liberties Association, "Stay Off the Grass: COVID-19 and Law Enforcement in Canada" (June 2020) at 27-33, online: <https://ccla.org/fines-report/>

[828] Arianne Robinson, "How does systemic racism predispose people to COVID-19?" *CBC Radio*, White Coat, Black Art (11 June 2020), online: <https://www.cbc.ca/radio/whitecoat/how-does-systemic-racism-predispose-people-to-covid-19-1.5607371>: "Over the last week, Toronto city officials revealed neighbourhood data to show a correlation between the rate of infection, racialized communities and lower incomes."

[829] Martin Regg Cohen, "Doug Ford says he wants to fight racial injustice. So why is he undermining tribunals that help do just that?" *Toronto Star* (10 June, 2020), online: <https://www.thestar.com/politics/political-opinion/2020/06/10/doug-ford-says-he-wants-to-fight-racial-injustice-so-why-is-he-undermining-tribunals-that-help-do-just-that.html>: "But at the Human Rights Tribunal, even the government's tally of 30 appointments suggests it is operating at approximately half-strength, compared to 57 before the Tories took power — with a similar shortfall at the Environmental Review and Social Benefits tribunals […] At a time when society is more preoccupied than ever about racial and sexual discrimination, the government risks blowback if it introduces partisanship and tardiness to tribunals where justice must be both blind and timely."

Justice Rosalie Abella recently gave a lecture about the meaning of access to justice and the importance of just outcomes, stating that:

> We can't talk seriously about access to justice without getting serious about how inaccessible the result, not the system, is for most people. Process is the map, lawyers are the drivers, law is the highway and justice is the destination […] If, much of the time, the public can't get there because the maps are too complicated, then, as Gertrude Stein said, 'There's no there there.' And if there's no 'there there,' what's the point of having a whole system to get to where almost no one can afford to go?[830]

Future research must reflect the lived experience of marginalized communities and their opinions about tribunal processes and outcomes to recommend reforms. Some of these reforms may improve existing processes and structures. However, others may require much more fundamental changes to amend legislation, redistribute resources, and alter institutional processes. Even though tribunal procedures should promote full, fair and meaningful participation, the path forward must also lead to a just destination.

[830] Justice Rosalie Silberman Abella, "Our civil justice system needs to be brought into the 21st century" *Globe and Mail* (24 Apr 2020), online: <https://www.theglobeandmail.com/opinion/article-our-civil-justice-system-needs-to-be-brought-into-the-21st-century/>. This article is an excerpt from a recent lecture at Harvard Law School.

Bibliography

Legislation and Regulations

Accessibility for Ontarians with Disabilities Act, 2005, SO 2005, c 11

Adjudicative Tribunal Accountability, Governance and Appointments Act, 2009, SO 2009, c 33, Sch 5

Bill 184, *Protecting Tenants and Strengthening Community Housing Act*, 1st Sess, 42nd Leg, Ontario, 2020 (Royal Assent on 21 July 2020)

Canadian Bill of Rights, SC 1960, c 44, reprinted in RSC 1985, Appendix III

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

Emergency Management and Civil Protection Act, RSO 1990, c E.9

Human Rights Code, RSO 1990, c H19

O Reg 282/20

O Reg 222/98

Ontario Disability Support Program Act, 1997, SO 1997, c 25, Sch B

Ontario Works Act, 1997, SO 1997, c 25, Sch A

Pay Equity Act, RSO 1990, c P.7

Residential Tenancies Act, 2006, SO 2006, c 17

Tribunal Rules, Policies, and Publicly Available Information

Human Rights Tribunal of Ontario, "Accessibility and Accommodations", online: <http://www.sjto.gov.on.ca/hrto/accessibility-and-accommodations/>

Human Rights Tribunal of Ontario, "Form 1: Application", online: <http://www.sjto.gov.on.ca/hrto/forms-filing/>

Human Rights Tribunal of Ontario, "Language Services", online: <http://www.sjto.gov.on.ca/hrto/language-services/>

Human Rights Tribunal of Ontario, “Member Position Description”, online: <http://www.sjto.gov.on.ca/documents/sjto/Member%20Position%20Description%20EN.html;

Human Rights Tribunal of Ontario, “Practice Direction on Recording Hearings”, online: <http://www.sjto.gov.on.ca/documents/hrto/Practice%20Directions/Recording%20Hearings.html>

Human Rights Tribunal of Ontario, “Practice Direction on Requests for Language Interpretation”, online: <http://www.sjto.gov.on.ca/documents/hrto/Practice%20Directions/Language%20Interpretation.html>

Human Rights Tribunal of Ontario, “Practice Direction on Scheduling Hearings and Mediations, Rescheduling Requests, and Requests for Adjournments”, online: <http://www.sjto.gov.on.ca/documents/hrto/Practice%20Directions/Scheduling%20of%20Hearings%20and%20Mediations.html>

Human Rights Tribunal of Ontario, “Vice Chair Position Description”: <http://www.sjto.gov.on.ca/documents/sjto/Vice-Chair%20Position%20Description%20EN.html>

Lamoureux, Linda P & Holly Moran, Tribunals Ontario, “Tribunals Ontario Annual Report 2018-19”, (28 June 2019) at 47, online: <http://www.sjto.gov.on.ca/en/reports-plans-standards/>

Landlord and Tenant Board, “Accessibility and Accommodations”, online: <http://www.sjto.gov.on.ca/ltb/accessibility-and-accommodations/>

Landlord and Tenant Board, “COVID-19 Updates on Landlord and Tenant Board Operations”, online: <http://www.sjto.gov.on.ca/ltb/covid-19/>

Landlord and Tenant Board, “Forms”, Forms for Tenants, Request for French-Language Services or Request for Accommodation, online: <http://www.sjto.gov.on.ca/ltb/forms/>

Landlord and Tenant Board, “Human Rights: Interpretation Guideline 17,” online: <http://www.sjto.gov.on.ca/documents/ltb/Interpretation%20Guidelines/17%20-%20Human%20Rights.html>

Landlord and Tenant Board, “Language Services”, online: <http://www.sjto.gov.on.ca/ltb/language-services/>

Landlord and Tenant Board, “Tenant Rights: Interpretation Guideline 6”, online: <http://www.sjto.gov.on.ca/documents/ltb/Interpretation%20Guidelines/06%20-%20Tenants%20Rights.html>

Province of Ontario, “Renting: changes during COVID-19 (coronavirus)” (updated 23 June 2020), online: <https://www.ontario.ca/page/renting-changes-during-covid-19#section-0>

Social Benefits Tribunal, “Accessibility and Accommodation”, online: <http://www.sjto.gov.on.ca/sbt/accessibility-and-accommodations/>

Social Benefits Tribunal, “Forms and Filing”, Appeal (Form 1), online: <http://www.sjto.gov.on.ca/sbt/forms-filing/#form1>

Social Benefits Tribunal, “Language Services,” online: <http://www.sjto.gov.on.ca/sbt/language-services/>.

Social Benefits Tribunal, “Practice Direction on Pre-Hearing Conferences” (effective January 1, 2016), online: <http://www.sjto.gov.on.ca/documents/sbt/Pre-Hearing%20Conferences.html>

Social Benefits Tribunal, “Rules of Procedure for Appeals to the Social Benefits Tribunal”, online: <http://www.sjto.gov.on.ca/documents/sbt/SBT%20Rules%20Parts%201%20&%202%20EN.html#rule1>

Social Benefits Tribunal, “Videos and FAQs”, online: <http://www.sjto.gov.on.ca/sbt/faqs/>

Tribunals Ontario, “Access and Privacy Policy”, online: <http://www.sjto.gov.on.ca/documents/sjto/A2I-Policy-en.html>

Tribunals Ontario, Social Justice Division, “Accessibility and Accommodation Policy”, online: <http://www.sjto.gov.on.ca/documents/sjto/Accessibility%20and%20Accommodation%20Policy.html>

Tribunals Ontario, Social Justice Division, “COVID-19 Updates on Tribunals Ontario Operations” (updated 9 July 2020), online: <http://www.sjto.gov.on.ca/en/covid-19/>

Tribunals Ontario, Social Justice Division, “Social Justice Tribunals Ontario 2017/18 - 2019/20 Business Plan”, online: <http://www.sjto.gov.on.ca/documents/sjto/2017-18%20to%202019-20%20Business%20Plan.html>

Tribunals Ontario, Social Justice Division, Latest News, “CICB Update” (19 December 2019), online: <http://www.sjto.gov.on.ca/en/latest-news/#cicb>

Tribunals Ontario, Social Justice Division, Social Justice Tribunals Ontario Rules of Procedure: Common Rules, Rule A-5, online: <http://www.sjto.gov.on.ca/en/rules-of-procedure/>

Workplace Safety and Insurance Appeals Tribunal, “Expert Evidence”, online: <http://www.wsiat.on.ca/english/pd/pdExpert.htm>

International Sources

Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981, ratified by Canada 10 December 1981)

Convention on the Rights of Persons with Disabilities, 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008, ratified by Canada 11 March 2010)

Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990, ratified by Canada 13 December 1991)

International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969, ratified by Canada on 14 October 1970)

International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976)

International Covenant on Economic, Social and Cultural Rights, 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976, accession by Canada on 19 May 1976)

United Nations, Committee on Economic, Social and Cultural Rights, "General Comment No 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)" (2 July 2009)

United Nations, Committee on the Rights of Persons with Disabilities, "General Comment No 2 (2014), Article 9: Accessibility" (22 May 2014)

United Nations, Committee on the Rights of Persons with Disabilities, "General Comment No 6 (2018) on equality and non-discrimination" (26 April 2018)

United Nations, Committee on the Rights of Persons with Disabilities, "General Comment No 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention" (9 November 2018)

United Nations, Human Rights Committee, "General Comment No 32: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (29 March 2004)

Domestic Court Decisions

Aiken v Ottawa Police Services Board, 2015 ONSC 3793 (Div Ct)

Anand v Anand, 2016 ABCA 23

Arconti v Smith, 2020 ONSC 2782 (SCJ)

Arsenault v Thevathurai, 2015 ONSC 5357 (Div Ct)

Attorney General for Ontario v Persons Unknown, amended on 6 July 2020 (Ont SCJ), online: < https://www.ontariocourts.ca/scj/chief-justice-court-order-susp-resid-evict/>.

Audmax v Ontario (Human Rights Tribunal), 2011 ONSC 315 (Div Ct)

Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, 174 DLR (4th) 193

Bart v McMaster University, 2016 ONSC 5747 (Div Ct)

Beaux Properties Management Co v Shomer, 2019 ONSC 6170 (Div Ct)

Brewer v Landlord and Tenant Board Southern RO, 2018 ONSC 1006 (Div Ct)

British Columbia Human Rights Tribunal v Schrenk, 2017 SCC 62

Canada (Canadian Human Rights Commission) v Canada (Attorney General), 2011 SCC 53

Canada (Minister of Citizenship and Immigration) v Phan, 2003 FC 1194

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65

*Caron v Alberta (Chief Commissioner of the Alberta Human Rights and Citizenship Commission)***,** 2007 ABQB 525

CS v British Columbia (Human Rights Tribunal), 2018 BCCA 264 at para 22, leave to appeal to SCC refused, [2018] SCCA No 357

Delanty v Gloucester Housing Corp, 2019 ONSC 5286 (Div Ct)

Director, Ontario Disability Support Program v Miller (28 January 2005), File No 02/054 (Div Ct) Killeen, Stayshyn, Molloy, JJ, unreported

Dunsmuir v New Brunswick, 2008 SCC 9

Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624, 151 DLR (4th) 577

Farimex marketing international inc v Owen, [2000] JQ No 1179, 2000 CanLII 18938 (SC)

First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2

Georgoulas v Canada (Attorney General), 2018 FC 652

Gray v Ontario (Disability Support Program, Director) (2002), 59 OR (3d) 364, 212 DLR (4th) 353 (CA)

Hasan v Taylor, 2017 ONSC 102 (Div Ct)

Hryniak v Mauldin, 2014 SCC 7

James v York University, 2015 ONSC 2234 (Div Ct), leave to appeal to SCC refused, [2016] SCCA No 1

Matechuk v Raamco International Properties, 2015 ONSC 1196 (Div Ct)

Mattar v The National Dental Examining Board of Canada, 2020 ONSC 403 (Div Ct)

Mohammadian v Canada (Minister of Citizenship and Immigration), 2001 FCA 191, leave to appeal to the SCC dismissed, [2001] SCCA No 435

Moore v British Columbia (Education), 2012 SCC 61

Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch), 2001 SCC 52

Ontario v Association of Ontario Midwives, 2020 ONSC 2839 (Div Ct)

Pavon v Ontario (Director, Ontario Disability Support Program), 2013 ONSC 4309 (Div Ct)

R v Capay, 2019 ONSC 535 (SCJ)

R v Tran, [1994] 2 SCR 951, 117 DLR (4th) 7

Regan v Latimer, 2016 ONSC 4132 (Div Ct), motion to set aside refused, 2016 ONSC 4351 (Div Ct)

Roncarelli v Duplessis, [1959] SCR 121, 16 DLR (2d) 689

Roy v Hackett (1987), 62 OR (2d) 365, [1987] OJ No 933 (CA)

Royal Bank of Canada v Welton, [2009] OJ No 4205, 2009 CarswellOnt 6053 (SCJ)

Roy-Sinclair (Syndic de), 2007 QCCS 617

Samra v Brennestuhl, 2017 ONSC 1498 (Div Ct), leave to appeal to SCC refused, [2017] SCCA No 513

Shields v Lancelotte, 2016 ONSC 4433 (Div Ct)

Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1

Tanudjaja v Attorney General (Canada), 2014 ONCA 852, leave to appeal to SCC refused, [2015] SCCA No 39

Taucar v Ontario (Human Rights Tribunal), 2017 ONSC 2604 (Div Ct), leave to appeal to the SCC refused, [2017] SCCA No 401

Wilson v Atomic Energy of Canada Ltd, 2016 SCC 29

Wyllie v Wyllie (1987), 37 DLR (4th) 376, 4 ACWS (3d) 183 (BCSC)

Zhou v Cherishome Living, 2020 ONSC 500 (Div Ct)

Social Benefits Tribunal Decisions

1212-15758 (Re), 2019 ONSBT 820

1304-04164 (Re), 2015 ONSBT 2490

1307-06812 (Re), 2015 ONSBT 2388

1312-12902RR (Re), 2017 ONSBT 1687

1402-01765 (Re), 2017 ONSBT 3366

1402-01765 (Re), 2018 ONSBT 489

1402-01842 (Re), 2017 ONSBT 2250

1402-02043R (Re), 2015 ONSBT 2325

1402-02492 (Re), 2015 ONSBT 5576

1403-02784 (Re), 2015 ONSBT 4792

1404-03788 (Re), 2016 ONSBT 971

1404-04409 (Re), 2015 ONSBT 3806

1405-06041 (Re), 2015 ONSBT 6344

1406-06261 (Re), 2015 ONSBT 6395

1408-08806 (Re), 2016 ONSBT 598

1408-09364 (Re), 2015 ONSBT 5088

1409-09769 (Re), 2017 ONSBT 1182

1410-12252 (Re), 2015 ONSBT 5821

1412-13744 (Re), 2016 ONSBT 4635

1412-13963 (Re), 2018 ONSBT 364

1501-00005 (Re), 2015 ONSBT 5647

1501-00228 (Re), 2016 ONSBT 1019

1501-00396 (Re), 2015 ONSBT 5988

1502-01815 (Re), 2016 ONSBT 881

1504-03288RR (Re), 2018 ONSBT 1113

1506-05797 (Re), 2016 ONSBT 366

1506-06006 (Re), 2016 ONSBT 5089

1506-06244 (Re), 2016 ONSBT 3170

1507-07094 (Re), 2016 ONSBT 3673

1507-07094R (Re), 2017 ONSBT 2588

1508-07792 (Re), 2016 ONSBT 3516

1511-10029 (Re), 2017 ONSBT 3119

1511-10038 (Re), 2017 ONSBT 3085

1511-10141 (Re), 2016 ONSBT 5079

1512-11672R (Re), 2017 ONSBT 4458

1601-00146 (Re), 2016 ONSBT 5339

1601-00294R (Re), 2018 ONSBT 1719

1601-00474 (Re), 2016 ONSBT 4777

1602-01243 (Re), 2017 ONSBT 5481

1602-01419 (Re), 2016 ONSBT 5834

1602-01423 (Re), 2017 ONSBT 2107

1603-01657R (Re), 2018 ONSBT 852

1603-01820 (Re), 2017 ONSBT 3547

1604-02711 (Re), 2017 ONSBT 1477

1606-03867 (Re), 2017 ONSBT 2431

1606-04106 (Re), 2017 ONSBT 2959

1606-04478 (Re), 2017 ONSBT 3872

1607-04556 (Re), 2017 ONSBT 2120

1607-05236 (Re), 2017 ONSBT 3745

1607-05236 (Re), 2018 ONSBT 768

1607-05333 (Re), 2017 ONSBT 1836

1608-05629 (Re), 2017 ONSBT 3867

1608-05793 (Re), 2017 ONSBT 3517

1608-05922 (Re), 2017 ONSBT 4706

1608-05938 (Re), 2017 ONSBT 4070

1609-06411 (Re), 2017 ONSBT 1331

1609-06560 (Re), 2017 ONSBT 1333

1609-06745 (Re), 2017 ONSBT 1733

1609-07071 (Re), 2018 ONSBT 639

1610-07270 (Re), 2017 ONSBT 4565

1610-07319 (Re), 2017 ONSBT 6075

1610-07579 (Re), 2017 ONSBT 4587

1610-07745 (Re), 2017 ONSBT 2481

1611-07950 (Re), 2017 ONSBT 2947

1611-08205 (Re), 2017 ONSBT 6284

1611-08690 (Re), 2018 ONSBT 2576

1611-08690 (Re), 2018 ONSBT 4783

1612-09123 (Re), 2017 ONSBT 4315

1612-09469 (Re), 2017 ONSBT 3737

1701-00513 (Re), 2017 ONSBT 4883

1701-00513 (Re), 2017 ONSBT 5350

1702-01099 (Re), 2017 ONSBT 4332

1702-01113 (Re), 2018 ONSBT 1205

1702-01317 (Re), 2017 ONSBT 4428

1702-01317 (Re), 2017 ONSBT 4428

1702-01668 (Re), 2018 ONSBT 2204

1702-01676 (Re), 2017 ONSBT 4501

1703-01860 (Re), 2018 ONSBT 1647

1703-01860 (Re), 2018 ONSBT 2355

1703-01949 (Re), 2017 ONSBT 5342

1703-02128 (Re), 2018 ONSBT 2874

1703-02211 (Re), 2018 ONSBT 5598

1703-02308 (Re), 2018 ONSBT 2357

1703-02315 (Re), 2017 ONSBT 6392

1704-02853 (Re), 2017 ONSBT 4674

1704-02957 (Re), 2017 ONSBT 6205

1704-03022 (Re), 2017 ONSBT 5519

1704-03035 (Re), 2018 ONSBT 630

1705-03640 (Re), 2018 ONSBT 3945

1705-03640 (Re), 2018 ONSBT 4734

1705-03762 (Re), 2017 ONSBT 5851

1705-03849 (Re), 2018 ONSBT 2146

1705-04067 (Re), 2017 ONSBT 6233

1705-04114 (Re), 2017 ONSBT 6059

1705-04425 (Re), 2018 ONSBT 85

1705-04550 (Re), 2017 ONSBT 6301

1705-04551 (Re), 2018 ONSBT 2225

1705-05222 (Re), 2017 ONSBT 6326

1706-04867 (Re), 2018 ONSBT 890

1706-05023 (Re), 2018 ONSBT 202

1706-05104 (Re), 2018 ONSBT 4282

1707-05605 (Re), 2017 ONSBT 6143

1707-05734 (Re), 2018 ONSBT 1701

1707-06145 (Re), 2018 ONSBT 967

1707-06211 (Re), 2018 ONSBT 832

1707-06223 (Re), 2018 ONSBT 983

1707-06287 (Re), 2018 ONSBT 51

1708-06430 (Re), 2017 ONSBT 6274

1708-06625 (Re), 2018 ONSBT 1203

1709-07502 (Re), 2018 ONSBT 1716

1709-07977 (Re), 2019 ONSBT 9

1711-09155 (Re), 2018 ONSBT 3966

1711-09229 (Re), 2018 ONSBT 2764

1711-09242 (Re), 2018 ONSBT 2638

1711-09393 (Re), 2018 ONSBT 3031

1711-09798 (Re), 2018 ONSBT 4981

1712-10011 (Re), 2018 ONSBT 3123

1712-10271 (Re), 2018 ONSBT 3394

1712-10282 (Re), 2019 ONSBT 717

1712-10308 (Re), 2018 ONSBT 5057

1712-10427 (Re), 2018 ONSBT 3553

1801-00291 (Re), 2018 ONSBT 3683

1802-00966 (Re), 2018 ONSBT 4293

1802-01019 (Re), 2018 ONSBT 4903

1802-01128 (Re), 2018 ONSBT 4020

1802-01285 (Re), 2018 ONSBT 4679

1803-01379 (Re), 2018 ONSBT 5393

1803-01447 (Re), 2019 ONSBT 2645

1803-01682 (Re), 2018 ONSBT 5588

1803-01927 (Re), 2018 ONSBT 5352

1804-02168 (Re), 2019 ONSBT 35

1804-02369 (Re), 2018 ONSBT 5248

1804-02374 (Re), 2018 ONSBT 5047

1806-03654 (Re), 2019 ONSBT 7

1806-04272 (Re), 2019 ONSBT 389

1807-04766 (Re), 2019 ONSBT 994

1807-05066 (Re), 2019 ONSBT 2264

1808-05527 (Re), 2019 ONSBT 1447

1810-06568 (Re), 2019 ONSBT 2043

1810-06627 (Re), 2019 ONSBT 3263

1811-07754 (Re), 2019 ONSBT 2526

1909-06766 (Re), 2019 ONSBT 3802

Human Rights Tribunal Decisions

AB v Joe Singer Shoes Ltd, 2016 HRTO 1083

AB v Joe Singer Shoes Ltd, 2016 HRTO 1105

AB v Western University, 2015 HRTO 354

Ahmed v Extendicare West End Villa, 2016 HRTO 802

Armour v Threshold Homes and Supports Inc, 2019 HRTO 1183

Armstrong v Workplace Safety and Insurance Board, 2016 HRTO 1468

ATA v Houselink Community Homes, 2016 HRTO 1357

Atadero v Shoppers Drug Mart Inc, 2017 HRTO 780

Bassis v Commissionnaires Great Lakes, 2017 HRTO 479

Bilon v Niagara (Regional Municipality) Police Services Board, 2019 HRTO 1628

Biondic v Intact Financial Corp, 2017 HRTO 80

Borja v Bazos, 2016 HRTO 1030

Bryczkowski v Sim & McBurney - Sim Lowman Ashton & McKay LLP, 2016 HRTO 339

CAW - Canada Group of Employees v Presteve Foods Ltd, 2012 HRTO 1365

Coughlin v Brampton (City), 2018 HRTO 1352

Cronier v Securitas Canada Ltd, 2015 HRTO 57

CV v Mount Sinai Hospital, 2015 HRTO 1331

Cybulsky v Hamilton Health Sciences, 2019 HRTO 102

Davidson v Cummer Avenue United Church, 2017 HRTO 1000

DiFlorio v Nails For You, 2017 HRTO 576

Dolinar v University of Waterloo, 2017 HRTO 1671

Dolny v College of Massage Therapists of Ontario, 2016 HRTO 943

Fagan v Toronto Transit Commission, 2017 HRTO 1226

Fagan v Toronto Transit Commission, 2017 HRTO 1323

Fan v Royal Ottawa Health Care Group, 2015 HRTO 1018

Galoglu v A Wesley Paving Ltd, 2015 HRTO 1723

Garisto v Aphria Inc, 2019 HRTO 1477

Gonder v Durham Regional Police Services Board, 2019 HRTO 1371

Hum v Alma Mater Society of Queen's University Inc, 2015 HRTO 1061

Ihasz v Ontario (Minister of Revenue), 2015 HRTO 352

Jenner v Waterloo (Regional Municipality), 2018 HRTO 788

John v 1608271 Ontario Inc (cob Service Ontario 077), 2017 HRTO 1588

John v Ontario (Ministry of Community Safety and Correctional Services), 2017 HRTO 1451

JS v Dufferin-Peel Catholic District School Board, 2018 HRTO 644

Kassir v Del Property Management Ltd, 2017 HRTO 149

Keane v CompuCom Canada Co, 2018 HRTO 32

Kearney v Bramalea Ltd (No 2)(1998), 34 CHRR D/1 (Ont Bd Inq), rev'd on other grounds: *Ontario (Human Rights Commission) v Shelter Corp* (2001), 39 CHRRD/111, 103 ACWS (3d) 324 (Div Ct)

Kelly v CultureLink Settlement Services, 2010 HRTO 977

Knight v Surrey Place Centre, 2019 HRTO 482

Kusinski v Marvin Basar Pharmacy Ltd, 2017 HRTO 1277

Kwan v Ontario (Ministry of Community Safety and Correctional Services), 2016 HRTO 486

Leach v Ontario (Ministry of Community and Social Services), 2017 HRTO 1412

Leach v Ontario (Ministry of Community Safety and Correctional Services), 2018 HRTO 1113

Marsden v Halton Condominium Corp No 41, 2015 HRTO 907

Marsden v Ontario (Minister of Community Safety and Correctional Services), 2011 HRTO 30

Mastromatteo v Kenora (City), 2018 HRTO 42

Matthews v Manufacturers Life Insurance Co, 2016 HRTO 1112

McAllister v Victorian Order of Nurses, 2017 HRTO 1505

McPherson v DeSilva, 2016 HRTO 171

McWilliam v Toronto Police Services Board, 2016 HRTO 1413

Murugesan v CIBC Mortgages Inc, 2015 HRTO 1343

Nahirny v Liquor Control Board of Ontario, 2016 HRTO 648

Nahirny v. Liquor Control Board of Ontario, 2016 HRTO 543

Noor v University of Ottawa, 2018 HRTO 1295

Park v University of Ontario Institute of Technology, 2019 HRTO 1083

Pellerin v Conseil scolaire de district catholique Centre-Sud, 2011 HRTO 1777

Pollock v Wilson, 2017 HRTO 712

Rooks v Park 'N Fly, 2016 HRTO 1604

Rose v Toronto Police Services Board, 2015 HRTO 1716

Royeton v Toronto District School Board, 2017 HRTO 371

Ruffolo v Manulife Financial, 2017 HRTO 282

Schiller v Ontario (Ministry of Natural Resources and Forestry), 2019 HRTO 563

Searle v Peterborough Regional Health Centre, 2019 HRTO 1243

SG v Waterloo Cooperative Preschool Inc, 2018 HRTO 1716

Shackra v Basic Packaging Industries Inc, 2019 HRTO 576

Sismon v Ottawa (City), 2019 HRTO 432

Sokolowska v Nexonia Inc, 2015 HRTO 164

Sprague v Yufest, 2017 HRTO 1147

Stor v Randstad Holding NV, 2015 HRTO 963

T (OP) v Presteve Foods Ltd, 2015 HRTO 675

Tahir v Toronto (City), 2018 HRTO 1841

Taucar v University of Western Ontario, 2015 HRTO 380

Taucar v University of Western Ontario, 2015 HRTO 515

Taylor Estate v Royal Canin Canada Co, 2017 HRTO 1600

UM v York Region District School Board, 2017 HRTO 1718

Vaney v Toronto Police Services Board, 2017 HRTO 89

Wang v Toronto (City), 2019 HRTO 516

Weasner v St. John Ambulance Council of Ontario, 2017 HRTO 1150

Wolfe v Toronto Transit Commission, 2018 HRTO 1791

Worrell v DiPietro's Meat and Groceries, 2018 HRTO 739

Yahya v Sigco Industries Inc, 2015 HRTO 1555

Landlord and Tenant Board Decisions

File No CEL-58530-16-SA, 2016 LNONLTB 1332, 2016 CanLII 72161

File No CEL-62600-16-RV, 2017 LNONLTB 112, 2017 CanLII 28739

File No CEL-80413-18-IN, 2018 LNONLTB 4598, 2018 CanLII 143785

File No CET-76526-18, 2018 LNONLTB 3112, 2018 CanLII 88592

File No EAL-61451-16, 2017 LNONLTB 2602, 2017 CanLII 142939

File No EAL-62570-17, 2018 LNONLTB 2956, 2018 CanLII 86111

File No HOL-00395-16, 2016 LNONLTB 127, 2016 CanLII 37514, upheld on internal review, *File No HOL-00395-16-RV,* 2016 LNONLTB 273, 2016 CanLII 37511

File No HOL-03632-18-RV, 2018 LNONLTB 4257, 2018 CanLII 140407

File No NOL-31086-18, 2018 LNONLTB 4617, 2018 CanLII 143810, upheld on internal review, *File No NOL-31086-18*, 2018 LNONLTB 4616, 2018 CanLII 143784

File No NOT-29533-17-AO, 2017 LNONLTB 2117, 2017 CanLII 93883

File No SOL-53942-14, 2015 LNONLTB 16, 2015 CanLII 2900

File No SOL-57813-15, 2015 LNONLTB 1111, 2015 CanLII 85078

File No SOL-68892-16, 2016 LNONLTB 923, 2016 CanLII 47983

File No SWC-00391-15-AM, 2015 LNONLTB 1150, 2015 CanLII 86445

File No SWL-00134-17, 2017 LNONLTB 194, 2017 CanLII 28797

File No SWL-15072-18-RV, 2018 LNONLTB 2984, 2018 CanLII 86109

File No SWL-18807-18, 2018 LNONLTB 4361, 2018 CanLII 141494

File No SWL-32001-19, 2019 LNONLTB 457, 2019 CanLII 89687

File No SWL-79934-15-RV, 2015 LNONLTB 1191, 2015 CanLII 91976

File No SWT-84446-16, 2016 LNONLTB 810, 2016 CanLII 44317

File No SWT-94108-16, 2016 LNONLTB 2091, 2016 CanLII 100344

File No TEL-51969-14-SA, 2015 LNONLTB 362, 2015 CanLII 111068

File No TEL-70970-16, 2016 LNONLTB 2024, 2016 CanLII 89023

File No TEL-88814-18-RV, 2019 LNONLTB 7, 2019 CanLII 35238

File No TEL-90179-18, 2018 LNONLTB 3524, 2018 CanLII 113123

File No TEL-93663-18-AM, 2018 LNONLTB 3559, 2018 CanLII 113232

File No TET-75706-16-IN, 2017 LNONLTB 2627, 2017 CanLII 145866

File No TET-81423-17, 2017 LNONLTB 1607, 2017 CanLII 70469

File No TNL-90527-17-IN3, 2017 LNONLTB 473, 2017 CanLII 47408

File No TNL-99817-17, 2018 LNONLTB 4575, 2018 CanLII 48257, upheld on internal review, *File No TNL-99817-17*, 2018 LNONLTB 4618, 2018 CanLII 48253

File No TSL-07606-19, 2019 LNONLTB 723, 2019 CanLII 134502, upheld on internal review, File No TSL-07606-19, 2019 LNONLTB 675, 2019 CanLII 134575

File No TSL-22820-11-RV, 2015 LNONLTB 175, 2015 CanLII 15595

File No TSL-56575-14, 2015 LNONLTB 128, 2015 CanLII 9132

File No TSL-60910-15, 2016 LNONLTB 1853, 2016 CanLII 88388

File No TSL-63981-15, 2016 LNONLTB 557, 2016 CanLII 39872

File No TSL-67570-15-RV-IN2, 2016 LNONLTB 1221, 2016 CanLII 71323

File No TSL-67570-15-RV2, 2017 LNONLTB 55 at para 17, 2017 CanLII 9472

File No TSL-67570-15, 2017 LNONLTB 55, 2016 CanLII 39862, upheld on internal review, *File No TSL-67570-15-RV2*, 2017 LNONLTB 55, 2017 CanLII 9472

File No TSL-71184-16-IN2, 2016 LNONLTB 2236, 2016 CanLII 71317

File No TSL-71596-16-SA, 2016 LNONLTB 1004, 2016 CanLII 52810

File No TSL-72414-16-IN, 2017 LNONLTB 409, 2016 CanLII 104353

File No TSL-81945-17, 2017 LNONLTB 285, 2017 CanLII 28770

File No TSL-85905-17, 2017 LNONLTB 2463, 2017 CanLII 142780

File No TSL-88141-17, 2018 LNONLTB 2654, 2018 CanLII 42655

File No TSL-91342-17-IN, 2017 LNONLTB 2671, 2018 CanLII 143783

File No TSL-91342-17, 2018 LNONLTB 4072, 2018 CanLII 120936

File No TSL-93303-18-RV, 2019 LNONLTB 271, 2019 CanLII 87087

File No TSL-99900-18-RV, 2018 LNONLTB 4284, 2018 CanLII 140438

File No TST-07548-19-RV, 2019 LNONLTB 651, 2019 CanLII 134546

File No TST-44900-13, 2018 LNONLTB 2673, 2018 CanLII 42669

File No TST-47443-13-RV, 2016 LNONLTB 603, 2016 CanLII 39772

File No TST-62872-15-IN, 2015 LNONLTB 872, 2015 CanLII 69373

File No TST-69380-15, 2016 LNONLTB 1970, 2016 CanLII 88322

File No TST-71175-16-IN, 2016 LNONLTB 1974, 2016 CanLII 88772

File No TST-92725-18, 2018 LNONLTB 4204, 2018 CanLII 123275

TET-95985-18-RV (Re), 2019 CanLII 87755 (Ont LTB)

TSL-97940-18 (Re), 2019 CanLII 87578 (Ont LTB)

Secondary Material: Articles

Alton, Michelle A, “Rethinking Fairness in Tribunal Adjudication to Best Promote Access to Justice” (2019) 32 Can J Admin L & Prac 151

Buhler, Sarah, "Don't Want to Get Exposed: Law's Violence and Access to Justice" (2017) 26 J L & Soc Pol'y 68

Cartier, Geneviève, “Administrative Discretion and the Spirit of Legality: From Theory to Practice” (2009) 24:3 Can JL & Soc'y 313

Cartier, Geneviève, “Administrative Discretion as Dialogue: A Response to John Willis (or: From Theology to Secularization)” (2005) 55 UTLJ 629

Cover, Robert, “Violence and the Word” (1986) 95 Yale LJ 60

Crenshaw, Kimberlé, “Demarginalizing the Intersection between Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics” (1989) U Chi Legal F 139

Daly, Paul, “The Scope and Meaning of Reasonableness Review” (2015) 52 Alta L Rev 799

Daly, Paul, “The *Vavilov* Framework and the Future of Canadian Administrative Law” (2020) 33:2 Can J Admin L & Prac 111

Dyzenhaus, David & Evan Fox-Decent, “Rethinking the Process/Substance Distinction: *Baker v Canada*” (2001), 51 UTLJ 193

Flaherty, Michelle & Leslie Reaume, “Mediation-Arbitration in Ontario: Labour Relations, Human Rights, and Beyond?” (2017) 30 CJALP 351

Flaherty, Michelle, "Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law" (2015) 38:1 Dal LJ 119

Flaherty, Michelle, “Best Practices in Active Adjudication” (2015) 28 Can J Admin L & Prac 291

Froc, Kerri, “Costs Breakdown: What Mowat Means for Access to Justice in Human Rights Regimes” (2014) 18 CLELJ 253

Gottheil, Michael & Doug Ewart, “Lessons from ELTO: The Potential of Ontario’s Clustering Model to Advance Administrative Justice” (2011) 24 CJALP 161

Gottheil, Michael, “Clustering in Ontario: The DIY Tribunal” (paper delivered at the Canadian Institute for the Administration of Justice Annual Conference, “The Courts and Beyond: The Architecture of Justice in Transition”, 2012) 195, online: <https://ciaj-icaj.ca/en/library/papers-and-articles/annual-conferences/> [unpublished]

Hollander-Blumoff, Rebecca & Tom R Tyler, “Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution” (2011) 1 J Disp Resol 1

Kerr, Don, Tracy Smith-Carrier & Juyan Wang, “From Temporary Financial Assistance to Longer Term Income Support: Probing the Growth in ODSP” (2019) 79 CRSP 11

Kristjanson, Freya & Sharon Naipaul, “Active Adjudication or Entering the Arena: How Much Is Too Much?” (2011) 24 Can J Admin L & Prac 201

Lepofsky, M David & Randal NM Graham, “Universal Design in Legislative Drafting — How to Ensure Legislation is Barrier-Free for People with Disabilities” (2010) 27 NJCL 129

Lepofsky, M David, "The *Charter*'s Guarantee of Equality to People with Disabilities - How Well Is It Working?" (1998) 16 Windsor YB Access Just 155

Liston, Mary, "Expanding the Parameters of Participatory Public Law: A Democratic Right to Public Participation and the State's Duty of Public Consultation" (2017) 63:2 McGill LJ 375

Malhotra, Ravi, “Has the *Charter* Made a Difference for People with Disabilities?: Reflections and Strategies for the 21st Century” (2012) 58 SCLR 273

Minow, Martha, “Interpreting Rights: An Essay for Robert Cover” (1987), 96 Yale LJ 1860

Mosher, Janet E, "Lessons in Access to Justice: Racialized Youths in Ontario's Safe Schools" (2008) 46:4 Osgoode Hall LJ 807

Pottie, Laura & Lorne Sossin, "Demystifying the Boundaries of Public Law: Policy, Discretion, and Social Welfare" (2005), 38:1 UBC L Rev 147

Pratt, Anna & Lorne Sossin, “A Brief Introduction of the Puzzle of Discretion” (2009) 24:3 CJLS 301

Ranalli, Audra & Bruce Ryder, "Undercompensating for Discrimination: An Empirical Study of General Damages Awards Issued by the Human Rights Tribunal of Ontario, 2000-15" (2017) 13 JL & Equality 91

Raso, Jennifer, "Displacement as Regulation: New Regulatory Technologies and Front-Lines Decision-Making in Ontario Works" (2017) 32:1 CJLS 75

Raso, Jennifer, “From Enforcement to Integration: Infusing Administrative Decision-Making with Human Rights Values” (2015) 32 Windsor YB Access to Just 71

Roach, Kent & Lorne Sossin, “Access to Justice and Beyond” (2010) UTLJ 373

Schlag, Pierre J, “Normativity and the Politics of Form” (1991) 139 U PA L Rev 801

Sossin, Lorne & Jamie Baxter, “Ontario’s Administrative Tribunal Clusters: A Glass Half-Full or Half-Empty for Administrative Justice?” (2012) Osgoode Hall Law School Working Paper No 28, online: < https://digitalcommons.osgoode.yorku.ca/all_papers/28/>

Sossin, Lorne & Zimra Yetnikoff, “I Can See Clearly Now: Videoconference Hearings and the Legal Limit on How Tribunals Allocate Resources” (2007), 25 Windsor YB Access to Just 247

Sossin, Lorne, "An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law" (2002) 27:2 Queen's LJ 809

Sossin, Lorne, “Boldly Going Where No Law Has Gone Before: Call Centres, Intake Scripts, Database Fields, and Discretionary Justice in Social Assistance” (2004) 42:3 Osgoode Hall LJ 363

Sossin, Lorne, “From Neutrality to Compassion: the Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion” (2005) 55 UTLJ 427

Sossin, Lorne, “Redistributing Democracy: An Inquiry into Authority, Discretion and the Possibility of Engagement in the Welfare State” (1994) 26:1 Ottawa L Rev 1

Sossin, Lorne, “The Administration and Criminalization of the Homeless: Notes on the Possibilities and Limits of Bureaucratic Engagement” (1996) NYU Rev L & Soc Change 623

Stratas, David, “The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency” (2016) 42:1 Queen’s LJ 27

Taggart, Michael, “Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law” (2005) 43:3 Osgoode Hall LJ 223

Welsh, Nancy A, “Do you Believe in Magic: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation” (2017) 70:3 SMU L Rev 721

Williams, Patricia, “Alchemical Notes: Reconstructing Ideals from Deconstructed Rights” (1987) 22:2 Harv CR-CLL Rev 401

Willis, John, “Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional” (1935) 1 UTLJ 53

Wright, David A, "Implementing the New Ontario Human Rights Code: A Tribunal Perspective" (2014) 18:1 CLELJ 101

Secondary Material: Monographs

Dicey, AV, *An Introduction to the Study of the Law of the Constitution*, 10th ed (London, UK: Macmillan, 1965)

Dyzenhaus, David, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford, UK: Hart Publishing, 1997) 279

Galligan, Denis, *Discretionary Powers* (Oxford: Oxford University Press, 1986)

Goldberg, Suzanne B, "Intersectionality in Theory and Practice" in Emily Grabham, Davina Cooper, Jane Krishnadas & Didi Herman, eds, *Intersectionality and Beyond: Law, Power and the Politics of Location* (Abidingdon: Routledge-Cavendish, 2009) 124

Green, Samantha & Lorne Sossin, "Administrative Justice and Innovation: Beyond the Adversarial/ Inquisitorial Dichotomy" in Laverne Jacobs & Sasha Bagley, eds, *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Surrey, UK: Ashgate, 2013) 71

Hutchinson, Terry, "Doctrinal Research: Researching the Jury" in Dawn Watkins & Mandy Burton, eds, *Research Methods in Law* (New York: Routledge, 2013) 7

Kennedy, Rónán, "Doctrinal Analysis: The Real 'Law in Action'" in Laura Cahillane & Jennifer Schweppe, eds, *Legal Research Methods: Principles and Practicalities* (Dublin: Clarus Press, 2016) 21

Lipsky, Michael, *Street Level Bureaucracy: Dilemmas of the Individual in Public Services* (New York: Russell Sage Foundation, 1980)

Macdonald, Roderick A, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19

Mosher, Janet, "Welfare Reform and the Making of a Model Citizen" in Margot Young *et al*, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 119

Nedelsky, Jennifer & Craig Scott, "Constitutional Dialogue" in Joel Bakan & David Schneiderman, *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) 59

Réaume, Denise, "Dignity, Choice, and Circumstances" in Christopher McCrudden, ed, *Understanding Human Dignity* (Oxford: OUP for The British Academy, 2013) 557

Newspaper Articles and Other News Sources

Abella, Justice Rosalie Silberman, "Our civil justice system needs to be brought into the 21st century" *Globe and Mail* (24 Apr 2020), online: <https://www.theglobeandmail.com/opinion/article-our-civil-justice-system-needs-to-be-brought-into-the-21st-century/>

Arianne Robinson, “How does systemic racism predispose people to COVID-19?” *CBC Radio*, White Coat, Black Art (11 June 2020), online: <https://www.cbc.ca/radio/whitecoat/how-does-systemic-racism-predispose-people-to-covid-19-1.5607371>

Cardoso, Tom, “Ontario Ombudsman launches probe into long wait times at Landlord and Tenant Board”, *Globe and Mail* (9 January 2020), online: <https://www.theglobeandmail.com/canada/article-ontario-ombudsman-launching-investigation-into-long-wait-times-at/>.

Cohen, Martin Regg, “Doug Ford says he wants to fight racial injustice. So why is he undermining tribunals that help do just that?” *Toronto Star* (10 June, 2020), online: <https://www.thestar.com/politics/political-opinion/2020/06/10/doug-ford-says-he-wants-to-fight-racial-injustice-so-why-is-he-undermining-tribunals-that-help-do-just-that.html>

Dabaghi-Pacheco, Omar, “CERB 'a slap in the face' for Ontarians scraping by on disability payments” *CBC News* (3 May 2020), online: <https://www.cbc.ca/news/canada/ottawa/covid19-odsp-wage-benefits-1.5552060>

Gibson, Victoria, “More than 6000 Ontario Tenants Could Face Eviction for Nonpayment of Rent during COVID-19, New Figures Show”, *Toronto Star* (25 July 2020), online: < https://www.thestar.com/news/gta/2020/07/25/more-than-6000-ontario-tenants-could-face-eviction-for-nonpayment-of-rent-during-covid-19-new-figures-show.html>

Lorrigio, Paola, “Delays at Ontario human rights tribunal could undermine cases: lawyers,” *National Post* (11 January 2020), online: <https://nationalpost.com/pmn/news-pmn/canada-news-pmn/delays-at-ontario-human-rights-tribunal-could-undermine-cases-lawyers>

Press, Jordan, “Social Security Tribunal turns to people in the system to help cut wait times”, *National Post* (25 January 2020), online: <https://nationalpost.com/pmn/news-pmn/canada-news-pmn/social-security-tribunal-turns-to-people-in-the-system-to-help-cut-wait-times>

Spurr, Ben, “Surge of complaints prompts Ontario ombudsman to investigate delays at Landlord and Tenant Board”, *Toronto Star* (9 January 2020), online: <https://www.thestar.com/news/gta/2020/01/09/surge-of-complaints-prompts-ontario-ombudsman-to-investigate-delays-at-landlord-and-tenant-board.html>

Additional Sources

Advocacy Centre for Tenants Ontario, “5 Bill 184 Changes to the Law that Tenants Must Know” (27 July 2020), online: <https://www.acto.ca/5-bill-184-changes-to-the-law/>

Advocacy Centre for Tenants Ontario, “Tenant Duty Counsel”, online: <https://www.acto.ca/our-work/tenant-duty-counsel/>

ARCH Disability Law Centre, “Open Letter: Ontario’s COVID-19 Triage Protocol” (8 April, 2020), online: <https://archdisabilitylaw.ca/wp-content/uploads/2020/04/April-8-2020-Open-Letter-Ontarios-COVID-19-Triage-Protocol-PDF.pdf>

British Columbia Civil Liberties Association, West Coast Women’s Legal Education and Action Fund & Pivot Legal Society, “Blueprint for an Inquiry: Learning from the Failures of the Missing Women Commission of Inquiry” (2012), online: <https://bccla.org/wp-content/uploads/2012/11/20121119-Report-Missing-Women-Inquiry.pdf>

Canadian Civil Liberties Association, “Stay Off the Grass: COVID-19 and Law Enforcement in Canada” (June 2020), online: <https://ccla.org/fines-report/>

Codjoe, Esi, “What’s New at the Human Rights Tribunal of Ontario?” (delivered at the Ontario Bar Association, Annual Update on Human Rights Conference, 20 May 2020) [unpublished]

Cohl, Karen and George Thomson, “Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services” (2008), Law Foundation of Ontario, online: <https://lawfoundation.on.ca/download/connecting-across-language-and-distance-2008/>

Democracy Watch v Ontario (Notice of Application), online: < https://democracywatch.ca/wp-content/uploads/FinalNoticeOfApplicOntTribunalConstCaseJuly082020.pdf>

Dodge, Amanda, "Access to Justice Metrics Informed by the Voices of Marginalized Community Members: Themes, Definitions and Recommendations Arising from Community Consultations" (2013) Canadian Bar Association, online: <www.cba.org/CBA/cle/PDF/JUST13_PaperDodge.pdf>

Ellis, Ron, “Tribunal Watch Ontario: New Sheriff in Town” (25 May 2020), online: <https://administrativejusticereform.ca/tribunal-watch-ontario/>

Fair Practices Commission, “2019 Annual Report”, online: <https://fairpractices.on.ca/wp-content/uploads/2020/06/FPC_2019_AR_EN.pdf>

Government of Canada, “One-time payment to persons with disabilities” (updated 5 August 2020), online: < https://www.canada.ca/en/services/benefits/covid19-emergency-benefits/one-time-payment-persons-disabilities.html>.

Government of Canada, “Questions and Answers on the Canada Emergency Response Benefit” (updated 6 July 2020), online: <https://www.canada.ca/en/services/benefits/ei/cerb-application/questions.html>

Government of Ontario, “Emergency Information” (updated 27 July, 2020), online: < https://www.ontario.ca/page/emergency-information#emergencyorders>

Human Rights Legal Support Centre, “Annual Report 2018-19” at 14, online: <https://www.hrlsc.on.ca/en/about-us/reports-and-statistics/annual-reports>

Income Security Advocacy Centre and the Ontario Community Legal Clinic System's Steering Committee on Social Assistance, "Feedback Submission on 'Income Security: A Roadmap for Change' to the Minister of Community and Social Services" (15 December 2017), online: Income Security Advocacy Centre <http://incomesecurity.org/policy-advocacy/our-response-to-a-roadmap-for-change/>

Income Security Advocacy Centre, "Income Security: A Roadmap for Change" (October 2017), online: <http://incomesecurity.org/resources/publications/>

Income Security Advocacy Centre, "OW & ODSP Benefit Rates and the Ontario Child Benefit" (February 2020), online: <http://incomesecurity.org/resources/publications/>

Income Security Advocacy Centre, "Pre-Budget Submission to the Ontario Legislature's Standing Committee on Finance and Economic Affairs and the Ontario Minister of Finance" (January 2019), online: <http://incomesecurity.org/resources/publications/>

Law Commission of Ontario, "A Framework for the Law as it Affects Persons with Disabilities: Final Report" (2012), online: <https://www.lco-cdo.org/en/our-current-projects/the-law-and-persons-with-disabilities/persons-with-disabilities-final-report-september-2012/a-framework-for-the-law-as-it-affects-persons-with-disabilities/>

ODSP Action Coalition, "Dignity, Adequacy, Inclusion: Rethinking the Ontario Disability Support Program, Submission to the Commission for the Review of Social Assistance in Ontario" (29 June 2011), online: <https://www.odspaction.ca/node/157>

Ontario Human Rights Commission, "In the Zone: Housing, Human Rights and Municipal Planning" (2012), online: <http://www.ohrc.on.ca/en/zone-housing-human-rights-and-municipal-planning>

Ontario Human Rights Commission, "Policy on Ableism and Discrimination on the Basis of Disability" (2016), online: <http://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/9-undue-hardship#_edn239>

Ontario Ministry of Children, Community and Social Services, "Ontario Disability Support Program COVID-19 key information" (updated 25 June 2020), online: <https://www.mcss.gov.on.ca/en/mcss/programs/social/odsp/odsp-covid-fact-sheets.aspx>

Paradis, Emily, "Access to Justice: The Case for Ontario Tenants, Final Report of the Tenant Duty Counsel Review" (October 2016) Advocacy Centre for Tenants Ontario, online: <https://www.acto.ca/production/wp-content/uploads/2017/07/TDCP_Report_2016.pdf>

Pinto, Andrew, "Report of the Ontario Human Rights Review 2012" (November 2012), online: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/>

The Truth and Reconciliation Commission of Canada, “Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission” (2015), online: http://nctr.ca/assets/reports/Final%20Reports/Executive_Summary_English_Web.pdf

Tiessen, Kaylie, “Ontario’s Social Assistance Poverty Gap” (2016) Canadian Centre for Policy Alternatives, online: <https://www.policyalternatives.ca/sites/default/files/uploads/publications/Ontario%20Office/2016/05/CCPA%20ON%20Ontario%27s%20social%20assistance%20poverty%20gap.pdf>

Trebilcock, Michael J, *Legal Aid Review* (Toronto: Ministry of the Attorney General, 2008), online: Ministry of the Attorney General, Ontario, <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock>

Tribunal Watch Ontario, “Statement of Concern” (17 May 2020), online: <https://tribunalwatch.ca/statement-of-concern/>

Walkem, Ardith, “Wrapping Our Ways Around Them: Aboriginal Communities and the Child, Family and Community Service Act (CFCSA) Guidebook”, (2015) ShchEma-mee.tkt Project, Nlaka’pamux Nation Tribal Council, online: <https://www.nntc.ca/docs/wowat_bc_cfcsa_1.pdf>