

A MODEL ADMINISTRATIVE JUSTICE ACT

By Ron Ellis

PART I

PURPOSE, INTERPRETATION, SCOPE, APPLICATION

Purpose

1. The purpose of this Act is to ensure:
 - a. that the independence and impartiality of Ontario's adjudicative tribunals and their members are compliant with the common-law requirements of adjudicator independence and impartiality as defined, for greater certainty, by the jurisprudence grounded in the 1985, Supreme Court of Canada decision in *Valente v. The Queen*;
 - b. that the processes pursuant to which Ontario's adjudicative tribunals exercise their adjudicative powers are compliant with the common-law principles of natural justice and procedural fairness;
 - c. that Ontario's adjudicative tribunals exercise their adjudicative functions in as efficient and timely a manner as is reasonably possible; and
 - d. that Ontario's adjudicative tribunals and their members are optimally competent, expert, inclusive, and accessible.

Definitions

2. In this Act,

“adjudicative tribunal” and “tribunal” means an entity or individual person that is not designated as a “court” or “judge” but is authorized by an Ontario statute to exercise an adjudicative function that would otherwise be exercised by a court, but not including entities or individuals commonly known as “arbitrators” whose statutory authority to exercise their adjudicative function is contingent on their being selected for the adjudicative role by agreement of the parties to the dispute.

“Administrative Justice System” and “System” means the part of Ontario's system for the rights-based resolution of disputes that is comprised not of

courts and judges but of tribunals and that may also be known as the “Tribunal Justice System”;

“chair” means the chair of a tribunal and, in the case of a cluster of tribunals, the associate chair of each of the clustered tribunals** and a cluster’s executive chair;

*** EXPLANATORY NOTE: In the case of a cluster of tribunals, it is the intention to move the responsibility for evaluating the performance of members of each of the clustered tribunals and recommending the renewal of their terms from the cluster’s executive chair back to the clustered tribunal’s associate chair.*

“Council” means the independent, non-partisan entity known as the, “Administrative Justice Council” as constituted, structured, organized, funded and administered in accordance with the provisions of Part II of this Act;

“Ministry” means the Ministry of the Attorney General’s Administrative Justice Division.**

*** EXPLANATORY NOTE: This legislation assumes that all adjudicative tribunals will be hosted by the Ministry of the Attorney General with the hosting administered by a specialized Division of that Ministry.*

“member” and “tribunal member” means any individual person employed by a tribunal or appointed to a tribunal position who has statutory authority to exercise the tribunal’s adjudicative powers or any part thereof on a full-time or part-time basis whether serving for a fixed or indeterminate term, including persons appointed to chair positions or to member positions known by different titles such as “vice-chair”;

“selection committee” means a committee, whose composition has been approved by the Council, established for the purpose of assessing the qualifications of candidates for appointment to fill a tribunal member-position vacancy or pending vacancy (including, for greater certainty, candidates for appointment to fill vacancies in chair positions) and recommending to the Ministry the appointment of successful candidates,

Scope and Application

- 3.** Any selection or appointment of a chair or member, or renewal of a term of appointment of a chair or member, or denial of such renewal, or mid-term termination of the term of a chair or member, not made in accordance with the provisions of this Act is of no force or effect.

4. This Act and its provisions shall apply to every tribunal whose adjudicative powers are authorized by a statute enacted by the Legislative Assembly of Ontario and shall not be abrogated abridged infringed or diminished in whole or in part by the provisions of any existing or future Ontario statute or regulation unless the Legislative Assembly of Ontario has declared in an enacted and proclaimed statute that a statute or regulation that applies to a designated tribunal or any component thereof shall apply “notwithstanding The Administrative Justice Act”.
5. Any notwithstanding declaration shall be deemed to have expired on the third anniversary of the proclamation of the statute in which it appears.
6. The consequences of a deemed expiration of a notwithstanding declaration for any tribunal and its members shall be determined by the Council.

PART II

ADMINISTRATIVE JUSTICE COUNCIL

Structure

7. There is hereby constituted an entity to be known as the “Administrative Justice Council” governed by an independent and non-partisan board of directors to be known as the “Board of Governors” comprised of board members appointed to the following defined positions.
 - a. Two “judiciary” positions to be filled by retired judges of the Provincial or Superior Court, selected by the Ministry;
 - b. two “tribunal” positions, to be filled by persons with senior administrative justice adjudicative experience and who are selected by the Society of Ontario Adjudicators and Regulators;
 - c. one “public interest” position to be filled by persons who are not lawyers and who may be reasonably seen as representative of the public interest, selected by the Ministry;
 - d. one “labour” position, to be filled by persons with senior labour movement experience, selected by the Ontario Federation of Labour;
 - e. one “business” position, to be filled by an experienced business person, selected by the Ontario Chamber of Commerce;

- f. one “legal clinic” position to be filled by a person with senior community legal service clinics experience, selected by the Association of Community Legal Clinics of Ontario;
- g. one “lawyer” position to be filled by a person who is a practising member of the bar, selected by the Administrative Law Section of the Ontario Bar Association;
- h. one “academic” position to be filled by a person who is a tenure-stream member of an Ontario law faculty with expertise in administrative law, proposed by the Chair of the Board of Governors and approved by at least six of the other Governors; and
- i. the Chair of the Board of Governors position to be filled by a person proposed by the Ministry and whose appointment has been approved by at least seven of the other members of the Board in a secret ballot.

Administration of Board of Governor Appointments

- 8.** The Ministry shall be responsible for administering the selection of the Board members by the designated organizations and their appointment and, when a designated organization is unwilling or unable to make the designated selection in a timely manner, the other appointed members of the Board shall determine the means by which that vacant position is to be filled.

Term of Board of Governor Appointments

- 9.** To allow for Board continuity the first appointments to the Board of Governor positions other than the Chair position shall be for staggered durations of up to three years as determined by the Ministry followed by second and third renewal appointments of three years each. The first appointment as Chair of the Board shall be for a term of three years renewable three times.
- 10.** Renewal of appointments of Governors shall be made upon the recommendation of the Board Chair, and renewals of the Chair’s appointment upon the recommendation of at least seven of the Governors voting by secret ballot in camera in the absence of the Chair.

Compensation of Governors

- 11.** Members of the Board of Governors including the Chair shall be paid a per diem fee for attendance at meetings and other engagement in the Council’s

business at rates determined by the Board and shall be reimbursed for reasonable travelling expenses.

Meetings

- 12.** The Board of Governors shall meet quarterly or at additional times called by the Board Chair as the Chair deems necessary or upon petition to the Chair by a majority of the Governors

Administration

- 13.** Direction, oversight and management of the day-to-day business of the Council shall be provided by a full-time staff led by a chief executive officer to be known as the President, selected and appointed by the Board.
- 14.** The appointment of a person to be the Council's President shall be proposed by the Board Chair, and approved by at least seven of the Governors, for an indeterminate term at a specified compensation to be adjusted annually. The President may be removed by the Board by the votes of at least seven of the Governors.

Council's General Mandate

- 15.** The Council shall be responsible for maintaining an ongoing, proactive oversight of the structures, operation, administration, hearing processes, procedures and performance of the administrative justice system and its various components for the purpose of identifying any failure to comply with rule-of-law, justice-system principles or to meet optimal standards of competence, expertise, inclusivity, accessibility, efficiency, and timeliness, and for the purpose of advising the Ministry concerning the need for correction or adjustment of discrepancies or short-comings in any aspect of the System or its components that come to its attention and of making a public report of any discrepancies or shortcomings that in its opinion remain unduly persistent.
- 16.** For greater certainty, the Council's mandate shall not include reviews on the merits of any tribunal's adjudicative decision which reviews shall remain within the purview of the Ontario Superior Court of Justice

Adjudicator Training

- 17.** The Council's oversight mandate shall extend to adjudicator training, both in-house, tribunal-run programs and professional programs.

Tribunal's Jurisprudence

- 18.** The Council's oversight mandate shall extend to the quality and accessibility of each tribunal's jurisprudence.

Public Accountability Documents

- 19.** The Council's oversight mandate shall include taking the place of the "responsible minister" in approving each of a tribunal's "public accountability documents" which a tribunal is required to have under sections 3, 4, 5 and 7 of the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009* (other than the "ethics plan" which remains subject to the approval of the Integrity Commissioner) which is to say: the mandate and mission statement, consultation policy, service standard policy, and member accountability framework.

Council's Powers

- 20.** The Council shall have all the powers necessary for or reasonably pertinent to the performance of its general mandate and of the particular functions assigned to it by the provisions of this Act including for greater certainty the power to initiate investigations of issues relevant to its mandate by investigators selected and appointed by it and the power to invest such investigators with the powers to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath or affirmation and to require such witnesses to produce such documents or things as such investigators may consider necessary for their investigations, all in the same manner as a court of record in civil proceedings, and to accept such oral or written evidence as such investigator considers proper whether or not it would be admissible in a court.
- 21.** Government-initiated episodic or periodic reviews of a tribunal's or a member's performance shall require the Council's prior approval of the government's choice of reviewer and of the extent and nature of the reviewer's terms of reference.

Advance Notice of Proposed Changes

- 22.** The Ministry shall provide the Council with advance notice of proposed, new or significantly changed legislation or regulations or Management Board Directives relevant to the structures, hearing processes, operation or administration of the Administrative Justice System or any of its components and the Council shall provide the Ministry with its written opinion concerning the compliance and compatibility of the proposed legislation or

regulation or directives with the rule-of-law, justice system principles and with System standards.

Inalienable Funding

23. In each fiscal year, the government shall provide the Council with inalienable funding comprised of an annual base amount of funding of at least xxxxxxxx dollars adjusted annually for cost-of-living increases plus xx% of the total budgets for the previous year of all Ontario's tribunals and regulatory agencies, minus any unallocated surplus from the previous year.

Budgets

24. The Council's expenditure of its funds will accord with annual budgets developed by the Council in consultation with the Ministry and approved by the Board of Governors with a vote of at least seven of the members of the Board.

Mandate and Powers After a Notwithstanding Declaration

25. The Council's oversight mandate and its powers of review, investigation, advice, and reporting, including public reporting, shall extend to tribunals or members whose adjudicative powers are derived from statutes the legislature may have declared to apply notwithstanding this Administrative Justice Act.

PART III

SELECTION AND APPOINTMENT OF MEMBERS

Recruitment Plan

26. When the government proposes to appoint a member or members to fill positions in a newly created tribunal or vacancies in a tribunal's existing roster of members or to expand that roster, including, for greater certainty, vacancies in a chair position, the Ministry shall first apply to the Council for approval of a plan, to be known as a "recruitment plan", specifying:

- a. the position or positions to be filled;
- b. the minimum qualifications that successful candidates will require for each position;
- c. the steps in the selection process that will be followed in determining the best qualified candidate for each position;
- d. the composition of the proposed selection committee; and

- e. the plan for attracting qualified candidates through the publication of timely recruiting notices in the range of media best calculated to attract the interest of highly qualified and inclusive candidates.

27. The recruitment plan as approved by the Council shall be administered by the selection committee's designated chair with the assistance of tribunal staff subject to the Council's supervision.

Selection Committee Mandates

28. Selection committees shall recommend to the Ministry the appointment of the one candidate it has determined to be the most qualified candidate for each of the vacancies. Candidates shall not be advised of their selection until the government has accepted the committee's recommendation.

Government's Options

29. Upon receipt of a selection committee's recommendation by the Ministry, the government shall have three options:

- a. to forthwith accept the recommendation and authorise the selection committee to so advise the successful candidate and, upon the candidate's acceptance of the appointment, forthwith make the appointment;
- b. to forthwith defer the appointment and ask the selection committee to reconsider its recommendation;
- c. to forthwith reject the recommendation.

30. If the government chooses option **b** or **c**, the Ministry shall forthwith provide the selection committee and the Council with the government's reasons for that decision in writing. The selection committee and the Council shall hold such reasons and the name of the candidate in confidence.

Selection Committee's Response

31. Upon receipt of a government's request to reconsider a recommendation, the selection committee shall reconsider its recommendation in light of the government's reasons and either withdraw its recommendation and recommend the appointment of another candidate or affirm its original recommendation and provide the Ministry with reasons that address the government's reasons. The latter reasons and the name of the candidate in contention shall be held in confidence by the committee members and by the Ministry and government.

32. Upon receipt of a government’s final rejection of a recommendation, the selection committee shall recommend the appointment of another candidate.

Appointments Not Partisan or Political

33. Appointments of tribunal members by the government pursuant to the provisions of this Act are professional, career appointments of individuals who have participated in a competitive, merit-based, qualifications-driven selection process and they are not and shall not be considered to be – or known as – partisan or political appointments. Accordingly, appointments and the renewals of terms of appointments shall be made promptly by the government in accordance with the provisions of this Act and there shall be no further occasion for traditional, so-called “curtesy” delays in the appointment or renewal processes because of a pending election in which the government of the day may be changed. **

*** EXPLANATORY NOTE: It is awkward to include this provision as part of the model Act but the traditional curtesy-pauses in tribunal appointments and renewals in the three months leading up to an election is so ingrained a tradition and so inconsistent with the concept of professional, non partisan appointments, that its inappropriateness needed to be made clear. The government’s obligations to appoint and renew members in accordance with these provisions does not depend on which political party or parties happens to have formed the government of the day at the time appointments or renewals fall to be made.*

PART IV

MEMBERS’ TERMS AND RENEWALS**

*** EXPLANATORY NOTE: In the administrative justice literature the appointments of incumbent members to further terms in the ordinary course are sometimes referred to as “reappointments” and sometimes as “renewals”. This model Act has settled on “renewals” as the more apt reflection of the nature of the transaction.*

Terms

34. For successful candidates for member positions, other than chair positions, their appointments shall be for the following terms:

- a. For candidates with less than two years previous experience in the exercise of an adjudicative function, their first appointment as a tribunal member shall be for a term of two years, to be renewed contingent only upon the recommendation of their chair as approved by the Council, for a further three years and then upon the same

contingency for another five years and then for such further terms within or beyond the limits of total service time that may be established by the Council for the members of that tribunal, as the chair may recommend and the Council approve.

- b. For candidates with two years or more experience in the exercise of an adjudicative function, their first appointment as a tribunal member shall be for a term of three years to be renewed, contingent only upon the recommendation of their chair as approved by the Council, for a further three years and then, upon the same contingency, for another five years and then for such further terms within or beyond the limits of total service time established by the Council for the members of that tribunal, as the chair may recommend and the Council approve.
- 35.** For greater certainty, in the case of members of clustered tribunals it is the associate chair of each tribunal who shall make the recommendations concerning the renewal of members' terms, not the executive chair.
- 36.** For candidates for chair positions, their first appointment shall be for a five-year term, renewed for a second term of five years and then for a final term of a further five years with each renewal contingent only upon the Council's recommendation based on a Council-directed merit-based evaluation of the chair's performance.**

*** EXPLANATORY NOTE: The intention is to extend the total number of years that one individual can serve as the chair of one tribunal (including, to be clear, as the associate chair of a clustered tribunal – see the definition of “chair”) to 15 years contingent only on merit-based, non-partisan performance reviews at the end of the first and second five-year terms, thus making the positions attractive to confident professionals with senior qualifications and motivating the government and selection committees to fill chair positions with particular care.*

Acting Chairs

- 37.** In the event of an unexpected vacancy in a chair position, the Council shall select and the government promptly appoint an acting chair for one term of not more than six months to serve until the recruitment and appointment of a new chair can be completed.

Basis for Renewal Recommendations

- 38.** Each term-renewal recommendation for incumbent members other than chairs shall be based on merit-based performance appraisals by the chair of the member's tribunal the nature of which are approved in advance by the Council.
- 39.** The recommendation shall be made when the appraisal satisfies the appraiser that the member's performance meets the tribunal's standards and accords with the tribunal's reasonable needs and expectations.

Delayed Renewals

- 40.** When the renewal of a member's or chair's term of appointment has been recommended by their chair or, in the case of chairs, by the Council, but the renewal proceedings have not been completed before the member's or chair's current term expires, that member's or chair's appointment shall be deemed to have been extended until the renewal proceedings are completed.

Non-Renewals for Reasons Short of Cause – Notice and Compensation

- 41.** In the event that a chair concludes that a member's performance will not justify a term-renewal recommendation for reasons that do not rise to the level of just cause for dismissal, the chair shall give the member confidential notice of that conclusion at least six months before the expiration of the member's current term and at the time of that notice cease assigning new cases to that member.
- 42.** Upon receipt of such a notice, the member may choose to resign or may apply in confidence to the Council for a confidential review by the Council of the chair's grounds for refusing a renewal recommendation and upon completion of that review the Council may order such disposition of the matter as it sees fit.
- 43.** If, as a result of the chair's inability to recommend renewal of the member's term for reasons not amounting to just cause, the member resigns or departs from the tribunal upon or before the expiration of the member's current term, the member shall be entitled to a separation package equal to four months of compensation and four months of continued benefits.
- 44.** Except as otherwise directed by the chair, members who receive notice of a pending non-renewal and as a result leave the tribunal shall be authorized and

required to complete their outstanding decisions and will be compensated for that work at the per diem rate approved for part-time members.

Discharge for Cause

- 45.** In the event that a chair finds grounds that in the chair's opinion do rise to the level of just cause for dismissal of a member without notice, the chair shall halt the continuation of cases by that member and advise the Council in confidence of those findings. Upon receipt of such advice the Council shall with notice to the member arrange for a confidential review of the tribunal chair's findings by an independent investigator and upon receipt of that investigator's report shall make such disposition of the matter as the Council may decide.
- 46.** In the event that the Council becomes aware that there may be grounds amounting to just cause for the dismissal without notice of a chair, the Council shall by confidential communication to the chair and the Ministry suspend the chair's appointment with continuing compensation and benefits, and assign a person chosen by it to assume the chair's responsibilities while it investigates the alleged grounds. Upon receipt of the investigator's report, the Council may reinstate the chair or proceed with a dismissal-proceeding which shall provide the impugned chair with a fair hearing before an independent adjudicator.

PART V

ROSTER REDUCTIONS **

*** EXPLANATORY NOTE: To maintain the integrity of a tribunal the government of the day must not be free to hinder its operations by merely failing to fill vacancies in its roster of adjudicators. On the other hand, the government needs to be able to reduce rosters in response to structural reductions in caseload pressures. This Part V addresses both of those concerns.*

Once Filled, Positions Deemed Permanent

- 47.** Once a tribunal position is established through the appointment of an individual as a member of that tribunal that position shall be deemed a permanent roster position and, unless and until it is designated to be a redundant position in accordance with the procedures specified in this Part, it shall continue to be filled through the renewals of that member's terms or through the filling of a vacancy in that position by the selection and appointment of another individual all in accordance with the provisions of this Act.

Redundant Positions

- 48.** When the Ministry concludes that a tribunal may have a larger roster of members than it needs in order to deal in a timely fashion with the flow of cases it can reasonably expect in the foreseeable future, it shall in confidence, but in consultation with the tribunal's chair, develop a roster-reduction proposal specifying:
- a. The facts and analysis on which the caseload projections and tribunal production levels are based;
 - b. the number of positions to be declared redundant;
 - c. the protocol for identifying the positions that are to be declared redundant including the members whose expected term renewals may have to be denied in support of the plan, which protocol maximizes fairness for those involved while minimizing the impact on the tribunal's capacity going forward;
 - d. the notice and compensation package for any members who must be effectively "laid off" and the plan for re-engaging them elsewhere in the System where possible; and
 - e. the strategy for managing the public announcement of the plan.
- 49.** The Ministry will share the proposed roster reduction plan in confidence with the Council who, after consultation in confidence with the tribunal's chair, shall give the Ministry its opinion of the plan and after considering that opinion the Ministry will make such adjustments, if any, as in its opinion are warranted in light of that opinion and may then proceed with the plan as adjusted.
- 50.** Members whose positions are declared redundant and who leave the System shall be entitled to a compensation package of four months salary and four months continued benefits from the expiry date of their last term.

PART VI

MEMBERS' COMPENSATION

- 51.** The full-time members' salaries and benefits and the part-time members' per-diem rates shall be established and adjusted annually in accordance with the system for determining compensation levels for members of the Ontario public service for which purpose they shall be deemed to be members of the public service. In compensation-setting and adjustment proceedings the

Council shall be deemed have the standing of the members' public-service employer.

PART VII

TRANSITION

Adjustment of Terms

- 52.** On the date of proclamation of this Act, the terms of appointment of incumbent tribunal members (for greater certainty including tribunal executive chairs, chairs, and associate chairs) whose existing terms are set to expire within less than 24 months of the proclamation date may have their terms extended to such dates as the Council may decide.
- 53.** On the date of proclamation of this Act, the terms of appointment of incumbent tribunal members (for greater certainty including tribunal executive chairs, chairs, and associate chairs) whose existing terms are set to expire within more than 24 months of the proclamation date, may have their terms shortened to such dates as the Council may decide.

User Satisfaction Surveys

- 54.** Three months after the proclamation date, the Council shall launch user satisfaction surveys designed by it of individuals who were parties to the disputes that each tribunal had resolved by adjudicative decisions issued during the 12 months preceding the proclamation date and of advocates who may have represented the parties in those proceedings before the tribunal.
- 55.** For the purpose of the survey, each tribunal shall divulge to the Council the names and contact information of the parties to the proceedings leading to the decisions in question and their advocates, if any. The Council shall hold that information in confidence, and use it only for the purposes of the surveys.
- 56.** In the administration of these surveys, the Council will be free to prioritize the order of tribunals to be surveyed based on the Council's judgement as to the relative degree that a tribunal's typical user communities may be said to include a disadvantaged community and the relative degree of life-impacting consequences for users typically at stake in the decisions of the tribunal.
- 57.** The results of the surveys shall be reported to the Council and to the chairs of the tribunals surveyed but shall not be made public.

Interim Acting Appointments

58. During the transition period – the 24 months following the Act’s proclamation date – the Council may propose and the government shall promptly appoint individuals to member or chair positions in an acting capacity for terms of not more than one year as needed to fill temporary vacancies.

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