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Article

The Provincial Auditor and the Administrative Justice System [a1]

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EXPLANATION

In 2007, the reports of the Ontario Provincial Auditor on its 'value for money' audits of the Ontario Disability Support Program (ODSP) came to the attention of the Ontario Administrative Justice Working Group. The reports, prepared in 2004 and 2006, cast reflections on the role and efficacy of the Social Benefits Tribunal as the adjudicative body hearing ODSP eligibility appeals. The reports raised concerns about apparent shortcomings in the Provincial Auditor's understanding of the pertinent administrative justice context in which a value for money audit of a statutory adjudicative process should be conducted. The Group wrote this commentary respecting these concerns, which it sent to the Auditor in March 2007.

Although the Auditor did not respond to the commentary, the issues that it raised remain relevant to the administrative justice community generally--both in Ontario and across the country--and to provincial or federal auditors who may have occasion to be involved with value for money audits of adjudication-based programs.

The commentary deals with issues of adjudicative independence and auditor access, the relationship of an adjudicative tribunal to its host ministry, the differences between first-decider decisions and de novo appeals from those decisions (which differences typically produce success rates on appeal that an auditor may find surprising), and the fact--uncomfortable from an auditor's perspective--that the law requires benefit adjudicators to deal only in probabilities, not certainties ***238** *nor even near certainties.*

Since this commentary was accepted for publication, Ontario has announced that the Ontario Social Benefits Tribunal will be "clustered" with a number of other tribunals and transferred from the agency portfolio of the Ministry of Community and Social Services to the Ministry of

the Attorney General. This new arrangement will address one of the concerns raised in this commentary as an issue missed by the audit reports--the conflicts inherent in the relationship of the Social Benefits Tribunal with the Ministry of Community and Social Services. Nonetheless, the issue of conflict or potential conflict between an adjudicative tribunal and its host ministry is one that remains relevant to the administrative justice sector in Ontario and elsewhere in Canada.

COMMENTARY

Preface

This paper has been written in response to a concern amongst members of the Administrative Justice Working Group (the "Group") about the statutory role of a provincial auditor in value-for-money audits of adjudicative functions. The Group's interest in this issue arises particularly from the Ontario Provincial Auditor's reports of his value-for money-audit of the Ontario Disability Support Program conducted initially in 2004, with a follow-up audit in 2006 (the "ODSP" Audit Reports). [1]

1. INTRODUCTION: WHAT IS THE CENTRAL ISSUE OF CONCERN?

In the Group's view, the main concern is that the Audit Reports may be seen as evidencing a failure on the part of the Provincial Auditor to appreciate the norms of structural independence which properly govern the following relationships that are at play in the ODSP regime:

- the relationship between an adjudicative body and a ministry that appears as a party before it;

- the relationship between an adjudicative tribunal and the ministry to which it reports; and

- the relationship between an adjudicative tribunal and the first-level government decision-maker whose decisions are reviewed by the tribunal.

Simply put, an adjudicative agency is required by administrative law principles, as enforced by reviewing courts, to maintain independence in each of these relationships. This is particularly important in the ODSP regime because the Ministry of Community and Social Services (the

Ministry) has a number of conflicting roles in relation to the Social Benefits Tribunal (the Tribunal). The Ministry is a ***239** party to every ODSP appeal before the Tribunal. The Disability Adjudication Unit (DAU) within the Ministry is the first-level, decision-making body over which the Tribunal has reviewing authority. The Tribunal is legislatively required to conduct an independent review of DAU decisions, notwithstanding the fact that the DAU is part of the same Ministry that determines the Tribunal budget; that the appeal decisions of the Tribunal directly affect the cost of delivering the Ministry program; that the Tribunal reports to the same Minister that is responsible for the DAU; and that the Ministry has lead responsibility at Cabinet over the appointment and reappointment of the Tribunal Chair and members.

The need to respect the norms of adjudicative independence is particularly critical in the case of the ODSP regime because the overall structure is already compromised by that unusually complex set of relationships.[2] The Audit Reports do not appear to demonstrate an appropriate appreciation of this very key issue of adjudicative independence. This failing results in a number of apparent misappre-hensions which threaten to undermine the validity of the audit conclusions. The assumptions and the recommendations in the Audit Reports are potentially very troubling from a systemic perspective. If this approach were applied more broadly in audits of adjudicative functions, it could have the potential to undermine the integrity of Ontario's administrative justice system.

The passages from the Audit Reports that have triggered the concern are set out in the attached Appendix.

2. DEFINING THE PROBLEM: HIGH SUCCESS RATE IN ODSP APPEALS

These Audit Reports disclose that, since 2004, the Provincial Auditor has had a serious concern about the high percentage of cases in which initial negative eligibility determinations by the DAU have been overturned on appeal to the Tribunal. Indisputably, the reported 80 per cent success rate on appeals would seem to be indicative of a serious systemic problem.

That success rate needs, however, to be understood in context. Appeals to the Social Benefits Tribunal are appeals "de *novo*", which is to say they are appeals in which the issues, both factual and medical issues and legal issues, are re-tried, from, as it were, the beginning, in a full hearing. Success rates of *de novo* appeals from refusal decisions in any benefit entitlement regime may normally be expected to be high even in a system that is running well. Given the volume of applications, ***240** Ministry officials making initial benefits determinations cannot devote the time and care to the adjudicative function that a tribunal is required to devote, and a reviewing tribunal will often have the advantage of submissions and evidence prepared and presented by experienced advocates representing applicants on an appeal. Moreover, by the time a disability case is heard on appeal, there will often be more and better medical evidence available so that the appeal tribunal may not be looking at the same case as the one that was initially denied.

Also, in a system in which only the rejections of eligibility can be appealed, it is natural for front-line decision-makers to resolve doubts by denying the application, leaving it to the appeal tribunal to give the marginal cases the greater attention required.

A principal reason why our social benefit legislation typically provides for an appeal *de novo* to an independent tribunal is to allow the large volume of applications at the entry level to be processed quickly through a procedure which, in the interests of expediency, must be allowed to cut some adjudicative corners. The cutting of those corners is legitimized from a justice perspective by the right of an unsuccessful applicant to a full review of his or her application by an independent, experienced tribunal after a fair hearing held in conformity with the principles of natural justice.

But on any theory concerning the role of benefit appeals tribunals, an 80 per cent success rate is obviously too high. The question is: did the ODSP audit ask the right questions in considering the unwarranted level of appeal success?

3. WHY DOES THE AUDITOR ASSUME THAT THE TRIBUNAL IS AT FAULT?

There can be, obviously, more than one possible explanation for the inordinately high turnover rate on appeals: the Tribunal may be doing something wrong, or the DAU may be doing something wrong, or both the Tribunal and the DAU may each be doing something wrong; or there may be flaws in the legislative design of the eligibility criteria that are driving the disparities of view between the DAU and the Tribunal.

The Audit Reports indicate very clearly, however, that the Provincial Auditor is of the view that the problem lies with the Tribunal. For example, in the passage quoted in the Appendix from the "Overall Audit Conclusions" section of the 2004 report, the Auditor says that "although" the initial determinations in the DAU are done by a qualified health practitioner, 80 per cent are overturned by the Tribunal, and then he notes, parenthetically, by way of an explanation, that the Tribunal consists "primarily of lay representatives". The Auditor thereby leaves the clear impression that he thinks that the initial determinations by the DAU are intrinsically more likely to be reliable than the Tribunal determinations because the DAU determinations are made by health practitioners and not lay representatives. As discussed below, this may not be a valid basis for doubting the reliability of the Tribunal determination process as compared to that of the DAU.

4. TRIBUNAL DECIDES LEGAL QUESTIONS, NOT MEDICAL QUESTIONS

The question of eligibility for a disability benefit is a legal question, not a ***241** medical question. It falls to be determined by a process of adjudication in which the adjudicator makes findings of fact based on medical and other evidence and then applies the law to those facts. In Canada's legal system, it is, in point of fact, almost always lay adjudicators--that is, adjudicators without medical or health qualifications-- who perform this kind of function.

This is true, for instance, with respect to the determination of workplace health and safety benefits, of Canada Pension disability benefits, of the amount of personal injury damages caused by motor vehicle accidents, and, of course, in all civil law suits, where medical issues are routinely decided either by lay juries or lay judges. And, indeed, it is generally believed that the adjudication of issues of eligibility for disability benefits is better done by adjudicators who do not have medical or health qualifications, as the latter are not tempted to override or interpret the actual medical evidence on the basis of their own, privately held, medical views.

5. SIGNIFICANCE OF TRIBUNAL'S REFUSAL TO MEET WITH PROVINCIAL AUDITOR

The Auditor's concern with the Tribunal's work is also evident in the 2004 Audit Report's recording of the “unwillingness” of the Chair of the Tribunal and also of “other tribunal members” to meet with the Auditor. Unfortunately, the fact that the Report offers no explanation for that unwillingness appears to suggest that the Tribunal may have something to hide. Although there is no public information available as to why the Tribunal Chair declined to meet with the Auditor, one can readily surmise that the reason would have related to concern about protecting the Tribunal's independence from government. The Audit Report's recording of the Chair's unwillingness to meet, while failing to consider the reasonableness of the refusal, suggests a lack of appreciation of the issue at stake--that is, tribunal independence. From an administrative justice perspective, this is quite concerning, coming, as it does, from so influential a source as the Provincial Auditor.

The Audit Report's reference to the fact that the “other tribunal members” were also unwilling to meet is equally troubling. Members of any tribunal work under the leadership of the Chair and would have no authority to speak for the tribunal in a meeting with the Auditor. Thus, the statement that none of the members would meet with the Auditor appears to be an unwarranted criticism that reflects a general lack of appreciation for the appropriate functioning of an independent adjudicative tribunal, particularly in the context of a review by a provincial auditor. The difficulty arises most acutely because the intended scope of the value-for-money audit in this case apparently included the Auditor's assessment of the quality of the tribunal's adjudicative decisions.

6. QUALITY OF TRIBUNAL DECISIONS IS PROPERLY REVIEWED BY THE COURTS

There is, of course, a legitimate public interest in having mechanisms in place to objectively assess the quality of an administrative tribunal's decisions. A tribunal that makes bad or unjustifiable decisions is not only a danger to the program at issue, but also to the interests of the parties who appear before it and, as well, to the reputation of the administrative justice system generally. But the legal system does provide a considerable degree of protection against bad decision-making by a tribunal. ***242** There is a statutory right of appeal from the Social Benefits Tribunal's decisions

on legal issues, and there is also the process of judicial review in which a court, if asked, will review the merits of any tribunal decision against an appropriate standard of review.

The Audit Reports make no mention of the frequency with which the Ministry challenges Tribunal decisions through the exercise of its legal rights of review, or of how the Courts have regarded the quality of the decision-making evidenced in the Tribunal cases brought to it for review. This omission is troubling because it is information that would have provided objective evidence as to the general quality of Tribunal decisions and, being public information, it would have been readily available to the Auditor.

7. CALL FOR FORMAL INVESTIGATION IS INAPPROPRIATE

Instead of examining the Tribunal record on court appeals and judicial reviews, both Audit Reports criticize the Ministry for the fact that "no formal investigation has been done into the reasons" for the high overturn rate. Since the reports infer that the Auditor has concluded that the unwarranted level of appeal success is most likely tied to the quality of decisions at the Tribunal, as opposed to the DAU, the reports appear to be calling for an investigation of the Tribunal and the quality of its decision-making.

A call by a provincial auditor for a formal investigation of the quality of decision-making by an administrative justice tribunal raises important questions of principle. This is particularly true in this case because the assumption appears to be that the investigation would be conducted by the same ministry--the Ministry--that is a party to the tribunal's hearings and whose decisions the tribunal reviews. What would such a "formal investigation" of an independent tribunal properly entail-- who exactly would do it, what would be the investigator's terms of reference, and how would the investigation be structured and performed so as not to be incompatible with the Tribunal independence? There is also the question of why the Provincial Auditor would recommend such an investigation as an alternative to the Ministry exercising its legal right to have the courts review the quality of Tribunal decisions in the ordinary course.

8. HIGH TURNOVER RATE MAY RESULT FROM UNSUPPORTABLE DECISIONS BY THE DISABILITY ADJUDICATION UNIT

The Audit Reports also do not indicate that the Auditor has considered the possibility that the cause of the high overturn rate might be found in whole or in part in the quality of first level decision-making by the DAU. This oversight is surprising given that there are many factors that would support a conclusion that the Tribunal is often in a better position to make a "correct" assessment of eligibility than the DAU. These factors include: a fuller and more recent evidentiary record; an oral hearing in which evidence can be presented and tested by questioning; and legal representation of the applicant. These factors explain why, in general, a high overturn rate on appeal is often evidence of problems affecting the quality of the decision-making at the lower level. In the case of ODSP appeals, even the inevitable passage of time between the DAU decision and the Tribunal hearing

would ***243** normally be expected to support a fuller medical picture and a clearer assessment of on-going disability by the Tribunal.

Also, the quality of DAU decision-making has been subject to public criticism, most notably in a 2003 report published by the Income Security Advocacy Centre (ISAC), a Legal Aid Ontario clinic that works with the over 50 provincial legal clinics that litigate ODSP cases before the DAU, the Social Benefits Tribunal and the courts. The ISAC report, "Denial by Design", identified a number of apparent flaws in the DAU decision-making process that may be contributing to the high turnover rate on appeal.

9. NEED TO ENSURE APPLICATION OF LEGALLY CORRECT STANDARD OF PROOF

One possible problem with DAU decision-making that emerges from the Audit Reports relates to the standard of proof. The Auditor urges a strict standard of proof by setting audit objectives in the 2004 Audit Report which include assessing whether "the Ministry's policies and procedures were adequate to *ensure* that *only* eligible individuals received financial assistance ...". The Audit *Conclusions* in the 2004 Report included the following: "the Ministry's procedures were still not adequate to *ensure* that *only* eligible individuals receive financial assistance ...". (Emphasis added.) The latter conclusion was quoted again in the 2006 Report.

This raises a question that can be addressed either in policy terms or in technical legal terms. From a policy perspective, it would have been possible for the Auditor to ask for a different kind of assurance. He could, for instance, have asked for an assurance that the the Ministry procedures were adequate to *ensure* that no person who is eligible for the assistance *failed* to receive it. Defining the standard of performance that way would charge the DAU with a responsibility different in kind from that contemplated by the "ensure-that-only" wording and could significantly change the assessment of its initial decision-making function. What is the analysis that led to the choice of the first way of stating the expectation rather than the second? May the Provincial Auditor be testing for a value ("ensure only eligible applicants receive assistance") that may undercut the overall goal of the legislative scheme-- presumably to provide benefits to qualifying disabled applicants?

The same, or at least a similar, question can be put in technical legal terms. When the Tribunal is considering a case on appeal, the law requires it to decide factual issues, including medical issues, by assessing the evidence against a "balance of probabilities" standard of proof--the standard that invariably applies to any adjudication of rights outside of the criminal sphere. But the standard of proof invoked by the words "to *ensure* that *only* eligible individuals receive financial assistance" would seem more akin to the criminal law standard of "beyond a reasonable doubt". If the Ministry has directed the DAU to exercise its mandate so as to *ensure* that *only* those who are eligible receive assistance, the DAU may well be turning down applicants unless their eligibility is clear

beyond any reasonable doubt, thus applying a criminal law standard of proof which the Tribunal must automatically reject on appeal. If there is in fact a stricter standard of proof being applied by the DAU than what the law requires the Tribunal to apply, that difference would by itself go some way to explaining the inordinate percentage of overturns on appeal.

A provincial auditor doing a value for money audit of a ministry adjudication ***244** function should be clear about the standard of proof that he or she expects to be applied in that function. Unlike auditors, adjudicators do not deal in certainties, and no assessment of the quality or reliability of an adjudicator's decision-making will be valid if it does not factor in the standard of proof. No adjudicator doing his or her job can *ensure* that *only* those eligible are granted financial assistance. The reality is that, in applying the balance of probabilities standard of proof appropriately, an adjudicator can only *ensure* that *most* of the applicants granted financial assistance were in fact--if the truth could ever be actually known--eligible for that assistance. The legal duty of an adjudicative tribunal is to grant eligibility if, on the evidence before it, it is more likely than not that the applicant is eligible.

10. MEETINGS BETWEEN DAU AND THE TRIBUNAL ARE PROBLEMATIC

Finally, there is evidence in the reports that the Auditor is not sensitive to the norms of structural independence that ought to govern the relationship between an adjudicative tribunal and its governing ministry. The 2006 Report notes that the Ministry informed the Auditor that "monthly meetings between the Disability Application Unit and the Social Benefits Tribunal began in July 2005". Since it is the decisions of the DAU that the Social Benefits Tribunal is charged with reviewing, and since from the Tribunal perspective the DAU is, effectively, the same Ministry that determines the Tribunal budget, and largely decides whether the Tribunal Chair and members will be re-appointed, such meetings and their implications for the independence of Tribunal decision-making are exceedingly problematic. And yet, in this instance, the Auditor appears to be encouraging these monthly meetings, observing that notwithstanding those meetings, the overturn rate continued to be high. In fact, the Auditor notes, with evident approval, that the Ministry has indicated that "it would continue to work with the Social Benefit Tribunal to determine the reasons for the high overturn rate".

11. CONCLUSION

It will never be possible to ensure that the Ontario adjudicative justice system is administered appropriately, in conformity with the principles of natural justice and procedural fairness, if the Provincial Auditor, in the value-for-money audits of adjudicative functions, is not assiduous in respecting the foundational principle of adjudicative independence. Moreover, the criteria of "value" that a Provincial Auditor should consider in any value-for-money audit of an adjudicative function must include an appreciation of the legal context, including the overall policy goal of the legislative scheme at issue, and the operative adjudicative principles which circumscribe tribunal

decision-making including standard of proof, standard of judicial or court review, and reasonable apprehension of bias.

The 2004/2006 Audit Reports appear to evidence a failure to acknowledge the important legal context in which adjudicative agencies operate, as well as a failure to respect the fundamental principle of adjudicative independence. It is reasonable to assume that this failure was not idiosyncratic to the ODSP audits but is rather reflective of the approach that the Ontario Provincial Auditor can be expected to take in reviewing any adjudicative function. This commentary calls for an urgent reconsideration of this approach.

*245 APPENDIX

The 2004 Auditor's Report[3]

Audit Objectives and Scope

Our audit objectives for the Ontario Disability Support Program (ODSP) were to assess whether:
• *Ministry policies and procedures were adequate to ensure that only eligible individuals received financial assistance* and that any financial assistance provided was in the correct amount; and

• the Ministry's recently implemented Service Delivery Model (SDM) was adequately supporting *the economical and efficient* delivery of the ODSP.

... In addition [to discussion with other people], *we contacted the Chair of the Social Benefits Tribunal* (which hears appeals regarding benefits that have been denied by the Ministry), *but we were advised that neither she nor other Tribunal members were willing to meet with us*.

...

Overall Audit Conclusions

... the Ministry's procedures were still not adequate to ensure that only eligible individuals receive disability support payments ... Some of our more significant observations were as follows:

...
• *Although the initial assessment of disability eligibility was done by a qualified professional such as a registered nurse or other health practitioner, we found that appeals heard by the Social Benefits Tribunal-- consisting primarily of lay representatives-- overturned the initial eligibility decision in about 80% of the appeals heard. However, no formal investigation had been done into the reasons for such a high rate of overturned decisions*. On the other hand, we did note that the Ministry had recently undertaken several initiatives to improve the consistency of the disability determination process.

The 2006 Auditor's Report [4]

Background

...

In our *2004 Annual Report*, we concluded that, although ODSP management has instituted some improvements to the program since its inception, *the Ministry's procedures were still not adequate to ensure that only eligible individuals receive support payments* in the amounts they are entitled to .... Some of our more significant observations were that the Ministry:

...
• did *not formally investigate* why the Social Benefits Tribunal overturned about 80% of the appeals of initial ministry eligibility decisions that it heard;

...

*246 *Current Status of Recommendations*

Medical Eligibility--Social Benefits Tribunal Appeals

Recommendation

The Ministry should, in consultation with the Social Benefit Tribunal, determine the reasons for the high rate at which the Tribunal overturns ministry eligibility decisions.

Current Status

The Ministry informed us that monthly meetings between the Disability Application Unit and the Social Benefits Tribunal began in July 2005. While there had been a decline in the overturn rate, it continued to be high at the time of our follow-up. The Ministry indicated that it would continue to work *with the Social Benefits Tribunal to determine the reasons for the high overturn rate*.

Footnotes

a1 A 2007 Commentary from Ontario's Administrative Justice Working Group. The Administrative Justice Working Group is an ad hoc assembly of administrative-justice professionals who have come together in an effort to contribute their collective experience to optimizing the fairness, independence, impartiality, competence and efficiency of the administrative justice system and its tribunals through non-partisan advocacy on behalf of that system. The Group's members are current or past administrative justice practitioners and academics who bring to the work of the Group an independent perspective together with substantial experience in the design of administrative justice tribunal structures, in the academic analysis of administrative justice issues, in the leadership, management and administration of administrative justice tribunals, and in advocacy before a variety of such tribunals.

aa1 Ron Ellis is a Toronto administrative justice counsel, and Kathy Laird is the Executive Director of the Ontario Human Rights Legal Support Centre and a former vice-chair at the Human Rights Tribunal of Ontario.

1 The report of the 2004 audit appears in Chapter 3, section 3.03, of the Ontario Provincial Auditor's 2004 Annual Report, and the report of the 2006 follow-up appears in Chapter 4, section 4.03 of his 2006 Annual Report. For convenience, we will refer to the first report as “the 2004 ODSP Report”, or “the 2004 Report”, and to the second as “the 2006 ODSP Report”, or “the 2006 Report”.

2 Although not unique in Ontario, the interrelationship between the Tribunal and the Ministry is unusual. This is illustrated by comparison to another tribunal that serves an overlapping public constituency, the Landlord and Tenant Board (LTB). The LTB reports through the Ministry of Municipal Affairs and Housing (MMAH), but MMAH is not a party before the LTB in the way that the Ministry is a party before the Tribunal. The LTB does not review decisions of an agency within MMAH in the way that the Tribunal reviews DAU decisions and LTB decisions have no direct impact on the cost of MMAH programs. Although the LTB, like the Tribunal, is responsible to its reporting ministry for operating a cost-effective operation, this reporting relationship does not raise the acute issues of potential bias and erosion of independence that are at issue in the SBT-DAU-MCSS relationship because MMAH is not a party to LTB proceedings and is not the lower level decision-maker under review.

3 See c. 3, s. 3.03, of the Ontario Provincial Auditor's 2004 Annual Report, at 81 to 83 [emphasis added].

4 See c. 4, s. 4.03 of the Auditor's 2006 Annual Report at 263 and 265 [emphasis