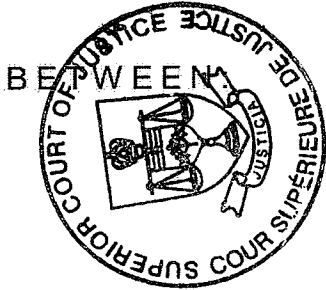


Court File No.: CV-20-00643637
-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**



DEMOCRACY WATCH

Applicant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
as represented by THE ATTORNEY GENERAL OF ONTARIO

Respondent

APPLICATION UNDER Rules 14 and 38 of the *Rules of Civil Procedure*

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing on a date to be fixed by the registrar at 10:00 a.m. at 330 University Avenue, Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

I S S U S Date: July 8, 2020

Issued by 
Local Registrar

Address of court office 330 University Avenue
8th Floor
Toronto, ON M5G 1R7

TO: Attorney General of Ontario
Ministry of the Attorney General
Crown Law Office – Civil
720 Bay Street, 8th Floor
Toronto, ON
M7A 2S9

APPLICATION

1. The applicant seeks:

- (a) an order granting public-interest standing to the applicant;
- (b) a declaration that the administrative justice policies of the Ontario government concerning the reappointment of adjudicative tribunal members, as specified below (the "**Impugned Reappointment Policies**"), are inconsistent with the purpose and objects of the statute or statutes conferring the reappointment powers and are therefore unauthorized;
- (c) a declaration that certain administrative justice policies of the Ontario government concerning the appointment of adjudicative tribunal members, as specified below (the "**Impugned Appointment Policies**"), are inconsistent with the purpose and objects of the statute or statutes conferring the appointment powers and are therefore unauthorized;
- (d) in the alternative, a declaration that the impugned reappointment and appointment policies or the appointment powers they authorize are incompatible with the constitutional principle of judicial independence, and/or incompatible with the constitutional principle of administrative independence and/or the principle of rule of law, and are therefore of no force and effect;
- (e) a declaration that appointments of tribunal adjudicator candidates to vacant adjudicative tribunal positions are null and void if the appointments are not made pursuant to recruitment and selection processes that comply with section 14 of the *Adjudicative Tribunal Accountability, Governance and Appointments Act, 2009* (the "**ATAGA Act**"), as directed by this Honourable Court; and
- (f) such further and other relief as this Honourable Court may deem just.

2. The grounds for the application are:

A. Legislative Context

- (a) There are 34 "adjudicative tribunals" in Ontario governed by the ATAGA Act, of which the respondent, the Ministry of the Attorney General for Ontario, has responsibility for 14 tribunals that have been clustered as "Tribunals Ontario" and 5 tribunals that have been clustered as "Land Tribunals";
- (b) The ATAGA Act places limits on the manner in which the powers to appoint adjudicators to adjudicative tribunals pursuant to the tribunals' empowering statute(s) are exercised;
- (c) The purpose of the ATAGA Act, as defined in section 1, is "to ensure that adjudicative tribunals are accountable, transparent, and efficient in their operations while remaining independent in their decision-making";
- (d) The recruitment and selection process for the appointment of adjudicative tribunal members is governed by section 14 of the ATAGA Act;
- (e) The Agencies & Appointments Directive issued under the *Management Board of Cabinet Act*, R.S.O. 1990, c. M.1 (the "**Directive**") sets out policies and processes for the appointment and reappointment of adjudicative tribunal members, but is not the only source of such policies or processes. The government also establishes de facto policies through consistent practice and public statements of intent;

B. The Impugned Policies

- (f) The following policies and processes for the appointment and reappointment of adjudicative tribunal members are inconsistent with the purpose and objects of the statute or statutes conferring the reappointment powers and are therefore unauthorized:

- (i) The Impugned Reappointment Policies of:
 - (A) abandoning routine re-appointments of meritorious adjudicators to successive terms;
 - (B) refusing reappointment applications from incumbent tribunal adjudicators without proper justification or reasons; and
 - (C) refusing meritorious reappointment applications;
- (ii) The Impugned Appointment Policies of:
 - (A) appointing tribunal adjudicators to fixed, excessively short terms of appointments;
 - (B) refusing extension recommendations for adjudicators even though the failure to grant the extension places the tribunal's ability to cope with its caseload in jeopardy;
 - (C) deeming adjudicators whose appointments expired as ineligible for appointment to other adjudicative tribunals; and
 - (D) deeming adjudicators whose expected re-appointments are refused as ineligible for appointment to other adjudicative tribunals;
- (g) The Impugned Reappointment Policies disregard merit-based reappointment recommendations and the negative impact on the actual and perceived independence of the adjudicators and tribunal and the negative impact on the efficiency and competence of adjudicative tribunals;
- (h) The Impugned Appointment Policies disregard their negative impact on the actual and perceived independence of the adjudicator and tribunal as well as the negative impact on the efficiency and competence of adjudicative tribunals;

- (i) Individually and cumulatively, the Impugned Reappointment Policies and the Impugned Appointment Policies described above are inconsistent with the purpose and objects of the statute or statutes conferring the appointment powers and are thus unauthorized;
- (j) The Impugned Reappointment Policies and the Impugned Appointment Policies frustrate the legislative scheme under which the power is conferred on the Ontario government;
- (k) The Impugned Reappointment Policies and the Impugned Appointment Policies fail to give effect to a competitive, merit-based appointment process that gives consideration to the specific criteria described in section 14 of the ATAGA Act, which are:
 - (i) experience, knowledge or training in the subject matter and legal issues dealt with by the adjudicative tribunal;
 - (ii) aptitude for impartial adjudication; and
 - (iii) aptitude for applying alternative adjudicative practice and procedures;
- (l) Alternatively, if the appointment powers are found to authorize the Impugned Reappointment Policies and the Impugned Appointment Policies, then those powers are unconstitutional because they violate the unwritten constitutional principle of judicial independence and/or administrative independence and/or the principle of the rule of law;
- (m) *Adjudicative Tribunals Accountability, Governance and Appointments Act*, 2009, S.O. 2009, c. 33, Sched. 5;
- (n) *Management Board of Cabinet Act*, R.S.O. 1990, c. M.1;
- (o) *Constitution Act, 1867*; and

- (p) Rules 14 and 38 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.

C. Public Interest Standing

- (a) The applicant, Democracy Watch (“DW”), is a national non-profit, non-partisan organization, which advocates for democratic reform, government accountability, and corporate responsibility;
 - (b) DW should be granted public interest standing because:
 - (i) whether the administrative justice policies of the Ontario government for appointing administrative adjudicators are *ultra vires* the ATAGA Act, or in the alternative whether those policies violate the constitutional principles of judicial independence and/or administrative independence, are serious issues;
 - (ii) The applicant has a genuine interest and a real stake in this issue; and
 - (iii) in all the circumstances, this application is a reasonable and effective means to bring the issue before the courts;
 - (c) DW does not seek costs of this application and asks that costs are not awarded against DW; and
 - (d) Such further and other grounds as counsel may advise and this Honourable Court may permit.
3. The following documentary evidence will be used at the hearing of the application:
- (a) The Affidavit of Duff Conacher, to be sworn, and the exhibits thereto; and

- (b) Such further and other evidence as counsel may advise and this Honourable Court may permit.

Safe: July 8, 2020

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Lawyers for the Applicant

DEMOCRACY WATCH Applicant and Respondent HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

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**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

NOTICE OF APPLICATION

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Lawyers for the Applicant