SESSION #6
Performance Management: No Surprises/Developing Best Practices

Moderator: **Grace Knakowski, Law Society of Upper Canada**
Speakers: **Murray Wm. Graham, Landlord and Tenant Board**
Mark Sandler, Cooper & Sandler, LLP / Law Society of Upper Canada
Gary Yee, Social Benefits Tribunal

Murray Graham: Performance Assessment of Tribunal Members

Mr. Graham spoke about the approach that has been developed for performance management at the Landlord and Tenant Board ("LTB"). To provide the context for his presentation, he began with an overview of the LTB. He stated that the LTB receives 80,000 applications annually, applications are generally heard within 3 weeks after they are filed, and the length of hearings ranges from 5 minutes to 5 days. The Board consists of 36 full-time members, 6 part-time members, and 7 regular vice chairs. As the Board is very busy, having a sufficient number of well trained adjudicators is highly important.

Mr. Graham then discussed a number of the tools that have been put in place to assist with the recruitment and retention of members. In the interview process, position specifications and core competencies are described and potential candidates are made aware of the heavy workload and performance expectations. The LTB has adopted a "no surprises" approach where new members are informed of the expected performance standards at the beginning of their appointment. The LTB also runs an in-house training program for new members consisting of 20 days of class training, as well as practical field training where they are able to observe the processing of an application from its filing to the issuing of an order. The LTB conducts annual members' meetings with a program for each meeting that promotes on-going education of members and provides a forum for the exchange of ideas and experiences. The LTB has also developed a members' performance appraisal process to assess specific core competencies. The goals of this process are to evaluate the competency of members, to identify areas for improvement and to plan for their further development. A vice-chair for each region is trained in performance assessment. Mr. Graham noted that through this training the vice-chairs have become an important resource in terms of mentoring new members and keeping members throughout the province aware of adjudicative issues. Members also receive training on order and reasons writing, and a proof-reading program is in place to improve quality and consistency of orders and decisions. Performance is also assessed through a detailed complaint protocol relating to member conduct during a proceeding.

Mr. Graham discussed the new requirements under the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009* S.O. 2009 c.33 ("*ATAGAA*"), which are designed to ensure that tribunals are accountable, transparent, efficient and independent in decision-making. He noted that once these provisions are proclaimed in force, administrative tribunals will be required to develop documents to demonstrate accountability, including a service standards policy providing standards of service for dealing with complaints, an ethics plan and a member accountability framework that will set out the functions of members and chairs and the knowledge and skills that are required for their appointment. Section 14, the key section dealing with member

performance, will require that appointments are made based on a competitive, merit-based process (s.14(1)) and with the recommendation of the chair of the tribunal after an assessment of the person's qualifications or performance (s.14(4)). Mr. Graham interpreted this section to mean that no one will be appointed unless the chair recommends the person, but not that existing members must be reappointed. He noted that while formal performance assessment processes are not explicitly required under this section, it would be very difficult to have a merit based process without such assessments. He suggested that this provision will result in increased scrutiny of the appointment and reappointment process, as the tribunal will have to ensure that its procedures are fair and objective.

Mr. Graham suggested that the development of a performance assessment program will require that members understand from the beginning what aspects of their performance will be assessed and on what basis. He emphasized that the assessment criteria that are communicated to the members should then be followed consistently in conducting assessments. He also suggested that members should be given feedback following their assessments and be allowed the opportunity to respond to any concerns that are raised. They should also be given the opportunity and the means to improve their performance based on the feedback they receive. He discussed some of the challenges involved in developing such an assessment program, and in particular noted that there are some aspects of performance that are difficult to measure or track with statistics. However, he suggested that an assessment should be an evaluation of the actual process of doing adjudication with prescribed standards. For example, at the Landlord and Tenant Board the performance assessment includes an evaluation of a member's ability to manage a high volume of work without affecting the quality of decision writing.

Gary Yee – Assessing tribunal quality through quantifiable measures

Mr. Yee addressed the topic of performance management from two perspectives: 1. a tribunal wide perspective, and 2. a quality versus productivity perspective. He began with a discussion of how to assess the performance quality of a tribunal. He noted that while goals for productivity are easier to measure, as they are numerical, quantifiable, and objective, assessing the quality of a tribunal is much more challenging. He suggested that performance measures should be valid, cost effective, timely, clear, and consistent. He described some of the direct measures that can be used to assess quality, including asking hearing participants to fill out opinion surveys or having an expert examine hearings and decisions to assess quality. He noted, however, that some of these direct measures can be difficult to implement because they touch on issues of adjudicator independence. He suggested that there are also many indirect indicators of quality, for example whether the tribunal has a performance appraisal system, effective legal support, a focus on professional development, stated criteria for what a good decision is, and an effective complaints policy. He suggested that by assessing tribunals on these indirect measures, we can see differences in quality between tribunals. He also referred to the accountability documents that will be required when the remaining provisions of the *ATAGAA* come into force, and suggested that these can be used as indicators of quality.

Mr. Yee suggested that in order to find quantitative measures of quality we can look to three areas: pre-hearings, hearings, and decisions/reasons. To develop quantitative measures for pre-hearings, we can start by determining the outcome we want to achieve, for example creating a timely and accessible process or promoting early

resolution. Based on the desired outcomes, we can set out performance goals with measurable targets. For example, a performance goal might be that cases are resolved without a hearing as early as possible. The target for this goal could be measured by determining the percentage of cases that are resolved without a hearing. Another performance goal might be that files that go to hearing are hearing-ready. The targets for this goal may be that files are complete, organized and provided to members in a timely manner, that follow-up is done with the parties to ensure that they are aware of the rules and time limits, and that any matters that might lead to an adjournment or an inefficient hearing are dealt with prior to the hearing. One way to measure this goal would be to have a checklist of the targets that indicate hearing readiness and then select a random sample of files and determine whether they are hearing-ready in accordance with that checklist. The percentage of files that are considered hearing-ready as per the checklists could then be calculated. Another numerical measurement for hearing-readiness might be to determine how many adjournments or re-scheduling of hearings are due to the file not being hearing ready. Mr. Yee noted that some of these measures may take a lot of resources and effort, for example by requiring extra reporting and manual gathering.

Mr. Yee then discussed measures that could be implemented at the hearing stage to assess quality. He suggested that a performance goal for a hearing might be to ensure a fair and focused hearing. The targets for this goal might be that the principles of natural justice are adhered to, that the proceedings are conducted in a courteous and respectful manner, that the hearings are proactive in that key issues are identified as early as possible, that evidence and submissions are focused on the issues, or that timelines are met. To measure these targets, Mr. Yee again suggested the use of checklists to be completed by someone observing the hearings. He suggested that none of these measures would infringe on the independence of the tribunal members. Again, he noted that these measures would require a lot of resources and they may not be practical for all tribunals. However, he suggested that it is important to at least start thinking about the topic and create theoretical commentary on it.

To measure quality in the area of decisions/reasons, he suggested that we need to go beyond simply measuring how many decisions are overturned. He noted that this is the area where independence concerns are the greatest. In measuring quality in this area, he referred to *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 and the Supreme Court of Canada's ruling that a reasonable decision will be one that is "intelligible, justifiable and transparent." He suggested that to measure quality in decisions, we could use a checklist of standards that set out the hallmarks of excellent decisions, which could be completed by experts, such as outside lawyers. He noted that the challenge will be for tribunals to find ways to make these measures and ideas fit their resources. He concluded by emphasizing the need to start a fuller discussion on the assessment of tribunal quality and to develop measures to complement the traditional performance standards that are focused on productivity.

Mark Sandler – Adjudicator education and assessment in the LSUC context

Mr. Sandler explained that, as the Chair of the Appeal Panel of the Law Society of Upper Canada ("LSUC"), he is operating under a statutory regime that is different from the ones described by the other panelists. The LSUC regulates lawyers and paralegals and is responsible for dealing with claims of professional misconduct and incapacity of its members. The format of the LSUC's regulatory proceedings is that a hearing panel will hear matters in the first instance and make decisions, which may then be appealed to an

appeal panel. The adjudicators sitting on these panels are made up of elected benchers of the LSUC and lay persons appointed by the Attorney General. Mr. Sandler noted that the vast majority of adjudicators are elected. He noted that while a number of LSUC adjudicators are skilled and experienced, there is no correlation between skill as an adjudicator and election to office. He explained that benchers may or may not possess the skill sets of an adjudicator because the role of a bencher is much larger than his or her adjudicative role, and thus, the reasons why a particular bencher is elected may, and usually will, have nothing to do with his or her adjudicative skills. He noted that this reasoning also applies to people who are appointed by the Attorney General.

Mr. Sandler described further differences between LSUC adjudicators and adjudicators on administrative tribunals. The *ATAGAA* is not applicable to the LSUC, its adjudicators, or its proceedings. LSUC adjudicators receive no, or nominal, remuneration and their adjudication duties are part time only. Furthermore, the Chair of the panel is one among equals and does not have the power to fire any of the other adjudicators. Benchers are expected to attend a certain number of hearings as adjudicators, and it is not the role of the Chair to disallow a bencher from fulfilling his or her adjudicative responsibilities. He stated that this regime raises different issues than those discussed by the other panelists in relation to how to measure, assess and evaluate performance standards.

Mr. Sandler noted that because of these differences, the LSUC must engage in the education of adjudicators in ways that are sometimes different than those of other boards or tribunals. He then described how the LSUC works towards enhanced performance on the part of adjudicators. Once a month in convocation, the LSUC conducts adjudicator education sessions in-camera with the benchers to outline recent appeal panel decisions which are binding on hearing panels. These sessions are also reduced to writing and circulated to non-bencher adjudicators. Mr. Sandler suggested that one of the ways to enhance adjudicator performance is to create a full body of jurisprudence that addresses procedural, evidentiary, and substantive legal issues that hearing panels may face in the future. He noted that all of the hearing panel and appeal panel decisions are in writing and available on CanLII. He indicated that it is expected that adjudicators will at least review the summarized jurisprudence from the education sessions and will use those decisions as a resource when delivering their own judgements. In addition, the LSUC has created templates for judgement writing, which are designed to enhance decision writing without affecting adjudicator independence. For example, these templates set out the correct articulation of the burden of proof, how credibility and reliability assessments take place, the kinds of considerations that inform adjournments, and the imposition of penalties. He stated that adjudicators are not obligated to follow these templates, but rather they are intended to provide guidance to the adjudicator. Panel Chairs are also available to discuss issues as they arise, with the goal of providing guidance, rather than direction, to the adjudicators. At the appellate level, the panel may circulate its decision to the Chair before it is released. The Chair will evaluate whether the reasoning meets adequacy standards and is appreciative of the existing jurisprudence.

Mr. Sandler also described the self-education requirements that adjudicators are expected to undertake in the fulfilment of their responsibilities. He noted that although the positions of adjudicators are voluntary, the LSUC has certain expectations that adjudicators are expected to fulfil. In addition to the materials from the adjudicator education sessions, adjudicators are given guides which contain the relevant statutes,

by-laws, and a code of conduct. The adjudicators are expected to review and understand this material.

Mr. Sandler explained that performance review is not done on a systemic basis. However, one of the functions of the appeal panel is that the appellate adjudicators review the transcripts of hearings as they have been conducted, which may result in discussions with the hearings adjudicators involved about issues of process. He noted that all hearings are transcribed and that the transcripts can assist in evaluating the work that is done by individual adjudicators. He stated that the LSUC is not in a position to impose performance standards on adjudicators because the legislation doesn't require it and the dynamics of their system don't permit it.

Questions for the Panel

Mr. Graham was asked what the core competencies are that the LTB looks for in adjudicators and how they are measured. Mr. Graham described core competencies as skills the LTB has identified as being necessary for an adjudicator to effectively do his or her job at their tribunal. He noted that these core competencies would be comparable to the intended content of a member accountability framework, which will be required under section 7 of the *ATAGAA* when it comes into force. He suggested that these core competencies will be different for every board. For example, due to the high volume of cases at the LTB, organizational skills, stamina, and ability to handle stress are highly prized skills; however, these skills may not be as important for other tribunals. With regard to measuring core competencies, Mr. Graham emphasized that they must be observable. He explained that in each category of skill set, the LTB has established behavioural indicators that relate to that skill set and are used to assess performance. The assessment process is then conducted by monitoring hearings, listening to recordings and analyzing orders that have been issued. The assessments are conducted by the Board's legal department and the Vice-chair who determine for example, whether the member understands the principles of natural justice, addresses relevant issues and findings and gives reasons, etc. He noted that performance assessment at the LTB is a multi-faceted process consisting of a number of checks and balances by the Chair, Vice-chair and legal staff involved. In order to measure the quality of orders, he stated that the LTB doesn't look at the outcome of an order, but rather at the process of doing the adjudication leading to the order.

The panelists were asked how, in their opinions, issues raised by the parties regarding the conduct of an adjudicator should be handled without compromising the independence of the adjudicator. Mr. Sandler suggested that one way the LSUC deals with these issues is through the appellate process. For example, if the appeal panel reverses a decision based on apprehended bias, this sends a message to the hearings panel member that his or her conduct or behaviour was inappropriate. However, he also encouraged a more informal approach for dealing with this issue. He suggested that the Chairs of the panels can make themselves available to counsel who frequently appear before their panels to engage in an off-the-record and candid discussion about their concerns. Through these informal discussions, certain practices may be brought forward that the Chairs feel must be addressed. He suggested that he would have no hesitation in sitting down with the adjudicators and informing them that a matter has been brought to his attention. He noted that this process is focused on identifying and remedying concerns rather than making findings as to their merit and/or retribution. He suggested

that this process serves to identify potential problems and assess how they can be avoided in the future.

Mr. Yee noted that the situation for adjudicators at tribunals is different from what Mr. Sandler described for LSUC adjudicators. Unlike the LSUC bencher adjudicators, for tribunal members it is their job and career at stake, and therefore, the process must be more transparent. He suggested that communication with counsel may be important, but that a formal complaint process would be more appropriate in a tribunal setting. Mr. Graham agreed and suggested that communications with stakeholders at the Chair level should relate to more general concerns, rather than specific issues concerning individual members. He noted that member conduct is included in the formal complaint process that has been established at the LTB. This process goes through the Board's legal department and has been specifically laid out so that members have a chance to respond to any allegations of misconduct against them. In addition, the complaints process is carefully designed to keep these allegations separate from the decision, as conduct complaints are about the process not the decision. Mr. Sandler recognized that this is a very sensitive issue and noted that the LSUC was the subject of comment in the *Lesage-Code Report* (2008). The report expressed concern that the LSUC was not doing enough to discipline lawyers whose conduct fell below appropriate standards when appearing in court. He suggested that part of the dynamic that makes a formal complaints process difficult for the LSUC is that judges and other counsel are reluctant to make formal complaints about lawyers. While he hears about complaints informally all the time, he noted that it is less likely that someone will take the step of actually making a formal complaint.

Mr. Yee was asked about the practicalities involved with his proposal of using checklists to measure the quality of tribunals. He recognized that there are significant practicalities involved with the use of checklists, but he was unsure how to avoid measuring quality without using some kind of checklist. He suggested that looking at the number of overturned decisions only captures the most extreme examples, and is not an accurate indicator of quality. He suggested that there are a number of questions that would need to be considered in developing quality checklists, such as how long to make the checklist and whether the assessment should be conducted by internal counsel or externally. He indicated that for now, we do not have any answers to these questions because no one has really embarked on this process yet.

The active adjudication approach that is being undertaken by some tribunals has sparked debate over what constitutes conduct, particularly in terms of running the hearing versus ensuring a proportionate hearing. In light of these debates, the panelists were asked for their thoughts on defining the line between a member's conduct and his or her decision. Mr. Graham noted that the LTB has a Code of Conduct and Ethics that is published, and if someone is concerned about the conduct of a member, they can refer to the Code and identify where and how they think the adjudicator breached it. He recognized that there are areas where conduct and reasoning errors merge, for example reasonable apprehension of bias is an error in law that is reviewable, but it could also be a conduct issue. He suggested that other than these aspects of conduct and error that overlap, the line for the LTB is fairly clear. Disputes at the LTB are between two third parties, not the government, so they are very adversarial and adjudicative in nature. Due to the nature of the disputes, the LTB has created clear, published documents, which those involved in the process are required to follow. Without documents such as the LTB's Code of Conduct, members would not be able to understand what standards they

are going to be held accountable to, nor would the parties know what level of service to expect.

The panelists were questioned about how performance assessment fits in to the reappointment process and whether there is, or should be, recourse for members who believe there was some unfairness to their failure to be reappointed. Mr. Graham suggested that tribunals are going to be under more scrutiny because of the new requirements in the *ATAGAA* regarding merit-based appointments and reappointments. He suggested that if the process and procedures surrounding performance assessments are not transparent, then this could create an opportunity for a member to claim that not reappointing him or her is an arbitrary decision. If however the tribunal adopts a clear, transparent process that allows a member to respond and is well documented, the decision not to reappoint shouldn't come as a surprise. Mr. Yee suggested that it was a significant achievement to get the Chair's recommendation on reappointment power included in the *ATAGAA* legislation, even though it was already the general practice. He noted that there is no recourse in the current legislation if a Chair makes an unfair decision regarding a recommendation for reappointment. However, he suggested that it is premature to talk about this issue because the Chair's recommendation does not guarantee reappointment anyway, as the government doesn't have to reappoint a member even if the Chair recommends it. He suggested that until the Chair has the power to actually make the reappointment, there is nothing practical to be gained by putting in place a mechanism to challenge the Chair's recommendation.

The panelists were questioned whether the formal complaints process could ever affect the litigation process and whether this would ever be an appropriate use of the process. In addition, what should a complainant expect to get from the complaints process? Mr. Graham stated that the complaints process at the LTB does not begin until a final decision had been rendered. If a matter is ongoing and a complaint is received, the LTB will send a letter to the complainant stating that the complaint will not be dealt with until the hearing is finalized. He suggested that delaying the complaints process until after the hearing is essential in keeping them separate. He noted that very few of the conduct complaints he has observed at the LTB are actually based on conduct, but occasionally complaints have identified training issues. In those instances, the member is brought into the process and allowed to respond, the member is then given training and mentoring, and an apology letter is sent to the complainant. He suggested that if the conduct had any effect on the decision, then the review process should take care of this. The purpose of the complaints process should be focused on identifying deficiencies and addressing them. He questioned whether there was anything beyond this that a party should expect to receive regarding the conduct. Mr. Sandler also suggested that it would be inappropriate to address conduct issues during a hearing. He noted that it is important to allow the hearing to run its course, otherwise we could run the risk of providing an opportunity for a conduct complaint to transform into a collateral attack. He suggested that if a formal complaint process is in place, the complainant should be informed of the findings and outcome that result from their complaint.