RESEARCH NOTE

PROCESS MATTERS - EMPIRICALLY EVALUATING ADMINISTRATIVE TRIBUNALS IN THE HEALTH SECTOR: THE QUESTIONABLE NEUTRALITY OF ADMINISTRATIVE TRIBUNAL PROCESS

Lydia Stewart Ferreira*

The health tribunal process is assumed to be neutral and allow for the tribunal's focus to be on the parties' legal arguments. This study quantitatively examined approximately 400 decisions over a five year period to determine whether or not health tribunal hearings are neutral or whether the hearing process itself affects the tribunal's decision independent of the parties' legal arguments. Certain tribunal procedures affected tribunal decisions independent of legal arguments. This novel quantitative research matrix, which analysed cases over a five year time period, identified trends, which are overlooked in traditional legal analysis of judicial review.

Il est présumé que le processus d'audience du tribunal de la santé est neutre et permet au tribunal de se concentrer sur les arguments juridiques des parties. Cette étude porte sur l'analyse quantitative d'environ 400 décisions et s'est étendue sur une période de cinq années; elle visait à déterminer si les audiences du tribunal de la santé sont neutres ou non, ou si le processus d'audience même influence les décisions du tribunal indépendamment des arguments juridiques des parties. Cette nouvelle matrice de données quantitatives, qui a analysé des causes sur une période de cinq années, a permis de constater des tendances qui sont mises de côté dans les analyses juridiques traditionnelles du processus de contrôle judiciaire.

I. INTRODUCTION

Administrative tribunals provide a party – who has been denied a government resource – a forum to appeal the government's resource allocation decision. A hearing before the tribunal follows a process that allows the parties to make submissions to a panel of adjudicators who will decide whether to grant or deny a resource. The process is important because due to a lack of consensus over substantive distributive justice principles for health care, society must rely on fair deliberative processes that yield a range of acceptable answers. If the process for achieving the decision is considered acceptable to individuals and society, the

* PhD (Osgoode), LLM (Osgoode), JD (Queen's), MPH in International Health (Boston) and a BSc (Waterloo). In 2014-15, Lydia was a Visiting Scholar at Harvard Law School, Petrie Flom Center. She is currently a Deputy Judge with the Superior Court of Justice and previously an adjudicator with the Health Professions Appeal and Review Board and the Health Services Appeal and Review Board. She has taught law at the University of Toronto Faculty of Law, Osgoode Hall Law School, Queen's University Faculty of Law, Windsor University Faculty of Law and George Brown College. Lydia has over 20 years of health policy and programming experience at the federal, provincial and municipal levels. She is currently undertaking academic research into the impact of the Trans Pacific Partnership Trade Agreement on Public Health Law and Policy.

decision is more likely to be accepted.¹ It is assumed that the tribunal process is fair and deliberative and thus produces a range of acceptable answers. However, empirical research to evaluate health tribunals has never before been comprehensively undertaken.²

This article quantitatively analyses a tribunal's hearing process. Specifically, the research seeks to quantitatively analyse whether there is an association between the tribunal's hearing process – distinct from the parties' substantive legal submissions to the tribunal – and the tribunal's decision to allocate health care resources. In essence, is the tribunal's hearing process statistically associated with the tribunal's decision to grant or deny a resource? If so, what elements of the tribunal's procedure create this statistical effect?

II. BACKGROUND

In Canada, the funding by government of health care services outside of the country is determined provincially. Appeals to Ontario government funding decisions are heard by a health tribunal. The health tribunal researched for this study was the Ontario Health Services Appeal and Review Tribunal [HSARB]. This health tribunal hears appeals regarding the denial of government insured health care services.

Health care services are provided to Ontario residents in three major situations and in three main geographic areas. The three major health care situations include: (1) a medical emergency situation, (2) a non-emergency outpatient situation and (3) a non-emergency inpatient situation. Ontario residents are also able to receive health care services in three main geographic locations: (1) within Ontario, (2) outside Ontario but within Canada and (3) outside Canada. This article analyses patient requests for health care services outside of Canada in non-emergency inpatient situations. For the purposes of this article, out of Canada coverage of non-emergency inpatient health care services is referred to as OCCNEIHS.

Health care services outside of Canada are - theoretically - available to all residents. The question is who pays for health care service outside of Canada. If the patient pays for the health care services outside of Canada through a private health insurance plan or out-of-pocket - often referred to as 'medical tourism' - the government and the publicly insured health plan are not involved. However, if the government is asked to use the public insurance plan to pay for health care services outside of Canada, legislation is invoked and decisions are made whether or not to fund the requested health care service.

In Ontario, the provincial government funds insured health care services for Ontario residents via the publicly funded Ontario Health Insurance Plan [OHIP] which is governed by the *Ontario Health Insurance Act* [HIA].³

As of April 2009, the criteria by which OHIP determined if an OCCNEIHS would receive OHIP funding was set out in the HIA's Regulation 552.⁴ According to this Regulation, the OCCNEIHS would

¹ See Norman Daniels & J E Sabin, "Limits to Health Care: Fair Procedures, Democratic Deliberation, and the Legitimacy Problem for Insurers", (1997) 26:4 *Philosophy and Public Affairs* 303; Norman Daniels & J E Sabin, *Setting Limits Fairly: Learning to Share Resources for Health*, 2d ed (New York: Oxford University Press, 2008).

² Lorne Sossin & Stephen Hoffman, "Empirically Evaluating the Impact of Adjudicative Tribunals in the Health Sector: Context, Challenges and Opportunities" (2010) 28: *Windsor YB Access Just* 343-360.

³ RSO 1990, c H6, [hereinafter *HIA*].

⁴ RRO 1990, Reg 552 [hereinafter "Regulation 552"].

be covered by OHIP if the treatment in question was: generally accepted in Ontario as appropriate for a person in the same medical circumstances as the insured person in question and either the treatment was not performed in Ontario by an identical or equivalent procedure or alternatively, if the treatment was performed in Ontario, travel outside the country to receive the treatment was required to avoid a delay that would result in the insured person's death or medically significantly irreversible tissue damage.⁵

Where OHIP has denied funding for the requested OCCNEIHS, the patient and/or their physician has the statutory right to appeal OHIP's decision to HSARB.⁶ As such, it is the patient who activates the tribunal's jurisdiction and hearing process. The tribunal has the jurisdiction to accept the OHIP decision, direct OHIP to take action or amend an OHIP decision as long as such a determination is in accordance with the *HIA*.⁷ The legislation does not provide the tribunal with the jurisdiction to assess economic or compassionate patient circumstances. The patient and/or OHIP may appeal the tribunal's decision to the courts.⁸

III. RESEARCH METHODOLOGY

The following research methodology was utilized to analyse the tribunal process:

A. Case Selection

The unit of analysis for this research was the written, publicly available decisions released by the tribunal on its website during the five year fiscal period 2003/04-2007/08. The search engine on the tribunal's website was used to identify all cases directly or indirectly dealing with OCCNEIHS. "Directly dealing with OCCNEIHS" refers to all cases where the review of non-emergency inpatient health care service outside of Canada was the main issue in the decision. "Indirectly" refers to those cases where reference was made to OCCNEIHS in the tribunal's decision but it was determined by the tribunal not to be applicable. For instance, in a case where an Ontario patient requested OCCNEIHS in Quebec, the tribunal determined that request for the OCCNEIHS was not relevant as Quebec is not outside of Canada.

B. Sample Size

Three hundred and eighty seven (387) tribunal decisions were analyzed. This number of decisions represented all of the OCCNEIHS cases during the study period. Of the 387 cases analysed, only 315 met the inclusion criteria of dealing directly with OCCNEIHS. Seventy two (72) cases were not included in the study sample. The reason for excluding these cases included: duplicates of existing included cases, motions and/or Orders related to an existing included case, and cases that incorrectly attempted to request an OCCNEIHS i.e. requests for health care in another province of Canada.

C. Timeframe

The five year time period was selected for the review of tribunal decisions for several reasons. First, the timeframe spanned a period of one Ontario elected government (Ontario Liberals 2003 to 2014).

⁵ *Ibid* at s 28.4(2)(a)(b)(ii).

⁶ *HIA*, *supra* note 4 at s 20(1).

⁷ *Ibid* at s 21(1).

⁸ *Ibid* at s 24(1).

Second, it was assumed that the legal research technology would allow for accessing case decisions for the period of 2002 and later. Third, in the spring of 2009 and again in the spring of 2011, the government amended s.28.4(2) of Regulation 552 which deals with the OCCNEIHS criteria. The amended s.28.4(2) presented a natural endpoint to critically assess the section. Fourth, this author was appointed to the tribunal in 2008 and began hearing cases from April 2008 to February 2009. As a result, this time period which included the author's decisions was excluded from the research period.

D. Research Matrix

A research matrix and coding system was developed in order to perform quantitative statistical association between the tribunal's procedures and the tribunal's outcome decision to grant or deny OCCNEIHS requests. The research matrix and coding system was developed in multiple phases. First, a literature review of existing qualitative and quantitative empirical research on tribunals was undertaken. A total of six qualitative⁹ and quantitative studies¹⁰ were reviewed for methodology and study variables.

Second, the tribunal process variables were coded within the research matrix. In order to determine the amount of time a case took within the tribunal, the File Date, Hearing Date and Decision Date were coded for analysis. Representation at the Hearing (self represented or represented by lawyer) and the Hearing Format itself (oral, written, teleconference, combination) were analysed relative to the tribunal's decision to grant the patients' requests. The presence of an Interpreter and whether the case was requesting a Review by a different tribunal panel was also analyzed.

Third, the coding system was pilot tested on 30 cases and revised. The revised coding system was then used on all cases including the initial 30 cases. An independent researcher randomly reviewed the accuracy of ten of the three hundred and fifteen coded cases. The coded data was then inputted into a statistical package with the assistance of the university's statistical consulting group.

Fourth, frequencies, percentages, cross tabulations, ANOVA and Chi-Square analysis were conducted on the data and graphed in order to distill significant trends for further analysis.

E. Study Limitations

The purpose of this study was to objectively quantify variables for analysis in order to statistically determine if there was an association between the tribunal's processes and the tribunal's resource allocation decisions. It should be noted that this study deliberately did not empirically research tribunal members' capacity, expertise, independence, potential bias of the members or the tribunal hearing

⁹ Laverne Jacobs, *"Fashioning Administrative Independence at the 'Tribunal' Level: An Ethnographic Study of Access to Information and Privacy Commissions in Canada"*, (PhD Thesis, York University Faculty of Law, 2009) [unpublished]; Brenda Gamble, *"What's In, What's Out – Stakeholder views on the Boundaries of Medicare"*, (PhD Thesis, University of Toronto, 2002) [unpublished].

¹⁰ J G Chipman, *"Policy-Making by Administrative Tribunals: A study of the manner in which the Ontario Municipal Tribunal has applied provincial land use policies and has developed and applied its own planning policies"* (SJD Thesis, University of Toronto Faculty of Law, 1999); K.E. Fernandes, *"Democracy, Power and Decision-Making"*, (MA Thesis, York University, 2009); Caroline Pitfield, *"Critical Evaluation of HSARB: Giving Patients a Louder Voice in the Health Care System"*, (LLM Thesis, University of Toronto Faculty of Law, 2003); Caroline Pitfield & Colleen Flood, "Section 7 'Safety Valve': Appealing Wait Times Within a One-Tier System." in Colleen Flood, Kent Roach & Lorne Sossin, eds, *Access to Justice, Access to Care: The Legal Debate over Private Health Insurance* (Toronto: University of Toronto Press, 2005) 477.

scheduler, the appointment process, duration of members' appointment to the tribunal, or the tribunal's internal organizational structure. None of the above information was available through this study's data source of tribunal decisions.

It is also important to highlight that the results of this study are for a specific timeframe and cannot be generalized to subsequent timeframes.

1. Duration at Tribunal

The database selection of the cases over five years was based on the Decision Date. As such, it was possible that a File Date and Hearing Date came before the study period while the Decision Date would have fallen within the study period.

Data comparisons were based on the case day, month and year. However, the File Date on the Decision only provided the year date but not the month and day date. This led to an analysis challenge. For example, a File Date year of 2005 could mean the file came into the Tribunal office as early as January 1, 2005 or as late as December 31, 2005. If the File came into the office December 31, 2005 and the Hearing Date was scheduled for January 1, 2006, it will appear as though the File Date of 2005 was heard one year later in 2006. Thus, the usefulness of the File Date as a start date to estimate time a case is within the Tribunal's system is very limited.

It is important to note that the Hearing Date code does not indicate how many days the case was actually argued at the Hearing before the tribunal. While Hearings lasting more than one day are not the norm, it is possible that a case could be heard over several days. For example, a case may have been argued three hours or three days but would have been coded as of the first day of the Hearing. This was the situation for case 02-HIA-0040 JD which was argued October 13 and 14th, 2004 as well as August 11, 2005. In that case, the Hearing Date to Decision Date would have been estimated from the first Hearing Date of October 13th, 2004 rather than August 11, 2005. If, hypothetically, the end of the Hearing was August 11, 2005 and the Decision was released September 1, 2005, it would appear that the case took 10 months rather than half a month between Hearing and Decision.

Based on these three factors, the Hearing Date and Decision date could only be used as a rough estimate the duration a case was within the tribunal system.

2. Self Represented / Lawyer Represented Coding

Parties were coded as being self represented or represented by a lawyer. Patients - particularly minors, deceased parties, or patients with ill health - were often represented at the Hearing by friends, relatives or 'agents' who may or may not have had legal training. To be coded as 'represented', the party had to be identified as 'Counsel' in the Decision under the section 'Appearances'. Otherwise, friends, relatives or 'agents' were coded as self represented.

Note that the level of legal training, litigation experience or legal assistance of self represented parties and 'Counsel' was not identified in the Decision. It is possible that self represented patients at the Hearing received legal advice or had their written submissions to the tribunal vetted through a lawyer. Thus, the categorization of self-representation had inherent limitations.

IV. RESULTS

A. Parties: Represented by Lawyer or Self-Represented

Overall, the tribunal denied OCCNEIHS cases 80% of the time and granted cases 20% of the time during the study period. Of interest was whether the presence of a lawyer at the tribunal hearing significantly increased the percentage of granted applications above the overall 20% rate on behalf of the patient.

The number of times the patient was self represented versus represented by a lawyer and how many times OHIP was represented by a non-lawyer versus an OHIP lawyer was analyzed. The number of times both the patient and OHIP were represented by a lawyer was also analyzed relative to the Tribunal's Decision to grant or deny the patient's appeal.

The data indicates that a very small percentage of patients were represented by lawyers. In only 32 cases out of 315 total cases (10%) did a lawyer represent the patient at a Hearing. Approximately 282 cases out of 315 (90%) did not have representation by a lawyer.

In 42 cases of 315 total cases (13%) a lawyer represented OHIP at a Hearing. Approximately 273 cases out of 315 (87%) OHIP did not have representation by a lawyer.

In 28 cases out of a total of 315 cases (9%) both the patient and OHIP were represented by lawyers. In 4 cases, the patient had a lawyer and OHIP did not. In 14 cases, OHIP had a lawyer and the patient did not.

Of the 28 cases with legal representation for both parties, 9 cases – or about 32% of the cases – resulted in the Tribunal granting the Application on behalf of the patient. This grant rate of 32% is higher than the overall grant rate of 20%.

B. Type of Hearing – Oral, Written, Teleconference or Split

The tribunal can conduct three types of Hearings - where the parties appear in person, referred to as Oral Hearings, by Teleconference or by Written Submissions. Each party – the Applicant and Respondent - determines which method of Hearing they wish for themselves. While the majority of cases involves one type of Hearing, it is possible to have a 'split' Hearing where one party elects one type of Hearing while the other party elects a different type of Hearing. For example, one party may elect an Oral Hearing while the other party elects to join the Hearing by Teleconference. In such a case, the Panel would appear in person, one party would appear 'orally' and be in the room with the Panel while the second party would join the group by teleconference call. In all cases, the Tribunal and the parties have the parties' written submissions before them.

Of all 315 Hearings, 192 cases (61%) were Oral Hearings, 56 cases (18%) were Teleconference Hearings and 85 cases (27%) were Written Hearings. These cases did not add up to 100% because some of the cases were combination cases. For example, the patient may have presented before the Tribunal by teleconference call while OHIP attended in person or vice versa.

Analysis was done on 'combination' Hearings to determine the type and number of split Hearings which took place during the five year study period. Of the total cases for the five year period, Oral-Teleconference Hearings took place 11 times, Oral-Written Hearings took place four times and Teleconference-Written Hearing took place three times.

C. Type of Hearing relative to Disposition

Of interest was whether the type of Hearing – oral, written, teleconference or 'split' - gave a party an advantage over the opposing party in terms of whether the appeal was granted or denied by the tribunal. The tribunal has an approximate overall grant rate of 20% and a deny rate of 80% for the five year study

period. Based on this, further analysis was done on the majority of 192 Oral Hearings. The table below indicates that an Oral Hearing was significant in a tribunal granting an appeal.

Table 1: Oral Hearing vs. Tribunal Grant of Appeal
Cross tabulation

			Oral		Total
			No	Yes	
Tribunal -Grant	No	Count	109	143	252
		Expected Count	98.7	153.3	252.0
		% within Tribunal-Grant	43.3%	56.7%	100.0%
	Yes	Count	14	48	62
		Expected Count	24.3	37.7	62.0
		% within Tribunal- Grant	22.6%	77.4%	100.0%
Total	Count		123	191	314
	Expected Count		123.0	191.0	314.0
	% within Tribunal-Grant		39.2%	60.8%	100.0%

The analysis indicates that there was a very significant association between an Oral Hearing and the Granting of the appeal. This significant association was based on 48 granted cases. The 48 cases represented 77.4% of the oral cases granted where the statistical average number of oral cases granted was only estimated to be 60.8%. In other words, if the Hearing was Oral, the application was granted significantly more times (77.4%) than expected (60.8%).

The 48 oral cases were individually identified and subsequently analyzed. Of the 48 oral cases granted by the Tribunal for the study period, the majority of Grants by the Tribunal appear to be because the requested health care service is not 'Identical or Equivalent' to health care service in Ontario or there is a Delay accessing an Identical or Equivalent health care service in Ontario that would result in the patient's death or medically significant irreversible tissue damage to the patient.

This significant association between the type of Hearing – in this case an Oral Hearing – and the Granting by the Tribunal of the patient's appeal – was further analyzed by Year. In the interest of time, only Decisions in the year 2004 and year 2006 were explored. No significance was found for Year 2004. However, significance was found for Year 2006. Thus, an Oral Hearing did not result in a significant number of Grants by the Tribunal for Year 2004 but it did result in a significant number of Grants by the Tribunal for Year 2006.

D. Interpreter

The study found that Interpreters were seldom used in Hearings. Only 3 cases - 1% of the time - used Interpreters.

E. Review Requests

One or both parties to a Hearing before the Tribunal may, upon receiving the Decision of the Tribunal, request that another Panel of the Tribunal review the evidence and render its own Decision. Of the 315 cases, only one case – less than 1% - requested another panel of the Tribunal to review the Tribunal's Decision.

F. Duration the Appeal is at the Tribunal

The analysis of dates sought to assess the total time a case took to be processed within the Tribunal. The timeframe in which cases came to the Tribunal office (the File Number), the time from the case arriving at the Tribunal office to the time a Hearing was scheduled (the Hearing Date) and the time from Hearing to the release of the Decision (the Decision Date) were analyzed in terms of total time and total time by year.

However, the data only permitted date assessments between the Hearing Date and the Decision Date because of comparable day, month and codes. The File Number only provided the year code and thus is not comparable.

Total Days: Hearing to Decision

Based on data analysis of the time from Hearing Date to Decision Date, a wide variation was seen. Over the study's five year period, cases took between 3 days to 1,220 days from the date of the Hearing to the date the Decision was released. The average over the five years from Hearing Date to Decision Date was 160 days – or about 22.8 weeks (160/7days) – or about 5.7 months (22.8/4weeks).

This range – 3 days to 1,220 days – is very skewed in comparison to a normal distribution. This is a distribution which is very skewed to the lower values of Decision days. The degree of skewness is indicated by a few extreme cases.

Total Days: Hearing by Decision by Year

The overall average number of days in the system was approximately 160 days, but this varied enormously. In 2006, the average number of days from Hearing Date to Decision Date was 137 days. In 2008, the average number of days from Hearing Date to Decision Date was 289 days. The graph below depicts the average number of days between Hearing Date and Decision Date data by Year:

Figure 1: Average Number of Days between Hearing Date and Decision Date by Year

Further analysis identified that there were 17 cases in fifth year with respect to this study's timeframe. The majority of these cases had a Hearing Date of 2007 and a Decision Date of 2008. These 17 cases were then cross tabulated to see if the Tribunal had Granted or Denied the application. Only one of the 17 cases was Granted.

Analysis was then done to determine the number of days a case was within the system – from Hearing Date to Decision Date - by year. In other words, did the number of days a case was within the system vary by year of Decision Date? Table 2 indicates that 2008 had the most days - a mean of 288.7 days - between the Hearing Date and the Decision Date.

Table 2: Number of Days by Year: Hearing Date to Decision Date

	<i>N</i>	<i>Mean</i>	<i>Std. Deviation</i>	<i>Std. Error</i>	95% Confidence Interval for Mean		<i>Minimum</i>	<i>Maximum</i>
					<i>Lower Bound</i>	<i>Upper Bound</i>		
3	17	183.0588	133.47728	32.37300	114.4311	251.6865	11.00	422.00
4	27	162.0370	127.59566	24.55580	111.5619	212.5122	37.00	473.00
5	53	182.8679	167.58546	23.01963	136.6757	229.0602	8.00	805.00
6	100	136.8700	147.40816	14.74082	107.6210	166.1190	3.00	1218.00
7	101	144.6139	88.35858	8.79201	127.1708	162.0570	17.00	454.00
8	17	288.7647	286.61593	69.51457	141.4004	436.1290	59.00	1220.00
<i>Total</i>	315	159.9397	147.28111	8.29835	143.6123	176.2671	3.00	1220.00

V. ANALYSIS

Significant associations were found between the Oral Hearing format and the outcome decision and legal representation and the outcome decision.

A. Parties: Representation by Lawyer or Self-Represented

The prevalent thought is that a party who is self represented may be at a disadvantage in his or her case against an opposing lawyer. Is there an actual statistical association between legal representation and the outcome decision to grant an appeal? This study found that applicants did not have legal representation 90% of the time. When applicants/patients and defendants/OHIP both had legal representation, applicants were more likely to be granted their appeal. This data raises several issues.

First, it is unclear, based on the data, if it is the presence of a lawyer for the patient or the actual argument of the lawyer for the patient that results in a higher Grant rate. A lawyer may act as an initial filter by only representing cases before the tribunal which are considered “strong” cases which may result in a grant of resources.

Second, the legal representation by both parties may not only affect how the arguments are submitted to the tribunal but also the relevancy of the evidence used to support the arguments. In this respect, legal representation may facilitate a focus on legal issues and the skill of the lawyer rather than a focus on a medical opinion.

Third, the representation by both parties before the tribunal may indicate that the nature of the actual case is of legal significance.

Fourth, the applicant/patient was always arguing against the government/OHIP. OHIP was typically not represented by a lawyer but rather by the General Manager of OHIP. The General Manager or his designate are physicians. While not ranking as representation by a lawyer, the physician OHIP representatives would have had successive appearances before the tribunal over the five year study period which might give them legal knowledge and an advantage over the patient who is self represented. The fact that OHIP was not represented by a lawyer at the Hearings should not indicate they

were not proficient in the legal arguments that may have been put forth by legal representation. It may no longer be accurate to say OHIP was self represented but instead the physician representative may have had specialized knowledge regarding the tribunal process.

A. Type of Hearing Relative to Disposition

If a Hearing was oral, the application was granted significantly more times (77.4%) than expected (60.8%) but only for one or two years analysed (2006). Again, this analysis points to the fact that significance cannot be generalized from one year to all years. This is important because any procedural changes must accurately address issues not artifacts.

The importance of oral hearings in 2006 raises a number of interesting questions – was the increased number of Grants a function of; the Year 2006, the cases themselves, the oral advocacy at the Hearing, the Panel deciding the case or other factors? The exploratory research nature of this project does not propose to answer the question but recognizes that further research needs to be done on the Year and influencing factors rather than just on type of Hearing.

B. Interpreter

The theory states that for substantive resource allocation decisions to be accepted, the process for determining the resource allocation must rely on fair deliberative processes that yield a range of acceptable answers. To facilitate this, the parties must understand the case upon which the decision is being made. The utilization of an interpreter, where needed, may be one way to facilitate an understanding.

The study found that Interpreters were seldom used in Hearings. Only 3 cases - 1% of the time - used Interpreters. An official Interpreter, in the language of the patient's choice, is arranged and provided in advance of the Hearing to the patient by the tribunal – free of charge. It is up to the patient to determine if an Interpreter is needed. Given the availability of this resource to address any financial and/or language barriers, it is interesting why more parties do not request an Interpreter. Parties in need of an Interpreter may either be unaware of this free service or those in need of an Interpreter are not coming forward with appeals to the tribunal.

C. Review Requests

Review Requests are a form of a second appeal to the same tribunal. Given that only one Review Request was received during the five year study, it is possible that parties either take the decision of the tribunal as the final decision on the matter or proceed to judicial review. Alternatively, it is possible that, having been denied by the tribunal, the patient will then access their private insurance coverage once they have, at the request of the insurer, attempted to have the health care service paid for by government public insurance rather private insurance. If this is correct, corporations – such as the private health insurance companies – may be using the tribunal as a screening mechanism.

D. Duration the Appeal is at the Tribunal

Access to a tribunal and the resulting decision is commonly thought to be a faster process than access to the courts and the resulting decision. This is questionable given the average of 5.7 month between Hearing Date and Decision date. This duration of appeal at the tribunal does not include the time period between the appeal submission and the hearing date. It is therefore assumed that the total duration an

appeal is at the tribunal is greater than 6 months. However, this Tribunal is not required by statute or regulation to receive, hear and issue a decision within a specified time.

Decision delays are largely influenced by one year. Decisions in 2008 took significantly longer from Hearing Date to Decision Date. So, what happened in 2008 that made this significant difference in the number of days a case was within the system between the Hearing Date and the Decision Date? Among many possible explanations, three in particular come to mind.

First, in 2008, the leadership of the tribunal changed. The transition from the old Chair of the tribunal to the new Chair of the tribunal may have affected the timing of the review of the Decisions by the Chair and thus the release of Decisions. Second, two tribunals – the Health Services Appeal and Review tribunal (HSARB) and the Health Professions Appeal and Review tribunal (HPARB) were amalgamated and fell under the same Chairperson. Many of the members of one tribunal were then cross-appointed to the other tribunal. This administrative procedure and new member learning curves may have influenced the release of Decisions. These changes may be an indicator of how important tribunal internal processes are on procedural fairness in terms of the ability to conduct timely Hearings and release Decisions.

Third, several key cases regarding OCCNEIHS were before the courts in mid 2008 – after the study period's completion. The author speculates that tribunal's Decisions regarding OCCNEIHS that were before the courts may have influenced the timing of the release of further tribunal Decisions (e.g. the tribunal may have wished to wait for judicial guidance on OCCNEIHS cases before releasing its tribunal Decision). Thus, variables outside of the Hearing and the tribunal's internal structure may affect the timing of resource allocation decisions.

Overall, this empirical study found that the results for one year – 2008 – cannot be generalized to all years. If only the data results from 2008 were used, the results would inaccurately reflect what has been taking place in the other four years. This is important because recommendations for an ideal decision making mechanism must examine data over time to accurately address issues or identify trends.

VI. CONCLUSION

There is a dearth of research on tribunals and in particular on the quantitative analysis of tribunal procedures involved in resource allocation decisions. This article reports on a novel empirical research methodology developed to quantitatively analyse tribunal decisions over time.

The research established that oral Hearings – for one year – and legal representation across all years are associated with the grant of an appeal. In terms of self-representation, it is important to note that the repeated appearance before the tribunal of a self represented party - such as the defendant/OHIP – may endow the party with quasi legal skills and thus may question the premise the party is truly self represented. The duration an appeal is at the tribunal may be a function of factors other than the Hearing such as the internal processes at the tribunal or pending court decisions. It was also speculated that the infrequent use of interpreters may be signaling that parties are unaware of this free service and/or only access the tribunal if they speak English. The infrequent use of Review Requests may signal that parties are satisfied with the tribunal decision or taking the decision to the courts or private insurers for further review.

Based on quantitative data analysis, this research may challenge the assumption that tribunal processes are neutral and do not affect the outcome decisions. Tribunal processes are assumed to be

neutral and allow the tribunal to focus on the substantive legal arguments of the parties in order to determine their outcome decision. It is questionable if parties to a dispute would accept an outcome decision if the research indicates certain tribunal procedures are not neutral and affect the tribunal's outcome decision.