Improving Access to Justice through International Dialogue: Lessons for and from Ontario's Cluster Approach to Tribunal Efficiency and Effectiveness

Michael Gottheil and Doug Ewart[1]

Introduction

Presenting this paper as part of an international overview of "Jurisdiction, Structure and Civil Practice and Procedure" at the 2010 Australian Conference of Planning and Environmental Courts and Tribunals provides a unique opportunity to open and encourage a dialogue with some of the only jurisdictions in the world to have joined land and environment issues in a tribunal similar to Ontario's[2] new Environment and Land Tribunals (ELTO) cluster[3]. As well, it supports an exchange of ideas and experience with jurisdictions which for some years have been leaders in tribunal reform more generally, and which accordingly offer a rich source of inspiration and guidance for Ontario's clustering initiative.

At the same time, Ontario has something to contribute to a two-way learning process: our initial research[4] suggests that Ontario's clustering model, while new,

---

[1] Michael Gottheil is Executive Chair of Environment and Land Tribunals Ontario, and Chair of each of its constituent tribunals. He was Chair of the Human Rights Tribunal of Ontario from 2005 to 2009, following some 20 years in the private practice of administrative, human rights and labour law. Doug Ewart is Senior Advisor, Administrative Justice Reform Project, Environment and Land Tribunals Ontario. He has over 30 years experience in justice policy development for both the Ontario and Canadian governments in fields including civil, family, administrative, criminal, aboriginal and human rights law, and equality rights issues. The views in this paper are those of the authors and do not represent the views of the Government of Ontario.

[2] With a population of just over 13 million, Ontario is Canada's largest province. It has 37 provincially-appointed adjudicative tribunals, along with two levels of provincially-established trial courts and a Court of Appeal. Reflecting Canada's constitutional structure, a federal trial court and appellate court also operate in Ontario, dealing with, among other matters, reviews of the decisions of federally appointed (as opposed to provincially-appointed) tribunals. The final level of appeal in Canada is the Supreme Court of Canada.

[3] To date, the closest analogy we have found to ELTO's collective jurisdiction is one of the hosts of the conference, the Land and Environment Court of New South Wales (NSW). The subject matters dealt with by the two bodies are uncannily similar, although the NSW Court has a much broader environmental jurisdiction. The fact that the NSW Court has operated for three decades in a field which Ontario has just entered is an example of why sharing information and ideas at this conference is of key importance to Ontario

[4] Part I of his paper has benefited from the research, analysis and insights of Jamie Baxter, a 2010 graduate of the University of Toronto Law school who prepared a very useful background paper on clustering while serving as a summer student at ELTO under the general supervision of Dean Lorne Sossin of the Osgoode Hall Law School of York University.

addresses several of the concerns which have been raised in academic and law reform discussions of tribunal mergers, amalgamations or clusters. And, it is hoped that some of the analysis in this paper on linkages between tribunal processes and access to justice may advance the sharing of experience and ideas in that area as well.

This paper seeks to foster these exchanges by providing core information on Ontario's cluster, and by putting forward for debate and consideration some perspectives on how structure, process and procedure can be designed to facilitate, in practical and tangible ways, the pre-eminent goal of access to justice, particularly in the context of clustered or amalgamated tribunals. Through discussion at the conference, and inclusion in its published proceedings, this paper will reach a much wider audience than could otherwise be hoped for. If the resulting cross-jurisdictional dialogue, comparative research and broad-based information sharing are similarly increased, the paper will have served its purposes.

The paper is structured in three parts. Part I provides an overview and preliminary analysis of Ontario's recent tribunal clustering initiative. Part II moves to the more general discussion of how tribunal practices and procedures can be designed to improve access to justice, and sketches the role which clustering or amalgamation can play in that regard. Part III then expands on two of the themes from Part II by exploring at greater length the expert and active-collaborative[5] approaches to adjudication, with particular reference to three recent developments in Canada which may be of interest to those administering or studying tribunals elsewhere, and on which international commentary will be instructive as related and further developments are considered in Canada.

Part I: Clustering

A. The Concept

The core rationales for directing the resolution of disputes to tribunals rather than to courts lie in the focused expertise and greater accessibility of tribunals. For the first of these reasons, and because tribunals developed gradually as acceptance of them moved out from the initial forays, and generally in response to issues faced by particular ministries or departments, tribunals have tended to be created to adjudicate disputes in a single area, and have been closely associated with their host ministry or department.

While the resulting silos promote and preserve specialization, they can lead to the inefficient use of infrastructure resources, as well as to tribunals which can become insular and self-referential. They may offer little caseload variety or

[5] See n. 31, *infra.*

professional development for adjudicators and can be prone to capture by one or more stakeholder groups or the host department or ministry. And, where its caseload is small, a tribunal may simply lack the resources to support an effective and sophisticated administrative justice organization despite its best efforts to achieve that goal.

Structural responses to these issues have come relatively recently, and have ranged from full amalgamation (unification), to amalgamation with distinct lists or groups of adjudicators for defined subject areas, to creating oversight bodies or secretariats which coordinate some aspects of the work of otherwise distinct tribunals.

Clustering is situated toward the middle of this spectrum. It can be defined[6] as a grouping of a subset of a jurisdiction's tribunals under one adjudicative leader, with each tribunal maintaining its own statutory jurisdiction[7], subject matter expertise, stakeholder relationships and (apart from the overall Chair) its distinct membership.[8]

There are few examples of clustering around the world, and none in North America, which bring together ELTO's particular group of high profile, high-impact tribunals[9]. However, the Victorian Civil and Administrative Tribunal's

---

[6] While the term is not widely used, it has been used in this context with a different meaning than the one employed here – see the New Zealand Law Commission, which uses 'clustering' to describe bringing tribunals together in a much more unified way ("fewer and larger" tribunals "integrated within a single entity") than the above definition suggests: *Determining Justice for All, A Vision for New Zealand's Courts and Tribunals*, March 2004. at page 288).

[7] In comparing the effectiveness of groupings of tribunals internationally, it is important to be aware of whether those groupings have been established in a context where statutory reforms amalgamated or merged the jurisdictions of the constituent tribunals or, more fundamentally, sought to rationalize laws and policies governing the issues which come before the grouped tribunals. In the case of Ontario, for example, neither was done, and clustering will play out in the absence of any other reforms related to the jurisdiction of the clustered tribunals or the legislative and policy context within which they work in their often overlapping areas of operation.

[8] In the cluster context, cross-appointments do not diminish the reality that each member of a tribunal has been specifically appointed to it, and has jurisdiction only over matters before the specific tribunal(s) to which they have been appointed. This is reinforced in Ontario, where to be cross-appointed within a cluster it would appear that an adjudicator must meet the statutory criteria for appointment to any tribunal, which include "experience, knowledge or training in the subject matter and legal issues dealt with by the tribunal" to which they are to be appointed. See s. 14 of the *Adjudicative Tribunals Accountability, Governance and Accountability Act*, *2009,* S.O 2009, Ch. 33, Sch. 5. With the exception of its provisions regarding clustering, the *Act* has not yet been proclaimed.

[9] A somewhat similar, smaller-scale initiative is found in Washington State's development of its Environment and Land Use Hearings Office. While this will bring together boards which hear planning as well as environmental matters, it would appear that the integration this involves is primarily at the administrative rather than the adjudicative level.

creative development and use of lists within an amalgamated structure, and the New South Wales Land and Environment Court's 30 years of experience with a subject matter jurisdiction which closely parallels ELTO's overall jurisdiction, provide particularly significant experiential bases to support further comparative analyses.

B. The Ontario Model

1. The Legislation: A Focus on Linkages and Synergies

Ontario's first cluster of tribunals[10], ELTO, is at the heart of Ontario's ongoing administrative justice reforms. It was created to demonstrate that clustered tribunals can be more efficient than the same tribunals operating alone and that the matters they deal with can be addressed more effectively, and access to justice and the quality of tribunal services can be significantly improved, when they operate as part of a cluster. It is widely seen as a key indicator of Ontario's commitment to improve and modernize administrative justice overall.

Clustering in Ontario started informally, with the five tribunals which constitute ELTO[11] being brought to one location and placed under one ministry[12], and with

---

[10] In August of 2010 the Ontario government indicated that it was proceeding with a second cluster comprised of "social justice" tribunals, and initiated a competition for its Executive Chair.

[11] The tribunals which comprise Environment and Land Tribunals Ontario are:

The **Assessment Review Board**, which hears property assessment appeals to ensure that properties are assessed and classified in accordance with the provisions of the *Assessment Act*. The Board also operates under a variety of other legislation and hears appeals on property tax matters.

The **Board of Negotiation,** which conducts voluntary mediation in the event of a dispute over the value of land expropriated by a public authority. If no settlement is reached, the matter may be appealed to the Ontario Municipal Board.

The **Conservation Review Board,** which conducts proceedings where there are disputes concerning properties that may demonstrate cultural heritage value or interest, or disputes surrounding archaeological licensing. After determining a matter, the Board then makes recommendations to the final decision-making authority in the particular case, either a local municipal council or the Minister of Culture.

The **Environmental Review Tribunal**, which hears applications and appeals under numerous environmental and planning statutes including the *Environmental Bill of Rights, 1993*, the *Environmental Protection Act,* the *Ontario Water Resources Act* and the *Safe Drinking Water Act, 2002.* The Tribunal also functions as the Niagara Escarpment Hearing Office to hear development permit appeals and Niagara Escarpment Plan amendment applications for this protected World Biosphere Reserve, and serves as the Office of Consolidated Hearings to hear applications for joint hearings where separate hearings before more than one tribunal would otherwise be required.

the administrative infrastructure for all being amalgamated[13]. This process was accelerated with the appointment in November, 2009 of one Executive Chair to lead all of the clustered tribunals, and with the introduction and passage that Fall of legislation to create the legal structure for clustering.

That *Act*, the *Administrative Tribunals Accountability, Governance and Accountability Act*, *2009*[14], (the *Tribunals Act*) provides a broad framework for the governance of all adjudicative[15] tribunals in Ontario. It deals with matters such as requirements to prepare and publish documents outlining core structural elements of tribunals (their missions, mandates, qualifications for members, service standards, complaints policies, ethics plans, etc[16]) and requires that appointments of members of a tribunal be made on the recommendation of its tribunal chair following a merit-based competition[17]. In the *Tribunals Act*, the government is also given the power to designate two or more tribunals "as a cluster" if the matters they deal with are such that 'they can operate more effectively and efficiently as part of a cluster than alone"[18].

The particular way in which the provision governing clustering was drafted appears to send some important messages as to the Legislative intention behind

---

The **Ontario Municipal Board,** which hears applications and appeals in relation to a range of municipal planning, financial and land matters including official plans, zoning by-laws, subdivision plans, consents and minor variances, land compensation, development charges, electoral ward boundaries, municipal finance, aggregate resources and other issues assigned to the Board by numerous Ontario statutes.

[12] The two ELTO tribunals which were not already under the jurisdiction of the Ministry of the Attorney General were moved to that Ministry. This was seen as reflecting the role administrative tribunals play in the broader justice system, it was also seen as an indication that tribunals are justice agencies, independent from line ministries, as opposed to bodies delivering government programs

[13] The establishment of this cluster followed an extensive consultation process and analysis undertaken in 2005-2006 by the then Chair of the Ontario Labour Relations Board, Kevin Whitaker (now the Hon. Mr. Justice Whitaker of the Superior Court of Justice). See the *Interim Report of the Agency Cluster Facilitator for the Municipal, Environment and Land Planning Tribunals,* January 31, 2007 and the *Final Report,* August 22, 2007.

[14] Supra, n. 8

[15] In Ontario, the term adjudicative tribunal means a tribunal prescribed as such under the *Tribunals Act*. There is no legislated definition of the term. See O. Reg. 126/10 for the current list of adjudicative tribunals.

[16] The *Tribunals Act,* supra, n. 8, sections 3-8.

[17] *Ibid*., section 14. Note that the government may make exceptions to this: see ss. 23(e).

[18] *Ibid*., section 15. This provision has been proclaimed in force.

this concept. Pursuant to the Act, in order to cluster two or more tribunals the government is to have looked at the subject matters they deal with and determined that there is something about those subject matters that can be better dealt with in a clustered structure. In the Ontario approach to clustering, the rationale for a cluster accordingly lies in the subject matters of the constituent tribunals. And, once the government uses its clustering power, the tribunals are designated "as a cluster"[19]. This gives tangibility to the concept of a cluster – a cluster is more than a label: once constituted, it becomes an entity recognized by statute with its own identity and purpose.

Importantly, the legislated rationale for a cluster is not limited to improvements in efficiency, which we might equate with procedure and administration, but equally includes improved effectiveness in how the subject matters within the cluster are dealt with. There are two key concepts here: i) effectiveness, not just efficiency; and ii) effectiveness in relation to substance (subject mater), not just process.

The Act goes on to say that the accountability and governance documents which all tribunals in Ontario are required to have must, in the case of a cluster, be jointly developed and entered into[20]. As noted above, these documents include, among others, a mission statement and a description of the skills and attributes required of tribunal members. The fact that the tribunals in a cluster must jointly develop a mission, and a joint statement of the members' attributes and qualifications, indicates again that we are directed to look at a cluster as more than an administrative home for a collection of tribunals.

Once a cluster is created, the government may appoint an Executive Chair to oversee and manage all the tribunals in the cluster. That Executive Chair then, by statute, has all of the powers and duties assigned to the chair of each of the constituent tribunals by any statute, regulation, order-in-council or directive[21]. This choice to vest all of the previous chairs' powers and duties in just one chair signals an intention to go beyond a coordinating chair model to create an integrating chair.

Overall, it would seem that these provisions evince an intention by the Legislature to develop clusters of tribunals for purposes that go beyond administrative efficiencies and coordination. After all, such goals could be achieved by appointing outside efficiency experts and by encouraging the tribunals to work together. Referring to subject matter effectiveness and

---

[19] See O. Reg. 126/10 which formally constitutes the ELTO cluster. See also ss. 16(3)of the T*ribunals Act, supra* n. 8 which provides for the appointment of alternate chairs "of the cluster".

[20] *Ibid*, section 18.

[21] *Ibid*., section 17. Note that the government has the power to exempt by regulation some of the duties which might otherwise flow to an Executive Chair under this provision: see ss. 23(f).

appointing a single chair for a number of tribunals send a stronger message about coordination and signal a more serious desire for change. They suggest a need to interpret and apply a cluster mandate in a way which gives effect to this integrative legislative intention, subject only to respecting the unchanged statutory mandates of the constituent tribunals.

2. Synopsis of Key Features

Seen from the international perspective, the following key elements of Ontario's clustering model may be of particular interest[22]:

- Tribunals are grouped into a cluster in part because of a discerned linkage among the subject matters over which each of them has jurisdiction. This differs from approaches which group tribunals by reference to the kinds of powers they exercise or matters they deal with (for example, reviews of governmental action vs. disputes between parties, or purely private matters vs. matters also involving the public interest); or by the kinds of adjudicative models they employ (for example, the "full" adversarial approach vs. an active, inquiring adjudicative model); or by the users of the services of the clustered tribunals (for example homeowners re: property tax and renovation issues, or businesses re: licensing and regulatory matters).

- Each clustered tribunal has a distinct legal jurisdiction, even though the subjects within a tribunal's jurisdiction (for example, a wetland) may also, for other purposes, fall within the jurisdiction of another tribunal. As a corollary, each tribunal is likely to maintain a distinct set of stakeholders.

- Each clustered tribunal has a complement of adjudicators appointed specifically to it, with exclusive jurisdiction over the matters coming before that tribunal. This feature may be of particular relevance to those who are concerned about the dilution of subject matter expertise in amalgamated models, as it ensures both initial expertise[23] in the matters before a tribunal and increases the likelihood that there will be a sufficient diet of that work to maintain that expertise among its members.

- Although containing these features of distinctiveness, the cluster must give effect to the legislative intent behind it by using the fact of being clustered to improve the effectiveness with which each constituent tribunal

---

[22] As noted above, the ELTO cluster was created, and is being built, without any underlying rationalization of the constituting statutes for the five tribunals, nor of the more than 100 statutes and policies which define and shape their jurisdiction. This is an important distinction from other tribunal reorganizations or amalgamations, and must be kept in mind when international comparisons are made.

[23] See n. 8, *supra*.

discharges its specific statutory mandate. This appears to call for efforts to enrich the jurisprudence of each tribunal by bringing a broader range of knowledge, experience and perspectives to bear on the matters that come before it, and by fostering an enhanced ability to see and respond appropriately to areas of subject matter connectedness.

- Through selective cross-appointments, extensive cross-training[24] and co-location, the experiential and knowledge bases of adjudicators are broadened. This not only promotes the subject matter synergies referred to immediately above, but as well recognizes the importance of common, high standards of accessible adjudicative practices across a cluster. At the same time, it should provide increased job satisfaction and career mobility for adjudicators.

- The leadership structure of the tribunal need not be established by strict adherence to the previous governance hierarchies of the constituent tribunals. The *Act* contemplates an Executive Chair with all of the powers and duties of the previous chair of each tribunal. Beyond that, it permits, but does not require, the appointment of an Associate Chair for each tribunal. While that appears to be the direction the government is taking for ELTO, there is nothing to prevent having no Associate Chairs, or having Associate Chairs who are responsible for more than one tribunal, or, perhaps, appointing them on a non-tribunal basis, such as, for example, by cluster function such as mediation services, professional development, adjudication practices, expedited matters, and so on. Even where Associate Chairs are appointed on a tribunal-specific basis, the job descriptions for those Associates can make it clear that their key responsibilities are to the governance and development of the cluster as a whole[25]. In addition, the Act permits the Associate Chairs to be appointed as Alternate Executive Chairs of the cluster as a whole, further reinforcing their corporate role.

- While the back office functions of all five tribunals have been amalgamated into a single administrative service for matters like finance and communications, tribunal-specific staff are being retained for the case-processing functions of the constituent tribunals. This reflects the view that adjudicators and all others in the tribunal who process cases

---

[24] For example, ELTO's training plan will feature ELTO-wide programs offered to members of all tribunals. Although, as appropriate, tribunal-specific programs will also be offered, they will be priorized, developed and coordinated through the pan-ELTO training committee.

[25] Pursuant to the current ELTO position description, an Associate Chair "is a member of ELTO's senior management team and assists in building and leading the ELTO cluster of tribunals" in addition to providing jurisprudential leadership for and day-to-day oversight [but not being the delegated head] of one or more of ELTO's constituent tribunals.

should be seen as a team who together serve the members of the public bringing disputes forward for resolution. Having staff with a sophisticated knowledge of the caselaw, stakeholders and procedures of each tribunal is essential to building and fostering that capacity, and the reciprocal respect and trust it calls for between adjudicators and staff.

- The five ELTO tribunals now operate under a common mission and mandate statement and a common set of core values[26]; an ELTO-wide conflict of interest policy and code of conduct are nearing completion as this is being written.

- The five tribunals were co-located as a step prepatory to the appointment of an Executive Chair and the legislative recognition of the cluster. They operate on four floors of an office building in central Toronto. While initially each tribunal had more or less distinct space in that building, steps are underway to redesign the premises so that all adjudicators are on the same floor, the senior management group is housed together, tribunal counsel are co-located, and so on.

In addition to these unique – at least viewed collectively – attributes, Ontario's cluster has many of the features common to amalgamations or mergers. These include:

- The exponentiation of the reach of a single leadership team, and hence the ability to modernize the operations of a number of tribunals (increased professional development, effective use of decision-quality mechanisms, a user focus, more active adjudication, etc) in a consistent, expedited and harmonious way.

- Finding opportunities to provide processes tailored to users whose interests may cross tribunal boundaries, for example, homeowners seeking a minor variance (dealt with by the OMB)or appealing a property assessment (dealt with by the ARB). As is the case in amalgamations, a cluster may be able to create de facto cross-tribunal "lists" within the cluster through cross-appointments and unified codes of procedures for classes of cases which fall within the jurisdiction of more than one of the clustered tribunals, but particularly affect the same specific parts of the province's population.

- Using the expertise and experience of a broad pool of adjudicators and staff to develop improved approaches to common adjudicative issues such as the use of expert evidence or managing complex cases.

---

[26] These and other ELTO documents may be found at www.elto.gov.on.ca.

- Increasing the quality of decisions because of the multi-tribunal pool of expertise.

- Offering, in addition to the specific benefits of having a larger pool of staff and adjudicators noted immediately above, the ability to better ensure diversity more generally, with the consequential benefit that the cluster as a whole is more reflective of the face and perspectives of the entire province.

- Making it easier to maintain a pool of adjudicators competent to conduct proceedings in more than one language.

- Improving the geographic reach of the tribunals where members reside across the province and are qualified for cross-appointment within the cluster.

- Providing, through cross-appointments, an enhanced ability to rely upon full-time members.

3. Some Current Issues

The above matters all speak to the potential benefits of the ELTO cluster. However, compelling as the theory of clustering may be, and despite the encouragement offered by some of the experience elsewhere, there are a myriad of small and large management and leadership challenges involved in converting a very bare bones statutory framework into a functioning cluster which is respected both internally and externally. Highlights among them are the following:

- Protection of subject matter expertise, and public confidence in that expertise, while also encouraging broad professional development and improving subject matter cross-fertilization[27] (maximizing subject matter synergies);

- Issues around cross-appointments (integrative value vs. potential loss of tribunal-specific expertise and collegiality, or the appearance of such loss leading to concerns from tribunal members and stakeholders if such appointments are not selective and strategic);

---

[27] See, for example, the observation of Justice Brian J. Preston that "[a] one-stop shop also facilitates better quality and innovative decision-making in both substance and procedure by cross-fertilization between different classes of jurisdiction", in "Operating an Environmental Court: the Experience of the Land and Environmental Court of New South Wales", a paper delivered as the Environmental Commission of Trinidad and Tobago Inaugural Distinguished Lecture on Environmental Law, (at page 26 of the text): also published in (2008) 25 EPLJ 385.

- Conflict of interest issues across the cluster, particularly for part time members with active practices in areas dealt with by the cluster[28];

- Providing subject matter leadership within each tribunal without Balkanizing them;

- Building an integrated leadership cadre and culture for the cluster as a whole given the varying cultures and ways of doing business which may have developed in the clustered tribunals over time, and perhaps particularly given the practical reality of the work involved in overseeing the day to day operations of several busy tribunals while also leading the overall strategic development and management of the cluster. And, more generally, managing the amount of time required to operationalize a cluster at the administrative level in a way which also permits a modernization agenda to be advanced.

- Preserving innovative adjudicative techniques which may be challenged if a tribunal using them is clustered with a number of more traditional tribunals;

- Getting the benefit of a richer base for decision-reviews and finding opportunities to leverage training, without raising concerns that one subject area or tribunal is being preferred or without diluting expertise;

- Creating integrative office environments without losing the benefits of close collaboration at specific tribunals.

Conclusion

Despite the above-noted challenges, it seems clear that when properly conceived and resourced clustering can provide a mechanism to obtain efficiencies in infrastructure usage and to develop and implement modern tribunal practices. It also offers the potential to be built in a way which increases the effectiveness with which each clustered tribunal applies expertise[29] to discharge its particular statutory jurisdiction, and, as Part II of this paper will suggest, which increases access to justice.

---

[28] See *Grand River Conservation Authority v Her Majesty the Queen in Right of Ontario (Ministry of Transportation)*, Ontario Municipal Board, unreported, April 23, 2010.

[29] In a cluster, this expertise can be seen as including the experience and knowledge of all adjudicators in the cluster, just as within a single tribunal expertise can (and should) be seen as being that of the tribunal institutionally rather than only that of any given tribunal member who presides over a case. Indeed, the doctrine of deference to tribunal expertise makes little sense unless that expertise is seen as inhering in the tribunal's historical and collective experience in the field rather than in each appointee to it, however new to the tribunal or whatever their background.

Part II: Designing Structure, Process and Procedure to Achieve Access to Justice

Before exploring ways in which tribunals – and clustering – can increase access to justice, it is important to unbundle that term and to give equal weight to both elements of the phrase 'access to justice'. Although so frequently used that it trips off the tongue or pen as a single concept, two important and analytically distinct thoughts are contained within it. The first, access, is a means; the second, justice, is an end. Thus while access primarily involves the ability to be meaningfully and equitably heard by a decision maker, justice adds the very important dimension of a principled and fair result, based on the merits, and unaffected by differing resources or individual or systemic disadvantage. Seen in this way access to justice might colloquially be phrased as 'getting to a good place in a good way'.

This Part will first outline a wide range of ways in which tribunals can actively promote access to justice for all tribunal users or potential users. It will focus on matters which many or most tribunals can achieve within existing budgets and statutory powers, or with only modest adjustments to them. In particular, broader access concepts such as intervener funding or enhanced legal aid, and institutional justice concepts such as tenure and the level of remuneration for adjudicators, are not the focus of this paper. Similarly, although access to justice is often considered in relation to other important matters such as plain language, practical guides, clear forms, and accessible hearing rooms, this paper's focus is on the how the structures, policies and procedures a tribunal uses in adjudication can be tailored to advance access to justice[30].

While the procedural and structural initiatives discussed in this Part are not particularly novel, it is perhaps novel – and instructive – to view them through an access to justice lens. This not only provides a unifying theme to make coherent the implementation of a series of otherwise discrete and sometimes controversial reforms, but as well provides a theme which is very likely to engender significant public support to counter the more entrenched views which otherwise may dominate conversations about these kinds of reforms. Part II will end with a brief analysis of how a clustered or amalgamated approach to tribunals can facilitate the adoption of these measures, and hence may itself be a means to advance access to justice.

The access to justice initiatives canvassed in Part II run the gamut from the atmosphere which prevails throughout a tribunal, through to its internal review mechanisms. Several of them cover territory which is often a central part of the debate about the respective merits of the adversarial and inquisitorial systems of

[30] Although processes such as mediation, conciliation and arbitration can also advance access to justice, they represent well-trod ground, and also will not be explored here.

adjudication. It is accordingly important to stress at the outset that this paper does not situate its discussion of access to justice within that debate[31]. The issue for this paper is not whether tribunals should move towards a new adjudicative model, but rather it is to outline reforms that alone, or especially in combination, may increase access to justice wherever the underlying system or starting-point.

This approach reflects the view that 'first-principles' debates about which total system is preferable can not only impede making any significant change, but can also obscure the ways in which sound practices from varying systems can be integrated into a number of models. For example, some of the elements of the active-collaborative model discussed in this paper are quite consistent with elements found within adversarial systems, especially, but not only, in pre-trial matters. In any event, the paper suggests that the possible reforms be considered on their individual and collective merits, and not through the often ideological lens of a total-system debate.

Setting that debate aside, this section of the paper will explore, from a user perspective, what kinds of changes to, or extrapolations from, existing structures, processes and policies have the potential to significantly increase access to justice at tribunals. It suggests that there is indeed a very wide range of areas in which initiatives can be brought forward by tribunals to achieve that objective. These ideas can be 'mixed and matched' in various jurisdictions at various times and for varying subjects and user groups. A seismic shift from one model of adjudication to another is not needed to draw upon these initiatives to meaningfully improve access to justice at any given tribunal or grouping of tribunals.

Illustrative Access Initiatives

The following initiatives are put forward in brief outline form to illustrate the many mechanisms open to tribunals which have the potential to improve access to justice. While in some instances initial reflections are offered on how an initiative

[31] To the extent that readers are driven to view some of the concepts in this section through the lens of an inquisitorial approach, a brief comment on that term is required. For the purposes of this paper, a key distinction must be drawn between the civil concepts of an investigating magistrate and an inquisitorial adjudicator. Confusion can result when the term inquisitorial is applied to both. Readers will better appreciate this paper if they exclude the investigative model from their conceptualization of the inquisitorial approach, and hence do not think of it here in terms of a tribunal conducting its own investigation and calling its own evidence. To help draw this distinction, this paper will avoid the term inquisitorial as much as possible, and will primarily use the term 'active-collaborative' adjudication to describe the suite of practices which a tribunal may use to i) obtain early disclosure to the tribunal (including through detailed application and response forms and by suggesting, without directing, additional areas to be covered or witnesses who might be called); ii) focus the issues for determination using the information supplied by the parties and its own expertise; and iii) manage, direct and sometimes conduct the eliciting and testing of the parties' evidence at a hearing.

might best be put into practice, each would still require context-specific analysis and fleshing-out, ideally in close collaboration with stakeholders, before being added to a tribunal's procedural repertoire.

As well, each needs to be considered not only from the perspective of those who now find it difficult or impossible to equitably use tribunal services, important as that perspective is, but as well from two additional perspectives. The first is that of those who, with varying degrees of ease, already effectively navigate tribunal services. They too can benefit from reduced costs and delays when modern adjudicative practices are used, and perhaps as well when the credibility of the processes they use, and the decisions they seek to rely on, are enhanced through broader access. The second is the perspective of the public at large, and indeed the public interest, which also benefit when tribunal decisions can be based on a full spectrum of relevant perspectives.

1. Commensurate Proceedings

Where proceedings are managed to ensure that they are commensurate with the core issues needed to decide a case, proceedings are neither longer nor more complex than they have to be to fairly decide the determinative issues. As a result, a significant deterrent is removed for those who are less able to afford the cost in money or time of longer processes, or who are less adept or comfortable in complex and protracted matters. Even for those who may have sufficient resources to engage in more costly or lengthy litigation, there is neither private benefit nor a public interest in having cases go on longer than needed to reach a fair outcome on the merits.

Indeed, a purely economic analysis would conclude that, apart from those who work in the legal field, no party benefits from protracted and costly litigation, except perhaps by being able to outlast the other parties through dint of resources. Assuming that this is not a strategy a tribunal would want to endorse, the notion that there is value in having litigation last longer than needed to determine the core issues falls away. So too does the argument that procedural fairness requires that parties have the right to solely determine the course of the litigation. Parties have the right to be heard, not to litigate.[32]

In this connection, it is also appropriate to take into account the reality that limited public resources are dedicated to the justice system, and perhaps particularly to its administrative justice arm, The misuse, or unnecessary use, of those precious resources by one set of litigants automatically reduces the capacity of the system

[32] See; Michael Gotheil, *A Case for Alternative Adjudicative Models: Enhancing Access to Justice in Administrative Law Proceedings*; Regulatory Boards and Administrative Law Litigation Journal (2009), Vol. X, No. 2 (Federated Press).

as a whole to meet the needs of others in a timely and effective way[33]. When that is allowed to happen, access to justice is undermined.

Even where the work of ensuring that proceedings are commensurate to the nature of the matter requires as much additional adjudicator time outside the hearing, to shape the proceeding, as it saves in hearing time, and thus does not enlarge the capacity of the tribunal to hear more matters, it can significantly enhance access to, and the experience of, justice at tribunals.

2. Standing and Participation.

Rules of standing and participation can be designed to validate the relevance of a broad range of interests and to bring additional voices to the table. This approach can improve the range, and the contextual analysis of, the information available to the decision-maker and can facilitate a breadth of participation which promotes the credibility of the process and the quality and legitimacy of its outcomes[34]. In a virtuous circle this can then further encourage people who have an interest in the matter, and who have relevant information, to come forward to add their information and analysis to the record on which a decision will be made.

As with certain other matters discussed here, these considerations can be particularly important where tribunal decisions must reflect the public interest, and not just resolve a *lis* between the parties. In these circumstances, more open processes can help ensure that the adjudicator has the information needed to make the required decision in a way which reflects the community's shared, long-term interest in a good outcome, rather than just the information needed to declare a winner.

3. Welcoming Public Participation

An open door will not alone bring a broader set of views to a tribunal. At least two "attitudinal" approaches are also necessary. First, tribunals must ensure an atmosphere at counters and in hearing/mediation rooms that is supportive of and welcoming to those who are not regular users of the tribunal, and that avoids

---

[33] Of particular interest in this regard is the provision of the New South Wales *Civil Procedure Act, 2005,* which requires the Court to manage proceedings having regard to a number of objects, including "the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties" [s. 57(1) emphasis added]

[34] Although it was posted just as this paper was being finalized, and hence could not be fully reflected in the analysis herein, a very recent comparative analysis of two Australian Courts dealing with the reviews of development approvals seems to provide strong support for this proposition. See Andrew Edgar, "Participation and Responsiveness in Merits Review of Polycentric Decisions: A Comparison of Development Assessment Appeals", July, 2010, (http://ssrn.com/absreact+1650387), also published at (2010), 27 .E.P.L.J. 36.

creating the impression of a club[35] composed of insiders. As with other issues, a "whole of tribunal" approach is required, in which staff at all levels, as well as adjudicators, are committed to creating, and have the training and support to create, an atmosphere which is experienced as inclusive by all.

Second, tribunals must, through their actions and in their decisions, demonstrate that they have a serious interest in all relevant views being put forward. Although perhaps initially counterintuitive, this can mean being relatively strict about requiring those who wish to participate to explain how they have a relevant point to make, and, having done so, that they provide a focused presentation on that point. Simply indulging those who want to say something to a tribunal can all too easily lead to proceedings being conducted in a way which creates the impression, and sometimes reflects the reality, that the non-traditional participants are being pandered to, and that their views were never intended to get serious consideration. Enhancing access to justice means facilitating "informed participation", which ensures not only that the hearing will be conducted efficiently but as well that participation is effective.

Similarly, where there has been broader participation, adjudicators should take care to give it reasoned consideration in their decisions. This should go beyond an isolated recitation of the fact of participation or the points made, to instead demonstrate that the perspective has been considered and integrated throughout the adjudicator's reasoning wherever it is relevant.

4. Effective Participation by the Self-represented

Much has been written about how adjudicators can assist those without representation to participate in legal processes in a meaningful way[36]. This paper will not attempt to summarize that literature. For our purposes, what is important is that tribunal processes be reconsidered with a view to how they can be

---

[35] See Justice Kevin Bell: "[Tribunal members, advocates and witnesses [perhaps especially experts]] all seem to know the rules and procedures, and may even demonstrate personal familiarity with each other. But the new advocate in the Tribunal, the self-represented party, and the family and community members looking on may only experience anxiety, uncertainty, a sense of exclusion and even, in some cases, humiliation. Presentation by a tribunal to the uninitiated of being a club is entirely unintended but has very negative consequences…[including] a profound sense of disempowerment… [that] is felt at the personal level and experienced as disrespect for the dignity of the individual", in "The role of VCAT in a changing world: the President's review of VCAT", Speech delivered to the Law Institute of Victoria, September 4, 2008, at 17-18.

[36] See, as just one example, the Canadian Judicial Council's 2006 "Statement of Principles on Self-Represented Litigants and Accused Persons", at www.cjc-ccm.gc.ca. It can be noted that some of the concerns in the literature about an adjudicator appearing biased when they intervene to help an unrepresented party cope with the process are addressed in the active-collaborative model of adjudication discussed *infra.* In that model, an adjudicator plays an active role in relation to all parties, such that their interventions are not seen favouring the self-represented parties.

adjusted to facilitate the reality, where that is the case, that a significant number of tribunal users will not be represented.

This is a fundamentally different approach than taking traditional procedures as a given, and then bolting-on various accessories and ancillary aids to try to make those procedures less daunting for those without representation. It calls for looking at processes through the eyes of those without representation, and more generally, through the eyes of the parties, rather than their representatives. Truly accessible processes will be those which are understandable and navigable by parties, whether or not they are represented. In much the same way as with modern approaches to accessibility and accommodation for persons with disabilities, the focus should not be on accommodating ”special needs”, but rather on working to incorporate universal design features.

But, care should be taken to identify these issues, and possible responses to them, with users of tribunal services, including those who have been, or can speak for, unrepresented participants. When this is done, a different perspective may emerge, such as the expectation of process or formality which many individuals may bring to a hearing based on movies or television programs. For some, an untraditional process, or informality itself, may be taken as a signal that their claim is not seen as significant because it has not been granted the grandness of a traditional, formal, court-like approach. For the purposes of this paper, what matters is not the specifics of how processes are made understandable and accessible, but rather the inclusive re-examination of adjudicative systems to improve access to justice to tribunal processes, and to a just outcome, for all participants, whether or not they are represented.

5. Expert Adjudicators

Increased use of expert adjudicators can reduce the need for technical and expert evidence[37]. It can also permit adjudicators to confidently reduce the issues in play and the amount of evidence heard overall, based on an expert appreciation of what is required to fairly decide the matter. And, where a tribunal through its recruitment, training and retention policies, and its adjudication practices, is well-known for its expertise, parties will have confidence in these rulings and will be inclined to respect rather than challenge them.

The resulting shorter, better-focused proceedings will help ensure that outcomes are based on the relevant evidence and issues, rather than on the resources of the respective parties. This will provide confidence among all potential tribunal users that they can participate in a cost-effective way, and that their evidence

---

[37] “A court can address inequality of alms between the parties. Specialization and the availability of technical experts (commissioners) in the Court address in part inequality of resources and access to expert assistance and evidence”: per Justice Brian J. Preston, *supra*, n. 27.

and submissions will be properly understood and fairly evaluated, and in these ways will encourage participation in tribunal proceedings.

Of the above matters, managing expert evidence will likely provide the greatest challenge to a tribunal. Depending on the nature and complexity of the matters dealt with by a tribunal, expert adjudicators alone[38] will not routinely eliminate the need for parties to retain experts and present expert evidence. Highly complex and technical matters will often require expert evidence. And unless a tribunal employs an investigatory approach, and is properly resourced to fully canvass and bring forward the needed technical evidence, it will be the parties' responsibility to do so. In those circumstances, even though expert adjudicators will lead to efficiencies in a number of ways, including in how expert evidence is managed and heard, their use will not eliminate the need for the parties to bring forward expert evidence, or any inequalities in their respective resources to do so.

6. Active-Collaborative Adjudication[39]

For our purposes, the active-collaborative style of adjudication is one in which expert adjudicators take an active role in narrowing and focusing issues both before and during hearings, and in eliciting and testing evidence at hearings, to help keep proceedings commensurate, accessible, and navigable for all parties and participants. It will usually be supported by rules which direct the parties to provide the kind of information a tribunal needs to be active in an effective manner. For example, rules can ensure that the adjudicator who will hear a matter receives and is expected to review detailed application and response questionnaires, documents to be relied on and statements of witnesses intended to be called well in advance of the hearing (or any pre-hearing conference dealing with the shape of the hearing) and is informed as early as possible of the positions the parties will be taking and the outcomes they are seeking to achieve.

These kinds of rules not only permit the early and effective focusing of a case and management of the parties' participation, but as well allow the adjudicator to identify areas on which additional evidence is needed from the parties[40]. Such

---

[38] See point 7, *infra*.

[39] The authors acknowledge with appreciation the research into active adjudication models undertaken by ELTO summer student, Samantha Green, a first year student of the University of Toronto Law School, under the general supervision of Dean Lorne Sossin of the Osgoode Hall Law School of York University.

[40] See n. 31, *supra*, re the distinction between this approach and common conceptions of the inquisitorial model. It must be recognized (and confronted) that within this approach, while the adjudicator takes an active role in shaping the hearing and identifying relevant issues and evidence, the tribunal does not become responsible for developing a full record. Care must be taken to make clear to parties, particularly self-represented parties, that it is not the tribunal's

rules may also make it clear that the proceeding is to start with a clear definition from the adjudicator, after hearing from the parties, of what is really in dispute, and what the tribunal must determine to resolve that dispute. They may also give the adjudicator express powers to elicit evidence in chief from witnesses called by the parties, and to both control and conduct cross examination to help ensure equitable access to, and a balanced record[41] for, the tribunal's decision-making[42].

This approach is referred to as collaborative as well as active because the parties remain responsible for adducing evidence, and because it requires the adjudicator to review with the parties, either at a pre-hearing conference or at the commencement of the hearing, or both, what issues remain in dispute and what additional evidence, beyond the record already filed, is needed to fairly determine the matter. In some kinds of matters, this can take the form of a "consultation" in which determinations can be made as to the matters on which *viva voce* evidence is necessary.[43]

The distinction between this approach and pre-hearings or pre-trials in traditional adjudicative models, is that if no consensus is reached, the adjudicator, after hearing the parties, can determine the issues to be addressed, and what evidence is required to determine the matter.

---

responsibility to make out their case. Further. expert adjudicators and active-collaborative adjudicative approaches cannot turn a complex legal issue into a simple non-legal matter.

[41] In its practice direction on expert and technical evidence, para. 8, the Environmental Review Tribunal provides as follows: "The decisions that the Tribunal must make involve the public interest and may have serious and far-reaching environmental consequences. These decisions must be based on a balanced record, composed of accurate and reliable technical information and professional opinions. All Parties and their representatives and witnesses have a responsibility to contribute to such a balanced record to assist the Tribunal to fulfill its duty." See the Tribunal's July 9, 2010 Rules of Practice and Practice Directions; http://www.ert.gov.on.ca/stellent/groups/public/@abcs/@www/@ert/documents/webasset/ec082677.doc.

[42] See the expanded discussion in Part III, *infra.*

[43] The Ontario Labour Relations Board's 'consultation' process permits the Board to determine that no *vive voce* evidence is needed. That process was developed by the Board to deal with certain classes of cases which require very expeditious processing to avoid becoming moot. The legislative anchor for this is a provision identifying a defined subset of the Board's jurisdiction, and providing that no hearing at all is required to determine those matters. This provision was then used by the Board to support rules which permit Board members to determine whether to hear evidence, or simply have the parties elaborate or make submissions on their written materials. The process, and court decisions upholding it, are very helpfully set out in a recent article by OLRB Vice Chair Jack Slaughter: *A Review of the Interim Order Powers and Consultation Processes of the Ontario Labour Relations Board,* The Advocate's Quarterly, Vol. 37 at 87.

Overall, in an active-collaborative adjudication model the adjudicator's sophisticated knowledge of the subject area and procedures is deployed to the benefit of all parties, and to advance the public interest in an efficient proceeding, and a just outcome consistent with applicable laws, precedents and policies. The model can help to ensure that a party's inadequate knowledge of the issues or jurisprudence, or their inability to appreciate what needs to be proven or to see gaps in the record, or to effectively lead evidence or test the evidence from other parties, do not impede a fair and just outcome. In these ways, both access and justice can be advanced.

As noted, to support this approach, detailed rules of practice are highly desirable. Such rules enhance "informed participation" by signalling to parties the types of information that will be required, or expected by the tribunal, in the adjudication of the case. In addition, they enhance "informed access" by clearly setting out shared expectations of the respective responsibilities of the parties and the tribunal, and of the process.

As well, detailed rules promote consistency in approach across a tribunal as all adjudicators are working from a clear set of standards[44]. Such rules can also provide a clear, integrated framework for the exercise of a more active style, and thus may help a reviewing court understand the context in which a particular ruling was made[45]. And, where the rules are developed in consultation with stakeholders, significant issues and potential pitfalls can be identified early and addressed appropriately, myths and misunderstandings can be put to rest in an informal setting, and a consensus around new approaches can be nurtured.

7. Controlling the Use of Expert Evidence

Tribunals can shape their proceedings to better define the role for experts, limiting the advantage enjoyed by those who can afford more, more senior, or better prepared, experts. Tribunals can also use techniques such as joint experts, panels of experts or tribunal-appointed experts to help ensure neutral information and level the playing field. And, as a minimum, they can work to avoid creating a culture in which expert testimony, whether or not strictly opinion evidence, is seen to be privileged over non-expert evidence.

---

[44] While generally desirable, this approach is key where novel approaches are being brought forward in an area which contains many legal and public relations landmines, and where reviews are likely to be taken to more traditionally-oriented courts. In these circumstances, extemporizing by well-meaning adjudicators can lead to controversy and reversals, potentially setting back a significant part of a modernization agenda.

[45] The legislative framework for Ontario's Human Rights tribunal, discussed in Part III, below, is an excellent example of how an integrated set of provisions, running from the qualifications of adjudicators through to specific limits on review by the courts, can provide a solid foundation for tribunal rules which establish a more active adjudication model.

8. Decision Quality/Framework Decisions

By putting in place processes to ensure high-quality, consistent decisions, a tribunal can enhance public confidence in having recourse to it, and thus encourage individuals, regardless of their resources, to make use of its services, and to accept the tribunal's decisions as final. Where these goals are achieved, the final resolution of matters is expedited and, as well, the tribunal's decisions will provide clear guidance for the future and thereby reduce the need for litigation and advance the interests of justice.

Particularly where the review of government action is involved, decisions can be expressly crafted to provide clear guidelines for government decision-makers, thus promoting consistency "on the ground" and further reducing the need for often-costly litigation. Indeed, the Land and Environment Court in New South Wales appears to go beyond issuing framework decisions:

> The Court extrapolates principles from the cases and publishes them. The principles can be used by agencies in future decision-making.[46]

In these ways, a tribunal can provide ongoing access to justice without further recourse to the tribunal. This allows tribunal resources to be used to increase access for others by reducing delays in getting to their matters.

9. Reconsideration

Reconsideration of its decisions by a tribunal can reduce the need for costly and often complex appellate proceedings, which can be outside the reach of some participants whether as initiators or respondents. At the same time, however, its use requires considerable caution to avoid having tribunal decisions seen as "just first drafts". Properly used, reconsideration serves simply as a backstop for effective decision quality assurance mechanisms in a tribunal.

10. Engagement of Non-traditional Stakeholders

Broad and inclusive stakeholder engagement can advance access to justice by including and demonstrably valuing the views and perspectives of all categories of users of a tribunal, including those who are not traditionally seen as stakeholders. For many tribunals, stakeholders tend to be defined as the bar which practices before them and perhaps representatives of the significant repeat participants. This not only narrows the perspectives being offered to the tribunal, but as well it further reinforces the impression that other perspectives (or even classes of users or potential users of tribunal services) are not as welcome or valued, even in the context of a hearing.

---

[46] Justice Preston, *supra* n. 27 at 30.

Making the not-inconsiderable effort to meaningfully include more disparate interests will encourage a wider cross-section of users to feel fully welcome at the tribunal in all that it does. It will also ensure that the tribunal's processes are informed by all categories of potential users. And at the same time, getting out to, and engaging with the wider community can help ensure that the tribunal has a better context for understanding the practical application of its mandate, and for designing its processes and procedures, including through a better appreciation of the real-life experiences of those who are not regular users of the tribunal.

11. Recruitment and Professional Development

Finally, access to justice is also advanced through recruitment processes and professional development initiatives which attract, develop and retain very high quality adjudicators and staff members. The resulting culture of excellence will not only itself attract increasingly strong candidates to the tribunal, but as well will inspire confidence in tribunal users that serious and thoughtful presentations are worth the time and effort they entail, thus simultaneously advancing both access and justice.

Clustering and Amalgamations as Potential Accelerants

Whether and how to integrate any or all of the above initiatives into the structure, procedures and policies of any given tribunal can be a daunting matter to contemplate. Each issue may have to be debated, each stakeholder group consulted, and each potential public relations issue dealt with, often in a context where the caseload, or the sensitivity of the issues, or limited tribunal policy and engagement capacity, make the effort not practical even where the benefits are seen to be great. The impediments to proceeding will be even greater where the stakeholder group that may benefit is simply too small or diffuse to effectively counter entrenched interests in any public dialogue.

But in several ways the context of a clustered or amalgamated tribunal can assist in achieving access to justice. First, at least in the early days, the creation of a new structure, for some or all of a jurisdiction's tribunals, creates an expectation of change. While the prospect of change may not always be welcomed, both internally and, externally, amongst those who have found ways to make the system work to advance their interests, when governments propose tribunal amalgamation or clustering it is generally as part of an effort to improve the quality of administrative justice. Hence, change will be seen, or at least can be presented as, a positive step. And second, creating a new structure designed to improve overall effectiveness and efficiency will necessarily lead to a need to reflect upon existing tribunal process, procedures and policies, and thus provide a context for proposed changes.

As well, there is an economy of scale in bringing an access to justice initiative to a group of tribunals. Much of the policy development, consultation, rules drafting and communications planning can be unified, especially where tribunals with

related subject matter jurisdictions are involved. Similarly, only one leadership team is needed to advance and manage the change agenda. And, for both of these reasons, conflicting approaches and messaging in rolling out access initiatives for a number of tribunals can be avoided, creating a climate in which the changes can be considered on their merits, without the small differences creating undue distractions.

At the level of the tribunals themselves, a clustered or amalgamated group of tribunals is likely to contain a larger pool of adjudicators and staff to draw upon for creativity and ideas as access initiatives are being developed. And, as access initiatives are rolled out, the potential to develop a critical mass of those who know how to use them effectively is much greater than in a single tribunal. Further efficiencies, and greater consistency, can also flow when a larger cadre of adjudicators and staff can be trained together on new approaches, ideas and understandings, and can support each other in using them.[47]

Finally, the scale of change can itself be a driving factor. Particularly if the involved tribunals are a large proportion of a jurisdiction's tribunals[48], or contain a significant number of its more respected ones, the ability to counter the sometimes stultifying inertia of the status quo can be dramatically increased, Change, even fundamental change, can become a mainstream endeavour rather than an isolated one.

Part III. Three Canadian Examples of the Active-Collaborative Approach to Adjudication

In this Part the paper will outline three recent Canadian examples of what we are calling the active-collaborative adjudication model. One arose from a legislative reform initiative; the second was developed outside a legislated base, and then, with some refinements, was incorporated into Canada's largest class action settlement; and the third was developed in a tribunal's rules without any change in the legislation governing its procedural powers.

The purpose here is not to explore these models in depth, but only to draw from them ideas and approaches which may be of interest elsewhere, and on which comment from a broad international perspective will be highly informative on

---

[47] Note, however, the potential to drown innovation if traditional, adversary bodies are merged with ones which are attempting to develop more innovative and active approaches; especially in a lawyer dominated situation inertia will inevitably favour tradition-bound approaches.

[48] While the economies of scale outlined above argue for large scale amalgamations, there can also be similar benefits in smaller scale clusters, provided there is some inherent logic to the grouping. Where that is the case, having regard to the subject matters dealt with by the grouped tribunals, and most particularly to their amenability to the same access initiatives (and especially with regard to the style and pace of adjudication), support for change may be generated even in smaller communities of interest.

whether and how they should be further adopted and expanded in the Canadian context.

1. The Human Rights Tribunal of Ontario

Through amendments brought forward in 2006, Ontario's *Human Rights Code* [49] is now a Canadian high-water mark for a legislated framework establishing an expert and active-collaborative[50] model of adjudication.

The amendments were brought forward as part of a move to a direct access model of human rights protection[51]. They give Ontario's Human Rights Tribunal the express legislative authority to adopt non-traditional, non-adversarial approaches to adjudication, and a specific direction to use the procedures and practices which in its opinion "offer the best opportunity for a fair, just and expeditious resolution of the merits"[52]. Most importantly, however, those powers and that duty were clearly anchored in a comprehensive legislated framework that evinces a clear legislative intention to permit a fundamentally different approach to adjudicating human rights matters.

The *Code* left most of the design of the new direct access adjudication system to be done by the Tribunal through its rules[53]. However, in both the express language used, and the specific powers granted, the legislation is clear that non-adversarial procedures[54] are fully intended and supported, and that Tribunal rules to that effect prevail over Ontario's quite traditional, adversarial-based legislated code of procedures for tribunals[55].

---

[49] R.S.O. 1990 c. H-19, as amended.

[50] See n. 31, *supra*, for an overview of how these terms are used in this paper.

[51] Before the amendments, Ontario's human rights system required that complaints of human rights violations be filed with the Human Rights Commission. That body investigated complaints and tried to resolve them through mediation. If that did not succeed, and the Commission felt it was appropriate to do so, the Commission could refer the matter to the Human Rights Tribunal for adjudication. In such proceedings, the Commission had carriage of the complaint. About 150 matters were referred to the Tribunal annually, out of about 2400 complaints filed with the Commission each year. In the new system, claimants have direct access to the tribunal, which receives their complaints and adjudicates them. Over 3,000 claims are now received annually by the Tribunal.

[52] *Supra*, n. 49, s. 40.

[53] As the legislation was proceeding through the Ontario Legislature, the authors worked together in developing, through extensive consultations with a wide range of stakeholders, the Tribunal's new model for receiving and resolving human rights claims.

[54] *Supra*, n. 40, ss. 43(3)(a). See also s. 41.

[55] *Ibid*.,.ss.42(2)

Specifically, the legislation authorizes the Tribunal to make rules which permit its adjudicators to[56]:

(i) define or narrow the issues required to dispose of an application and limit the evidence and submissions of the parties on such issues;

(ii) determine the order in which the issues and evidence in a proceeding will be presented;

(iii) conduct examinations in chief or cross-examinations of a witness;

(iv) prescribe the stages of its processes at which preliminary, procedural or interlocutory matters will be determined;

(v) make or cause to be made such examinations of records and such other inquiries as it considers necessary in the circumstances; and

(vi) require a party to a proceeding or another person to produce any document, information or thing; provide a statement or oral or affidavit evidence; or in the case of a party to the proceeding, adduce evidence or produce witnesses who are reasonably within the party's control[57].

In these provisions, the Legislature has given the Tribunal the power to shape and control the hearing, and to provide for matters even more clearly anathema to the adversarial system such as conducting, as opposed to just limiting, cross-examination. Importantly, it specifically framed this grant of authority as permitting approaches that are alternatives to adversarial procedures, and not just to the less specific-concept of alternatives to traditional adjudicative procedures. Reinforcing this authorization to apply alternative hearing approaches, the *Code* provides[58] that both the Tribunal's rules and the *Code* itself:

> shall be liberally construed to permit the Tribunal to adopt practices and procedures, including alternatives to traditional adjudicative or adversarial procedures that, in the opinion of the Tribunal, will facilitate fair, just and expeditious resolutions of the merits of the matters before it[59].

---

[56] *Ibid.*, ss. 43(3)

[57] The Tribunal also has the power to appoint a person to make an inquiry into a matter and report back to the Tribunal and the parties (s. 44). The Tribunal's Rules suggest that this power is not likely to be used with any great frequency: see Rule 20.2.

[58] *Supra*, n. 40, s. 41.

[59] *Ibid.*, s. 41. This provision is significant because the existing Ontario interpretative rules already required that the Act be given a fair large and liberal interpretation: s. 61 of the *Legislation Act,2006*, S.O. 2006, Ch. 21, Sch. F, and so the inclusion of this further, specific provision in relation to non-adversarial approaches has particular salience.

Importantly, the Legislature enacted these changes as part of a coherent package of reforms governing how the Tribunal is to operate. The *Act* was the first legislation in Canada to require open, competitive, merit based appointments of members. The requirements include[60]**:**

i. experience, knowledge or training with respect to human rights law and issues;

ii. aptitude for impartial adjudication; and

iii. aptitude for applying the alternative adjudicative practices and procedures that may be set out in the Tribunal rules.

These requirements accomplish two key things. First, they establish a legislated link between the concepts of an active adjudication model, and an expert cohort of adjudicators. This link is fundamental to both the workability and credibility of active approaches to adjudication in a legal landscape dominated by a more adversarial model. And, second, persons seeking appointment to the tribunal are put on notice that they must bring to the Tribunal an aptitude for working, and a willingness to work, outside the adversarial paradigm.

After going on to provide for the specific new powers set out above, the *Code* then addresses the opposite end of the process, and reinforces the Tribunal's ability to employ an active adjudicative approach, by creating a special standard to be applied if the exercise of discretion under the Tribunal's rules is challenged. This special standard is in addition to the general privative clause found in the *Code*, which insulates the Tribunal from reversal unless a decision is found to be patently unreasonable[61]. It provides that a decision cannot be set aside because of the way discretion was exercised under the rules unless the exercise of discretion "caused a substantial wrong which affected the final disposition of the matter"[62].

This provision would appear to establish three important principles. First, dissonance with traditional modes of procedure is not a reason to reverse a Tribunal decision: only substantial wrongs may be considered on review. Second, even a substantial wrong is not sufficient to reverse a proceeding unless the result has been affected. And, flowing from the second matter above, it would appear that exercises of discretion under the rules cannot be challenged until the proceeding is concluded, meaning that even those who are wedded to traditional adversarial practices will nonetheless have to conduct proceedings under the

---

[60] *Ibid*., ss. 32(3). Note that this anticipated by some two years the new requirements of the *Tribunals Act*, supra, n. 7.

[61] *Ibid*., ss. 45.8.

[62] *Ibid.*, ss. 43(8).

Tribunal's non-adversarial model rather than bringing pre-emptive strikes to try to prevent new approaches from even being tried out.

Overall we see in this Ontario initiative a unified framework which calls for a tribunal to be staffed by expert adjudicators, with an aptitude for alternative adjudicative practices, and then permits them to be given extensive non-traditional and non-adversarial powers. It goes on to require that this grant of authority and rules made pursuant to it be interpreted broadly to permit these alternatives, and that the tribunal use procedures which offer the best opportunity for justice and expedition. It then insulates the exercise of discretion under the rules from being overturned unless it has caused a substantial wrong which affected the outcome. In the result, it appears that the new powers, which might be more easily challenged without this coherent legislative context, are substantially protected by being enveloped in a comprehensive legislative regime.

2. The Indian Residential School (IRS) Dispute Resolution Model

This out of court adjudication model[63], now known as the Independent Assessment Process (IAP), is being used to resolve over 20,000 claims of sexual and serious physical abuse arising from Canada's Indian Residential Schools. Two matters relevant to this paper's discussion of the active-collaborative adjudication model are found in the IAP's blending of the adversarial and inquisitorial systems. They are the conduct of examinations in chief and cross examinations exclusively by neutral adjudicators, and the use of neutral expert witnesses selected and instructed by the adjudicator.

The IRS dispute resolution model was initially developed by Canada's federal government through consultations with former students, counsel who represent former students, and representatives of the four denominations which operated the various schools. Published as a detailed procedural code, it was then offered to former students on an opt-in basis, whether or not they had previously commenced a civil action, and without prejudice to their right to pursue an action in the courts if they were dissatisfied with the result of the adjudication.

As of 2005, about three thousand former students had come forward to use the model, at which point it became subsumed in class action negotiations to resolve all of the issues arising from the operation of the schools[64]. Those negotiations,

---

[63] Doug Ewart led the federal government's development, with former students, their counsel and the churches, of the opt-in model discussed below, and, under the direction of the federal negotiator, headed up the negotiations of this element of the class-action resolution of the IRS matter.

[64] In addition to the abuse claims, the negotiations involved compensation for the fact of attendance at the schools, a truth and reconciliation process and enhancements to healing programs.

led by the Hon. Frank Iacobucci, a former Justice of the Supreme Court of Canada, included as one key element the adoption of an adjudication model to address individual claims of sexual and serious physical abuse. With some enlargements to its scope, the pre-existing IRS dispute resolution procedural code was essentially adopted for that part of that settlement. All elements of the settlement, which at some $4 billion represents Canada's largest class action settlement to date, were then approved as fair and reasonable by superior courts in nine different Canadian jurisdictions[65].

The IRS model was designed to replicate, as closely as possible, the levels of damages awarded by the courts in sexual and physical abuse lawsuits. In the voluntary opt-in phase, awards could and did exceed $200,000. When, pursuant to the class action settlement, the model became essentially the only avenue to resolve claims, higher awards, up to just over $500,000, became possible within the model[66]. In the result, the unique features of the model should be considered in light of the fact that it has been adopted by the federal government, plaintiffs' counsel, the former students, and the churches, and approved by the Courts, to determine very serious matters involving very serious amounts of compensation.

For our purposes, only two elements of the model will be reviewed[67]. The first is that the model permits only the neutral[68] adjudicator to question or cross-examine any witness other than an expert witness. While having its genesis in the desire to assure sexual and physical abuse claimants that they would not be subject to inappropriate cross-examinations, the model was also based on the

---

[65] See for example, *Baxter et al v. Canada (Attorney General)* (2006), 83 O.R.(3d) 481 at para. 85. For examples of approving decisions which specifically adverted to the inquisitorial nature of the claims resolution model, see *Ammaq et al v. Canada (Attorney General*), [2006] N.U.C.J. 24 at 26, and *Semple et al v. Canada* (2006), 213 Man. R. 220, para. 15.

[66] From 2007 to July, 2010, over $600 million has been paid out pursuant to the IAP process for the first 5,000 claims. Another 15,000 are anticipated. See information on the website of the Indian Residential Schools Adjudication Secretariat at irsad-sapi.gc.ca.

[67] For the purposes of this paper, references will be to the Independent Assessment Process adopted in the class action proceedings, although the key issues discussed here are largely unchanged from the earlier opt-in model. That document can be found in Schedule D to the IRS Settlement Agreement, which is posted on the website noted immediately above.

[68] Both when the model was offered by Canada, and under the court-approved settlement, all adjudicators are recruited through an open, competitive process and are appointed on the joint recommendation of representatives of four groups: the former students; counsel for former students; the churches; and the federal government. Each of these groups has a veto over each appointment, so that in every proceeding all participants, and perhaps particularly the former students bringing their claims forward, can be assured that the adjudicator is neutral.

expertise which specially-trained[69] adjudicators could bring to determining and then eliciting the evidence they needed to resolve a given case[70].

Given that serious issues and significant sums, as well as personal and institutional reputations were at stake, the adoption of inquisitorial model techniques for the eliciting[71] and testing of testimony, other than from experts, is particularly significant, as it does not permit counsel for the claimant, government or church to examine or cross-examine most witnesses.

As this departs dramatically from the approach which is familiar to most civil litigation counsel, and to at least their institutional clients, some recognition of the adversarial system was required to obtain agreement to the model. In the end, a unique blending of the two systems on this point was developed. Pursuant to that blend, where counsel are not permitted to question a witness (which is the case for the vast majority of witnesses in these matters), they can require the adjudicator to put any desired line of questioning to the witness. This can be done before the hearing, along with an identification of areas counsel believe need particular scrutiny at the hearing[72], or at the hearing itself. With only limited discretion over whether the issue will be pursued, but full control over the actual questions, the adjudicator must act as requested[73]. And, counsel can require the adjudicator to hear any witness with relevant evidence, except an expert witness (see below).[74]

---

[69] In addition to adjudicative practices and the details of the model, this training included the history of the residential school system and perspectives of former students on a number of key issues. See in this regard the decision of the Federal Court of Appeal in an unrelated matter concerning the use of an inquisitorial approach in immigration matters. In *Thamotharem v. Canada (Minister of Citizenship and Immigration),* [2008] 1 F.C.R 385, the Court upheld a guideline which provided that a claimant would first be questioned by an official rather than by his or her counsel, noting in part that the immigration adjudicators had received training in questioning refugee claimants: see para. 38

[70] This role is facilitated by the requirement that claimants provide detailed information to the Secretariat before their claim can advance for adjudication.

[71] But not the gathering: see IAP, supra, III(e)(iv). “The [adjudicator’s] role is inquisitorial, not investigative. This means that while the adjudicator must bring out and test the evidence of witnesses, only the parties may call witnesses or produce evidence, other than expert evidence.

[72] IAP, supra, III(d)(ii)

[73] IAP, supra, III(e)(ix). Where counsel attend hearings, they may meet with the adjudicator at intervals to suggest questions or lines of inquiry. The adjudicator must explore the proposed lines of inquiry unless he or she rules them to be irrelevant to credibility, liability or compensation in the IAP, but the adjudicator retains discretion on the wording of the questions put to a witness.

[74] IAP, supra, III(e)(x).

Although this degree of party involvement is incorporated in the model, the model makes it clear to the adjudicators that they must take the lead in eliciting and testing testimony from the parties' witnesses. Their role at a hearing is not to wait for questions to be proposed by counsel, but rather to lead and test the evidence[75]. The hearing is not counsel-driven; the process simply permits counsel to intervene where matters, in their view, are being or may be missed.

Consistent with the distinction between investigative processes and inquiring ones, the model does not permit the adjudicators to call their own evidence. The adversarial concept of party control thus applies to the evidence to be called, as well to insistence on lines of questioning. These significant roles for counsel respect the view that they may often know their case, and often the case they have to meet, better than an adjudicator. That knowledge leads to their being able to assess what evidence is needed, as well as to an awareness during the proceeding of issues that are not being fully developed in the evidence, or are not being properly tested. In part for these reasons (see below), the model also permits counsel to question expert witnesses.

A second aspect of the IRS process which is relevant to the active-collaborative adjudication model is the way it structures the provision of expert evidence. The approach taken here was again to blend adjudicator control with party input. Adjudicator control comes from the core rule that expert evidence is to come from a neutral expert, chosen and instructed by the adjudicator. Party involvement comes from the rule that the expert has to be chosen from a list approved in advance by representatives of the four stakeholders[76] and, as noted above, from counsel being allowed to directly question an expert witness.

The lists of experts are standing lists, selected by representatives of the institutional parties as being broadly acceptable to all. A fresh list is not developed for each case. This not only expedites the selection process in individual cases, but as well removes from it the strategic considerations counsel might otherwise try to bring to the generation of the list.

Once an adjudicator selects an expert from the list, it is for the adjudicator to instruct the expert on what the live issues are and to arrange for them to give evidence. The adjudicator provides the expert with a transcript of the hearing, and any relevant records that have been filed. The adjudicator then briefs the

---

[75] IAP, supra, III(e)(ii). In this inquisitorial model, the adjudicator is responsible for managing the hearing, questioning all witnesses (other than experts retained by the adjudicator) and preparing a decision with his or her conclusions and reasons; and III(e)(iii): The adjudicator's questioning must both draw out the full story from witnesses (leading questions are permitted where required to do this), and test the evidence that is given (questioning in the form of cross examination is permitted where required to do this).

[76] IAP, supra, III(f)(v)

expert on the adjudicator's preliminary findings so that, to the greatest extent possible, their opinion can be based on the facts that are likely to be found[77]. This removes a common source of complexity where expert evidence is given. The expert's report is tabled with the parties, who may then require that the expert give oral evidence, and may question the expert at a resumed hearing[78].

In the result, the selection of an expert, and the obtaining of their opinion, are greatly expedited. The generic acceptability of each potential expert has been pre-determined, taking into account the interests of all stakeholder groups. The adjudicator then chooses the expert for a particular case and briefs them on the facts that are likely to be found, and on the exact issue on which their opinion is needed. This removes partisan tactics from what is supposed to be a process of providing the adjudicator with information needed to decide a particular case, and at the same time removes the difficulties often caused by injecting conflicting expert opinions into the adjudicative process.

Overall, in both of the ways outlined in this discussion, the IRS model demonstrates how a move to an active adjudication approach, even to the extent of barring party-examination and cross-examination of witnesses and having the adjudicator select and brief expert witnesses, can be made palatable where a strong rationale can be demonstrated, and where certain of the core interests and values of the adversarial system are respected.

3. The Environmental Review Tribunal's Rules for Green Energy Appeals

The green energy rules published in July, 2010 by Ontario's Environmental Review Tribunal (ERT) are of interest as they show how a tribunal, without any new legislated authority in relation to its procedures, can adopt a more active or collaborative style of adjudication to respond to a new substantive mandate. The mandate at issue here, recently given to the ERT, is to determine appeals which any resident of the province may bring against government approvals of green energy projects[79].

These appeals are expected to be complex because of the reactions which projects like wind farms sometimes engender, and because of the test which the Tribunal must apply in determining them:

---

[77] IAP, supra, III(f)(v)

[78] While to some extent this role for counsel reflects the fact that experts do not routinely feel intimidated in the adversarial process, it primarily flows from the selection and briefing role played by the adjudicator and from the general recognition of the role of counsel in the IAP.

[79] See s. 142.1 of the *Environmental Protection* Act R.S.O. 1990, c. E-19, as amended.

(a) serious harm to human health; or

(b) serious and irreversible harm to plant life, animal life or the natural environment[80].

Under the legislation providing for those approvals and the appeals against them, the Tribunal must issue its decision within six months of the appeal being filed with the Tribunal; if it fails to do so, the approvals are in most circumstances deemed to have been upheld[81]. For this reason, and because of the potential complexity of the issues and the number of parties or participants, a more active approach to determining these appeals was needed.

At the same time, the Tribunal remained bound by Ontario's *Statutory Powers Procedure Act*[82] (SPPA), which is generally structured to support a traditional adversarial approach to adjudication. Working within this context, the Tribunal adopted four key amendments to its rules.

First, it added to its rules a generic schedule for all of the events required to deal with these appeals, whether involving steps by the parties such as disclosure, or hearing events before the Tribunal. Pursuant to this schedule, the parties are informed before an appeal is launched that the hearing will start 8 weeks after the last date for filing an appeal. Within that eight-week period, several other events, including two preliminary hearings to address procedural matters, and a potential mediation, are provided for at pre-set intervals. The rules then provide only an extremely narrow opportunity for any of those dates to be changed[83].

When an appeal is filed, the Tribunal completes the template schedule with the actual dates for each event, and provides it to the parties within 8 days of the expiry of the time for filing an appeal. The schedule is then provided to other parties and participants in the proceeding as they are added. In the result, everyone involved in a matter knows from the earliest possible time not only the steps required to ready the matter for a hearing and to have it heard, but as well the exact dates on which those events will occur. This offers a good example of managing the expectations of potential parties and participants from the outset, rather than having to impose tight deadlines on individuals who expected to have much more time to develop and present their case. Delays which flow from wrangling over dates are also largely avoided in this process.

---

[80] *Ibid*., ss. 142.1(3)

[81] *Ibid*., ss. 145.2(6). And see Rule 37, *Rules of Practice and Practice Directions of the Environmental Review Tribunal*, July 9, 2010, The Rules may be found at http://www.ert.gov.on.ca/english/guides/index.htm

[82] R.S.O. 1990, c. S. 22, as amended.

[83] *Supra*, n 81, Rule 32, and Appendix A.

Second, the Tribunal brought into its rules a number of provisions to provide for a more active approach. Although largely drawn from the SPPA, the inclusion of these provisions in the Rules collects in one place the powers the Tribunal has to be more active. As such, the Rules signal to the parties that the Tribunal intends to be active, and also, for the reasons discussed above[84], provide an accessible, consistent code to guide adjudicators and those appearing in front of them in the application of those powers. The rules are as follows[85]:

> The Tribunal may require that, no later than seven days before the main Hearing, the Parties provide to the Tribunal a list of facts and issues that remain in dispute.
>
> The Tribunal may identify, define or narrow the issues to be determined and the evidence to be heard in the proceeding and may direct the order in which issues and evidence will be considered.
>
> The Tribunal may reasonably limit further examination or cross-examination of a witness where the Tribunal is satisfied that the examination or cross-examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the proceeding.
>
> The Tribunal may allocate the time permitted for the making of submissions.
>
> The Tribunal may question Parties, Participants, Presenters, witnesses or representatives on their behalf and advise when additional evidence, witnesses or submissions might assist the Tribunal.

Third, to support the role it will play in defining and managing the hearing, the Tribunal's rules require the parties to provide more information in their initial filings than it requires in other matters: in particular, they must provide at a very early date statements of the issues and the material facts they will rely on[86].

Fourth, the Rules require the parties to provide disclosure not only to each other, but as well to the Tribunal, before the first preliminary hearing. This disclosure includes all existing documents and lists of witnesses and a summary of intended evidence and, for respondents, their response to the appellant's issues. Further disclosure requirements arise after the preliminary hearing[87].

---

[84] See n. 44, *supra,* and the accompanying text..

[85] *Ibid*., Rules 179-185.

[86] *Ibid*, Rules 29 and 34.

[87] *Ibid*., Appendix A.

These latter two provisions critically underpin the more active approach, as they equip the Tribunal, at an early date, with the information it needs to apply its own expertise to determining what issues are seriously in play, and what evidence it needs to determine those issues.

While seemingly modest steps, the new rules, taken as a whole, reflect the core values of the active collaborative model: party responsibility for the evidence to be heard; early sharing of detailed information with the tribunal; an active tribunal role in shaping the hearing, after hearing from the parties, and the potential for the tribunal to question witnesses and counsel at the hearing to elicit information needed to resolve the case. As such, the ERT's green energy rules represent a significant new direction for the Tribunal.

Conclusion

Building a modern adjudicative tribunal requires attention to a host of considerations: the purposes behind the establishment of the tribunal; the nature of the disputes and parties that may come before the tribunal; the potential for tribunal "structures, practices and procedures" to advance or impede access; and the recruitment, training and retention of highly qualified staff and adjudicators.

In all they do, tribunals should be user-centred, and maintain their focus on core values of integrity, transparency, accessibility and fairness. Tribunals must understand that they play a critical role within the justice system, and in many ways, are the real face of justice for a community.

This paper has reviewed the issues of access, structures and process from that perspective and within the context of Ontario's recent clustering initiative and recent Canadian experience with the active-collaborative model of adjudication. It is hoped the paper will serve to spark analysis and commentary to advance the international sharing of ideas and experience which increasingly plays a central role in helping all who work in tribunals better serve their users and communities.