**A Checklist for Access to Administrative Justice Today**

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Access to justice is a constant preoccupation in today’s public policy debates. Most of the rights determinations in contemporary society are made by administrative tribunals rather than courts. Yet conferences, publications and policy initiatives on access to justice almost always centre on the courts.

It may not be productive to ask why. Perhaps it is our inability to focus on administrative justice issues at the level of tribunal practice, because of the diverse powers and structures of administrative bodies, which leads us to take refuge in common concepts such as standard of review. Maybe it is the truism that administrative tribunals were created in the first place to provide more accessible alternatives to the courts.

Nevertheless, the fact remains that a wide range of crucial rights are at stake at the tribunal level, and access to the courts by way of judicial review has marginal importance to the interests of often vulnerable administrative justice users. It is at the administrative level that access to justice will be achieved or denied. Moreover, as “masters in their own houses”, administrative tribunals may have greater flexibility than the courts to engage in introspection and self-improvement, especially but not solely at the start up stage.

In this short paper, I will attempt to target the unique attributes of administrative bodies, and at least categorize the areas in which improvements in access to justice should be aimed. My categorization will necessarily be quite general, and I will not attempt to delve into the almost infinite variations of administrative structures that commonly prevent commentators from drawing important lessons across the system. The “categories” are best understood as no more than a checklist of areas in which access to justice initiatives should then be specifically tailored and applied to particular administrative regimes.

The starting point must be: access to what? Professor R.A. Macdonald listed “a broad inventory of features” that characterize an accessible dispute resolution system: … “(1) just results, (2) fair treatment, (3) reasonable cost, (4) reasonable speed, (5) understandable to users, (6) responsive to needs, (7) certain, and (8) effective, adequately resourced and well-organized.”[[1]](#footnote-1)

With this framework, there are at least four such categories of access initiatives that can be undertaken, although they sometimes overlap: substantive, procedural, informational and resource related.

1. Substantive considerations

Tribunals must be designed to provide access to the rule of law. Like the Constitution, the rule of law “is not some holy grail which only judicial initiates of the superior courts may touch”.[[2]](#footnote-2) This immediately implicates the substantive performance of the administrative body.

Rules of standing will have a significant impact on concrete results. Traditionally, considerations of standing have turned on the nature of the person’s pecuniary or other legal interest, and have been used to promote efficiency and to delimit the right to assert a public interest. But at a much more immediate level, the issue is one of gatekeeping. Individual employees in unionized situations, consumers whose interests are indirectly affected by a proponent’s commercial initiative, or ratepayers who may object to a project in their municipality – they all have real interests, but the degree to which these interests can be asserted involves a balancing of fairness and efficiency that is inherent in the access dimensions of standing. At the “street level”, can one person bring an application on behalf of another who may be less equipped to advance the claim? What qualifications does a representative have to demonstrate in order to participate in hearings?

The mission of the tribunal must be reflected in its members. Administrative justice flows from an assumption of specialized expertise, which can only be achieved through rigorous and objective recruitment criteria. Members must be trained, evaluated, provided with ongoing education and properly compensated in order to provide the public with access to the benefits of the statutory scheme. Reappointments require proper evaluation. Fair and efficient hearings and timely and well reasoned decisions reflect the quality of administrative justice that is delivered, but they are also hallmarks of an accessible tribunal process.

Issues of adjudicative ethics will influence access to administrative justice, perhaps more so than in the judicial sphere. Conflicts of interest, adjudicator conduct, independence and impartiality must be regulated by codes of conduct. Unlike judges, many adjudicators will not be legally trained, and may not have been subject to the ethical regulation of a law society. The part time and term limited nature of adjudication for many members can pose a challenge for the tribunal in achieving common values and standards.

2. Procedural change

The overarching question is the nature of the litigant’s interaction with the tribunal. Is there an entitlement to an oral hearing? Regardless of the result, the opportunity to participate in a face to face hearing will often have a salutary impact on a party’s understanding of justice having been done. Is there access to videoconferencing or teleconferencing, and is it meaningful in light of the subject matter? Fixed hearing dates, as opposed to written submissions, pose an array of challenges – scheduling, adjournments, facilities, to name a few – and require balancing with considerations of efficiency and effectiveness. On the other hand, the ability to plead one’s case in writing is familiar to lawyers and paralegals, but is much more daunting for many other users.

Setting up procedures to maximize access in a particular area of administrative regulation - as opposed to a “one size fits all” approach that often materializes in the court system - presents a challenge and an opportunity for a tribunal. Every procedural choice can be analyzed from an access to justice perspective: time limits; the length, complexity and frequency of filing requirements; the formality of motion materials to support a procedural request; the circumstances in which tribunal staff can respond informally to such requests. Every one of these choices may involve a tension between resources and efficiency, on the one hand, and the parties’ ability to navigate the system. Like the courts, adjudicators have an interest in receiving well honed written submissions in order to focus and expedite the resolution of issues and avoid oral hearings. These requirements are imposed by tribunals that deal with sophisticated and unsophisticated parties alike, and the cost and therefore the barrier of legal assistance is borne by these parties.

Procedural choices with access to justice implications are made by tribunals through the adoption of rules, forms, guidelines, practice directions, policy statements, case assessment directions. At a higher level, they are made through innovative reform in how the tribunal conducts its business. Three examples come to mind.

One is active adjudication, an advanced form of case management, which Green and Sossin[[3]](#footnote-3) have put forward as a means of transcending the “adversarial-inquisitorial dichotomy”**.** Tribunals can demand advance disclosure of relevant information and use it to tailor and focus the ultimate hearing by issuing directions to the parties on what they will or will not deal with, and through which witnesses and what sort of examination. Active adjudication can continue during the hearing itself. Obviously active adjudication has risks in terms of fairness and respect for the parties’ own theories of the case, and requires well trained members to increase rather than injure access to justice.

A second method is the clustering and cross-appointment of tribunals with common or related subject matter. While the obvious benefit is cost savings, a related outcome can be development of subject matter expertise and avoidance of duplicate litigation.

The third issue – choice of forum - raises a longstanding and difficult question of two warring conceptions of access to administrative justice. Administrative schemes and structures are created to serve public needs in distinct subject matter areas, but these areas inevitably overlap. Is access to justice served by two subject areas – for example, human rights on the one hand, and landlord and tenant, or labour, or professional regulation, on the other – being dealt with once by the same tribunal, or twice, by two tribunals, each with its own expertise?[[4]](#footnote-4) This is an area where the legislature, through statutory reform, and individual tribunals, through their jurisprudence, can adopt rational approaches to “abuse of process” in order to balance the expenditure of public and private resources and the objective of expert decision-making.

3. Informational access

Transparency and information in the administrative system is essential to public access. This comprises a number of areas.

First, there is linguistic or sign language access, which is a human rights issue.[[5]](#footnote-5) The *Ontario Human Rights Code* does not expressly prohibit discrimination on grounds of language, but linguistic access can be seen as a systemic barrier based on racial, ethnic or national origin. Obviously parties with disabilities, including deaf or hearing impaired litigants or witnesses, are protected by the *Code.* Tribunals provide a service and are thus subject to the *Code.* The precise form of accommodation that may be required must be determined in the context of an individual case, but some tribunals have addressed this issue as a matter of policy[[6]](#footnote-6), by jurisprudence[[7]](#footnote-7), or by administrative arrangements (such as the assistance of the translation services of the Human Rights Legal Support Centre).

Section 14 of the *Charter* provides that “a party or witness who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter”. This section does not provide an absolute right to an interpreter, or to payment for one, but the importance of effective understanding of legal proceedings has been highlighted in recent years, particularly in criminal and immigration proceedings.[[8]](#footnote-8) More generally, the question of payment for interpreter services has been resolved by Regulation as it pertains to the Ontario courts, in the *Duong* case discussed below, and it is difficult to distinguish the human rights obligations of courts and administrative tribunals in this respect.

Second, there is electronic access to information through tribunal websites, including web access for users who are blind or visually impaired.

Third, there is the extent and quality of the information that is available: for example, legislation, case law, plain language guides, formal guidelines, rules, procedures, FAQs, practice directions. Information must be simplified in order to be understandable to the wide range of tribunal users. While some tribunals have been reluctant to make prior decisions available for privacy reasons, it is difficult to reconcile that position with transparency, accountability and public access.

4. Resources

The inability to afford legal representation is the principal flashpoint that has dominated the public access to justice discussion. From the foregoing it will be clear that this is by no means the only issue that must be confronted to increase access to administrative justice. Nevertheless, several strategies are available in this area.

Legal advice or representation are available before several administrative tribunals through legal clinics, Pro Bono Students Canada, the Advocates’ Society, Pro Bono Law Ontario, the Human Rights Legal Support Centre, Legal Aid certificates, or duty counsel. Advance cost orders to be paid by an opposing party or proponent may be available under the tribunal’s rules. Many tribunals have the authority to award costs at the conclusion of proceedings. Again, there are complex policy and access to justice issues that arise in balancing the disincentive that is created by the spectre of an adverse cost award with the availability of such compensation to facilitate cases that would otherwise not be brought.

Several administrative tribunals, serving disadvantaged members of the community, do not charge fees for their services. Other tribunals are funded by levies on their industrial users. Clearly, the funding of administrative bodies in an era of restraint is a subject that intersects with a variety of administrative justice concerns, including the ability and willingness of tribunals to facilitate access to their processes.

Obviously user fees will present a barrier to the accessibility of the tribunal. In some circumstances, the barrier can be alleviated through a means-tested fee waiver. In *Polewsky v Home Hardware Stores Ltd.[[9]](#footnote-9)*, the Ontario Divisional Court held that there is a constitutional right of access to the courts without barriers in the form of court fees. As a result of *Polewsky* the Ontario government promulgated a fee waiver regulation for the courts. The government then extended the same criteria to interpreter funding after the decision in *Duong v Taalman Engineered Products Ltd*.[[10]](#footnote-10) On administrative law grounds, the Federal Court of Appeal ordered the Minister to exercise discretion to determine whether a fee waiver was justified in an application for humanitarian and compassionate consideration of a foreign national.[[11]](#footnote-11)

CONCLUSION

As I stated above, this brief survey of administrative access to justice initiatives should not be regarded as more than what it is: a description of areas in which individual tribunals are (or should be) reviewing their practices and procedures in order to determine where access can be improved. Taken as a whole, the categories covered above, and indeed the contents of those categories, amount to little more than the constituent elements of an effective administrative tribunal. That is perhaps the lesson to be taken away: that a tribunal that affords access to administrative justice will be a tribunal that fulfills its statutory mandate effectively.

1. Rod McDonald, “Access to Justice in 2003: Scope, Scale and Ambitions” in J. Bass, W.A. Bogart, & F.H. Zemans, eds., *Access Justice for a New Century – The Way Forward* (Toronto: Irwin, 2005), at 23-24 [↑](#footnote-ref-1)
2. *Nova Scotia (Workers’ Compensation Board) v. Martin*, 2003 SCC 54, at para. 29 [↑](#footnote-ref-2)
3. L. Sossin. and S. Green, “Administrative Justice and Innovation: Beyond the Adversarial/Inquisitorial Dichotomy”, in S. Baglay, L. Jacobs eds, The nature of inquisitional processes in administrative regimes: global perspectives, University of Toronto Press, 2011, at p. 71 [↑](#footnote-ref-3)
4. Raj Anand, “Choosing the Right Forum for Human Rights Claims: The Aftermath and Implications of *Figliola and Trozzi*” (2013) 41 Advocates’ Q 24; *Penner v. Niagara (Regional PSB)*, 2013 SCC 19 [↑](#footnote-ref-4)
5. R. Anand, “Critical Link: Language Access as a Human Rights Issue” (June 2013) [↑](#footnote-ref-5)
6. See, for example, the Plain Language Guide of the Human Rights Tribunal of Ontario [↑](#footnote-ref-6)
7. *Filgueira v. Garfield Container Transport Inc.*, 2005 CHRT 32, affd on this point 2006 FC 785 [↑](#footnote-ref-7)
8. R. Anand, supra, note 5, pp. 32-40 [↑](#footnote-ref-8)
9. *Polewsky v Home Hardware Stores Ltd.* (2003), 66 O.R. (3d) 600 [↑](#footnote-ref-9)
10. *Duong v Taalman Engineered Products Ltd.* (23 September 2005), Hamilton 04-159-DV, (Ont. Div. Ct.) [↑](#footnote-ref-10)
11. *Toussaint v. Canada (Minister of Citizenship and Immigration)*, [2010] F.C.R. 452, rev’d 2011 FCA 146, appn. for leave to appeal dismissed 2011 CanLII 69660 (S.C.C.) [↑](#footnote-ref-11)