Rethinking Fairness in Tribunal Adjudication to Best Promote Access to Justice

Michelle A. Alton[*]

The duty of fairness owed to parties in tribunal adjudication has traditionally been understood to depend on a number of factors, including the judicial nature of the tribunal's processes and the importance of the decision. It has also been generally assumed that the best way for a tribunal to fulfill its fairness obligations is through the incorporation of additional adversarial procedural protections. As the Canadian legal system strives to address access to justice issues, however, these assumptions have been challenged, with more proportional methods of adjudication being recognized as just as legitimate and fair as conventional adversarial procedures. Taking into account this "culture shift", and recognizing that the meaningful participation of parties will often require a flexible and user-centric adjudicative approach, it is proposed that it is now time to also rethink how fairness in tribunal adjudication is assessed and best achieved.

On considérait traditionnellement que l'obligation d'équité envers les parties dans les tribunaux décisionnels dépendait de nombreux facteurs, notamment la nature judiciaire des procédures du tribunal et l'importance de la décision. On a également généralement supposé que la meilleure façon pour un tribunal de remplir ses obligations d'équité consistait à incorporer des protections procédurales contradictoires supplémentaires. Cependant, alors que le système juridique canadien s'efforce de résoudre les problèmes d'accès à la justice, ces présomptions ont été remises en question par des méthodes plus proportionnelles de règlement judiciaire des différends étant reconnus comme tout aussi légitimes et équitables que les procédures contradictoires conventionnelles. Tenant compte de ce « changement culturel » et reconnaissant que la participation significative des parties nécessitera souvent une approche judiciaire flexible et axée sur l'utilisateur, l'auteure suggère dans cet article qu'il est temps de repenser également la manière dont l'équité dans le processus décisionnel du tribunal est évaluée.

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[*] Michelle Alton is General Counsel with the Ontario Workplace Safety and Insurance Appeals Tribunal ("WSIAT"). The views expressed in this article are those of the author and are not intended to represent those of the WSIAT. I am grateful for the insightful feedback from various sources, especially David Mullan, Paul Aterman and Margaret Leighton. This article is solely focused on the adjudicative models and processes at adjudicative administrative agencies ("tribunals") and does not address other types of administrative agencies, such as regulators.

1. INTRODUCTION

Adjudicative administrative agencies, or "tribunals", play an important role in the Canadian legal system. As acknowledged in 2013 by Chief Justice McLachlin, tribunals are now responsible for adjudicating matters arising in almost all "important areas of endeavor and social concern."[1]

In light of the diverse range of areas in which tribunals function, it is not surprising that tribunals are not the same.[2] Tribunals have different mandates and statutory schemes that are tailored to the specialized areas in which they adjudicate.[3]

However, despite these differences, tribunals have at least one important feature in common: all tribunals represent a deliberate choice by the legislature to remove adjudication in a specialized area from the court system. As a consequence of this purposeful designation, tribunals are generally intended to be expert in their designated areas and to offer the potential for faster, less formal and more accessible adjudication relative to the courts.[4]

In the Supreme Court of Canada's unanimous 2014 decision, *Hryniak v. Mauldin,*[5] the Court explicitly recognized that "without an effective and accessible means of enforcing rights, the rule of law is threatened."[6]

As the expense, complexity and length of adjudication increases, particularly in the civil justice context,[7] tribunals, with their inherent potential for increased flexibility and innovation,[8] and lack of "procedural panoplies",[9] have a critical role to play in addressing access to justice issues.[10]

This article explores how a tribunal's adjudicative processes can be optimally designed to best promote access to justice, paying particular attention to the Supreme Court of Canada's call for a "culture shift"[11] in *Hryniak*.

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1 The Right Honourable Beverley McLachlin, P.C. Chief of Justice of Canada, "Administrative Tribunals and the Courts" An Evolutionary Relationship", (Address at the 6th Annual Conference of the Council of Canadian Administrative Tribunals, Toronto, Ontario, May 27, 2013) [McLachlin Remarks].

2 *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, 2000 CarswellBC 1860, 2000 CarswellBC 1861 (S.C.C.) [*Blencoe*] at para. 158.

3 *Ibid.*

4 *Rasanen v. Rosemount Instruments Ltd.*, 1994 CarswellOnt 960 (Ont. C.A.), leave to appeal refused (1994), 7 C.C.E.L. (2d) 40 (S.C.C.) [*Rasanen*]; Lorne Sossin, "*Designing Administrative Justice*", (2017), Osgoode Hall Law School, Legal Studies Research Paper Series, Research Paper No. 26, Volume 13, Issue 6 [Sossin], at 8 and McLachlin Remarks, *supra*, note 2.

5 2014 SCC 7, 2014 CarswellOnt 640, 2014 CarswellOnt 641 (S.C.C.) [*Hryniak*].

6 *Ibid.*, at para. 1.

7 Criminal proceedings are recognized as being distinct from tribunal and civil adjudication, and are not considered in this article.

8 McLachlin Remarks, *supra*, note 1.

9 *Rasanen, supra*, note 4.

10 McLachlin Remarks, *supra*, note 1.

Specifically, this article briefly reviews the traditional understanding of an adversarial-inquisitorial adjudicative model dichotomy, as well as the more modern recognition that most adjudicative systems are in fact "hybridized". The need for a distinct "hybridized" adjudicative model to reflect the unique nature of tribunal adjudication is also discussed.

This article then considers the duty of fairness, focusing on the broad shift in the Canadian legal system towards proportionality, flexibility and a user-centric adjudicative approach, and how this shift should affect the understanding of what is fair in the administrative context specifically. Recognizing that in some circumstances the incorporation of additional procedural protections can actually hinder, rather than enhance, the fairness and justness of a proceeding, it is suggested that the "*Baker*" fairness inquiry should be refined.

Finally, factors relevant to determining the best adjudicative approach for an individual tribunal to adopt in order to promote access to justice are discussed, with a specific focus on "structured flexibility" and the provision of resources and assistance. Meaningful participation of parties in a legal system requires not just responsive and flexible adjudicative techniques during the actual hearing, but also conscious tailoring of pre-hearing processes based on user needs and an "end to end" focus on access to justice.

Overall, the flexibility, innovativeness and responsiveness of tribunal adjudication must be protected and enhanced so that tribunals can continue to play an important role in the promotion of access to justice.

2. ACCESS TO JUSTICE AND THE *HRYNIAK* CALL FOR AN ADJUDICATIVE CULTURE SHIFT

Challenges with respect to access to justice are not new. In a Final Report written by the Action Committee on Access to Justice in Civil and Family Matters, "*Access to Civil & Family Justice: A Roadmap for Change*" ("Roadmap Report"),[12] Chief Justice McLachlin commented that for "as long as justice has existed, there have been those who struggled to access it."[13]

Access to justice can be defined in more than one way,[14] but is generally concerned with whether "users" of a justice system are able to participate in the system in a meaningful way, and in particular, whether their participation is impeded due to the complexity, length of time or cost of the adjudication.[15]

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[11] *Supra,* note 5, at para. 2.

[12] Action Committee on Access to Justice in Civil and Family Matters, "*Access to Civil & Family Justice: A Roadmap for Change*", (October 2013) [Roadmap Report].

[13] *Ibid*., Foreword.

[14] It has been noted that there does not appear to be one definition of "access to justice" that has been developed or accepted in the administrative law context specifically — Lorne Sossin, "Chapter Seven: Access to Administrative Justice and Other Worries" in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context, Second Edition*, (Toronto: Emond Montgomery Publications, 2013) 1 [Sossin — Access], at p. 212.

In *B.C.G.E.U., Re*,[16] *Christie v. British Columbia (Attorney General)*,[17] and *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*,[18] the Supreme Court of Canada confirmed that the right of access to justice is a fundamental right which is integral to the rule of law. However, the Court also clarified that the right to access to justice is not absolute and does not require specific types of access in all circumstances, for example, access to legal services.[19]

In its 2014 *Hryniak* decision, the Supreme Court of Canada stated that the greatest challenge facing the rule of law in Canada today is ensuring access to justice.[20]

The specific issue under consideration in *Hryniak* was the proper interpretation of Rule 20 of the Ontario *Rules of Civil Procedure* (the "Rules"),[21] pertaining to summary judgment. Relevant to the court's analysis of the amended Rule was Justice Coulter A. Osborne's review of the Ontario civil justice system, which culminated in his November 2007 report. One of the central recommendations in Justice Osborne's report was that the concept of proportionality should be expressly incorporated into the civil justice system so that the time and expense required to adjudicate an issue is relative or proportionate to what is at stake.[22]

In the course of its determination of how Rule 20 should be interpreted, the Court provided support for the incorporation of proportionality into adjudicative procedures in general. Specifically, the Court stated that in order for current access to justice challenges to be met, a shift in culture under which procedures are tailored to the needs of a particular case is required.[23]

The Court identified several specific changes required for the culture shift to be successful, including:

- A recognition that proportionate models of adjudication can be fair and just[24] and that a full trial is not needed in those cases where a more

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15 Honourable Coulter A. Osborne, Q.C., "*Summary of Findings and Recommendations of the Civil Justice Reform Project*", (November 2007) [Osborne Report], Introduction and Roadmap Report, *supra* note 13 at p. 02. In the Roadmap Report it is suggested that access to justice issues need to be considered more broadly than just in the adjudicative context — see p. 02.

16 1988 CarswellBC 762, 1988 CarswellBC 363 (S.C.C.) [*B.C.G.E.U.*]

17 2007 SCC 21, 2007 CarswellBC 1117, 2007 CarswellBC 1118 (S.C.C.) [*Christie*].

18 2014 SCC 59, 2014 CarswellBC 2873, 2014 CarswellBC 2874 (S.C.C.) [*Trial Lawyers*].

19 See *B.C.G.E.U.*, *supra*, note 16, at para. 24; *Christie*, *supra*, note 17, at paras. 17, 23, and 27; and *Trial Lawyers*, *supra*, note 18, at paras. 39 and 41.

20 *Supra*, note 5, at para 1.

21 R.R.O. 1990, Reg. 194.

22 *Supra*, note 15, Section 1, Introduction and Section 19, Proportionality and Costs of Litigation.

23 *Supra*, note 5, at para. 2. This shift requires both judges and lawyers to contribute to the promotion of proportionality — see para. 32.

proportionate, expeditious and less expensive model can also achieve a just result;[25]

- Acceptance that alternative methods of adjudication are no less legitimate than conventional trial procedures, and that the best way to adjudicate an issue will not necessarily be the most complicated or extensive option;[26] and
- Understanding that complicated, undue procedures, which often result in unnecessary delay and costs, can actually prevent disputes from being adjudicated fairly and justly.[27]

However, although the Court clearly sent a message that a significant shift in adjudicative culture is needed, the Court also emphasized that all adjudicative methods must be fair and just, and neither fairness nor justice can be compromised in the pursuit of promoting access to justice.[28] The need for a culture shift also does not alter the necessity of a decision-maker having confidence that she or he can find the necessary facts and apply the relevant legal principles when adjudicating a matter.[29]

Ultimately, what type of adjudicative method or approach will be fair in any particular situation will depend on the nature of the issues to be decided, the nature of the evidence, a consideration of what is proportionate, and what the adjudicator ultimately determines is necessary to be confident in her or his decision.[30]

The express support for the promotion of access to justice and proportionality in the *Hryniak* decision is consistent with the shift in the Canadian legal system generally towards more accessible, tailored and proportionate adjudication.[31]

The principles articulated in the *Hryniak* decision have been found to be particularly applicable to administrative agencies. In *Aiken v. Ottawa Police Services Board*, ("*Aiken*")[32] the Ontario Divisional Court considered an application for judicial review of a Human Rights Tribunal of Ontario ("HRTO") decision. One of the issues to be determined was whether the HRTO's decision that a full traditional hearing was not necessary in the particular circumstances violated the requirements of natural justice and procedural fairness.[33]

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[24] *Ibid.,* at paras. 2, 27 and 32.

[25] *Ibid.,* at para. 4.

[26] *Ibid.,* at paras. 27 and 28.

[27] *Ibid.,* at para. 24.

[28] *Ibid.,* at para. 23.

[29] *Ibid*., at paras. 28 and 50.

[30] *Ibid.,* at para. 59.

[31] See for example the Osborne Report, *supra*, note 15.

[32] 2015 ONSC 3793, 2015 CarswellOnt 8883 (Ont. Div. Ct.) [*Aiken*].

The Divisional Court positively referred to the *Hyrniak* decision and then stated that the principles outlined in that decision were even more applicable to administrative tribunals than the courts:

> What is true for the traditional civil trial system is even more applicable to the administrative tribunal system, which was designed to be a more expeditious and cost-effective process for the resolution of disputes.[34]

The *Hryniak* decision and its articulation of the principle of proportionality has also been relied upon by several tribunals, including the Ontario Labour Relations Board,[35] the Ontario Securities Commission,[36] and the Ontario Law Society Tribunal, Hearing Division[37] in relation to the determination of what is a fair adjudicative process.

The general adoption of the principles outlined in *Hryniak* and the focus on proportionality in various different forums supports that all adjudicative systems should be taking steps to promote access. This is particularly true for tribunals which in many cases have been deliberately designed to be a more accessible form of adjudication as compared to the courts.

Achieving access to justice requires more than just proportionality in procedures however, as true access requires a just and high quality substantive outcome as well as a fair process.[38] Therefore, in order to achieve access to justice it is also important that both transparency and consistency in decision-making are emphasized.[39] In general, transparent, participatory processes lead to more

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[33] In that case, a settlement had been reached between the parties with respect to all issues arising in the application except the extent of a systematic remedy. The HRTO Vice-Chair provided an opportunity for both parties to make written and oral submissions and then determined that there was no "reasonable prospect" that additional remedies would be ordered and that therefore a full hearing was unnecessary. While the application for judicial review was granted in the *Aiken* decision, in reaching its conclusion the Divisional Court did state that a full trial-like hearing is not always required by the principles of natural justice and procedural fairness — see *ibid*., at para. 34.

[34] *Ibid*., at para. 33.

[35] *Donia Aluminum & Roofing Ltd. v. UBCJA, Local 27*, 2015 CarswellOnt 10534 (Ont. L.R.B.). In that decision, *Hryniak* and *Aiken* were both positively referred to as support for the procedural decisions that the OLRB had been made during the course of the proceeding, including limiting evidence from witnesses.

[36] *Sino-Forest Corporation et al*., 2015 ONSEC 21 (Ont. Securities Comm.). In that decision, *Hryniak* was positively referred to as support for the decision to allow witnesses to provide testimony by way of written, sworn statements. When this decision was made, 117 days of hearing of the originally anticipated 118 hearing days had already occurred.

[37] *Law Society of Upper Canada v. McLean*, 2017 ONLSTH 209 (Ont. L.S.T.H.). In that decision, *Hryniak* was positively referred to as support for the acceptance of evidence of a witness by affidavit in accordance with the Tribunal's *Rules of Practice and Procedure*.

[38] Roadmap Report, *supra*, note 12, at 17 and Sossin Access, *supra* note 14, at 232.

[39] Consistency in the law has been acknowledged to be of fundamental importance — see *Dunsmuir v. New Brunswick*, 2008 SCC 9, 2008 CarswellNB 124, 2008 CarswellNB 125

informed and generally better decisions. A just process and outcome also promotes important rule of law values,[40] including the avoidance of arbitrary decisions,[41] the need for certainty, predictability and "one law for all",[42] and accessibility.[43]

As legal systems become more focused on addressing access to justice issues, the needs of the parties that the system serves must also be prioritized instead of the agency's own procedural preferences.[44] This type of "user-centered justice design" has been described as not only being consistent with foundational legal principles, but required by them.[45]

Overall, all participants in the justice system, including decision-makers, administrators, parties and representatives, have a role to play in achieving access to justice, which includes promoting equal opportunities for all persons to understand and meaningfully present their cases.[46]

3. MODERNIZING THE TRIBUNAL ADJUDICATIVE MODEL

Defined at its most basic level, adjudication is the consideration of the substantive legal rights of a party or parties in the context of facts that have been revealed through evidence.[47]

(S.C.C.) [*Dunsmuir*] at para. 163. As recently discussed in the minority judgment of the Supreme Court of Canada's decision, *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, 2016 CarswellNat 2998, 2016 CarswellNat 2999 (S.C.C.) [*Wilson*], conflicting "reasonable" decisions with respect to similar issues not only creates uncertainty for parties, but also undermines the integrity of the rule of law and the foundational principle that there should be one law for all. The outcome reached in a matter should not be dependent upon the identity of the decision-maker — see *Wilson*, at paras. 85 and 87 and *I.W.A., Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, 1990 CarswellOnt 2515, 1990 CarswellOnt 821 (S.C.C.) [*Consolidated-Bathurst*] at 327.

40 Grant Huscroft, "From Nature Justice to Fairness: Thresholds, Content and the Role of Judicial Review" in Colleen M. Flood and Lorne Sossin, eds, *Administrative Law in Context, Second Edition* (Toronto: Emond Montgomery Publications, 2013) at p. 150 [Huscroft].

41 *Reference re Secession of Quebec*, 1998 CarswellNat 1300, 1998 CarswellNat 1299 (S.C.C.) at para. 70.

42 *Ibid.*, at para. 71 and *Wilson, supra*, note 39, at para. 86.

43 *Hryniak, supra*, note 5, at para. 1.

44 Honourable Warren K. Winkler, "*Professionalism and Proportionality*", (2009), The Advocates' Journal, [Winkler] at 6. See also Sossin, *supra*, note 4, at 1, 3 and 6.

45 Shannon Salter & Darin Thompson, "*Public-Centered Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunal*" McGill Journal of Dispute Resolution, Vol. 3 (2016 -2017), 113 [Salter & Thompson] at 115.

46 Canadian Judicial Council, *"Statement of Principles on Self-Represented Litigants and Accused Persons*", (September 2006) [Statement] at 4 and 6. In a short and unanimous 2017 decision, *Pintea v. Johns*, 2017 SCC 23, 2017 CarswellAlta 680, 2017 CarswellAlta 681 (S.C.C.), the Supreme Court of Canada specifically endorsed the Statement established by the Canadian Judicial Council — see para. 4.

The adoption of a specific type of adjudicative approach or model by an adjudicative agency is not only relevant to defining the roles of the participants in the system, it can also impact what sort of adjudicative processes are appropriate.[48]

(a) Historical Adjudicative Models — Inquisitorial OR Adversarial

Historically, two adjudicative models have been recognized - inquisitorial and adversarial.[49] Under each adjudicative approach, specific mechanisms are utilized to ensure that a full case is provided to the ultimate decision-maker.[50]

In Canada, legal systems have traditionally been premised on an adversarial model.[51] In an adversarial system, parties are usually relied upon to produce relevant evidence and decision-makers take a much more passive approach.[52] Fairness and justice is typically ensured by entitling parties to full disclosure of the case that they need to meet and also providing parties with an opportunity to fully participate in transparent proceedings.[53]

In contrast, in inquisitorial systems, adjudicators are given broad powers to investigate so that they may take charge of gathering the evidence they deem necessary to reach an independent and fair decision.[54] Inquisitorial processes are also often designed to provide adjudicators with the authority to identify issues.[55]

Adversarial and inquisitorial adjudicative models have traditionally been described as "competing" judicial models,[56] with adjudicators being presumed to have only two adjudicative options, passivity or intrusiveness.[57]

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47 *Charkaoui, Re*, 2007 SCC 9, 2007 CarswellNat 325, 2007 CarswellNat 326 (S.C.C.) [*Charkaoui*] at para. 48, quoting *United States v. Ferras*, 2006 SCC 33, 2006 CarswellOnt 4450, 2006 CarswellOnt 4451 (S.C.C.) at para. 25.

48 Laverne Jacobs, Sasha Baglay, Melissa Kwok, Maria Mavrikkou & Ki Tay, "*The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives Research Workshop Report*" (2011) 24 Can J Admin L & Prac 261 [Inquisitorial] at 263.

49 See for example *Charkaoui, supra*, note 47, at para. 50.

50 *Ibid.,* at para. 50.

51 *Ibid.*

52 It is generally well-accepted that another key component of an adversarial system is that there are at least two parties participating in the proceeding so that the adjudicator has an opportunity to hear opposing perspectives — see for example, *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, 2013 CarswellMan 61, 2013 CarswellMan 62 (S.C.C.) at para. 209.

53 *Charkaoui, supra*, note 47, at para. 50.

54 *Ibid.*

55 Inquisitorial, *supra*, note 48, at 261.

56 Samantha Green & Lorne Sossin, "Administrative Justice and Innovation: Beyond the Adversarial/Inquisitorial Dichotomy" in Laverne Jacobs & Sasha Baglay, eds, *The Nature of Inquisitorial Processes in Administrative Regimes* (Surrey: Ashgate Publishing Limited, 2013) 71 [Green & Sossin] at 72.

57 *Ibid.*, at 75.

(b) The Modern Shift towards "Hybridized" Adjudication and a Focus on Best Results

Recent efforts to modernize adjudicative processes and address access to justice challenges in particular, have led to the traditional adversarial-inquisitorial dichotomy coming under criticism.[58] Specifically, it has been questioned whether an all or nothing adjudicative approach is able to respond to user needs. It has also been generally accepted that, at least in certain circumstances, and especially for self-represented parties, a traditionally adversarial adjudicative approach can actually discourage proportionality and access to justice, rather than promote it.[59] It has also been suggested that a purely adversarial or inquisitorial approach is particularly incapable of meeting the unique needs of tribunal adjudication.[60]

The reality is that despite the traditional tendency to treat adversarial and non-adversarial adjudicative approaches as mutually exclusive,[61] "purely" inquisitorial or adversarial judicial systems are actually quite rare.[62] Instead, most legal systems, and in particular, tribunals, are in fact "hybridized", utilizing a combination of adjudicative processes to enhance overall adjudication.[63] The value of trying to categorize adjudicative systems as either adversarial or inquisitorial has also been more recently questioned. Instead, it has been proposed that the focus for any tribunal when developing or reviewing its adjudicative processes should be to focus on what type of approach will produce the best results, both procedurally and substantively.[64]

(c) A Distinct Model for Tribunal Adjudication

Although it was at one time common for tribunals to be described as "inquisitorial",[65] it is now widely recognized that in reality, many tribunals are in

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[58] *Ibid.*

[59] Winkler, *supra*, note 44, at 7.

[60] Robert Thomas, Chapter 3, From "Adversarial v Inquisitorial" to "Active, Enabling, and Investigative": Developments in UK Administrative Tribunals", in Laverne Jacobs & Sasha Baglay, eds, *The Nature of Inquisitorial Processes in Administrative Regimes* (Surrey: Ashgate Publishing Limited, 2013) [Thomas] at 52 and Winkler, *supra*, note 44, at 7.

[61] Green & Sossin, *supra*, note 56, at 72.

[62] Laverne Jacobs & Sasha Baglay, "Introduction" in Laverne Jacobs & Sasha Baglay, eds, *The Nature of Inquisitorial Processes in Administrative Regimes* (Surrey: Ashgate Publishing Limited, 2013) 1 [Jacobs & Baglay] at 6. The Review Board regime created under Part XX.1 of the *Criminal Code* is a rare present-day example of a "true" inquisitorial judicial system, in which neither party bears a burden of proof, and thus, in the words of the Supreme Court of Canada is "remarkable" — see *Winko v. Forensic Psychiatric Institute*, 1999 CarswellBC 1266, 1999 CarswellBC 1267 (S.C.C.) at paras. 52 and 149.

[63] Green & Sossin, *supra*, note 56, at 72.

[64] *Ibid.*, at 83.

fact "hybridized[66] In light of the important role that tribunals play in promoting access to justice, a hybridized approach makes particular sense as it offers the potential for increased flexibility and responsiveness. However, not all "hybridized" adjudicative models are equal, or more specifically, as well designed to promote access to justice as compared to other hybridized models.

For example, it is not uncommon for a tribunal to have adopted a hybridized adjudicative model that is premised on a traditional adversarial model, with inquisitorial elements integrated at a later time. The application of an "inquisitorial gloss to a basically adversarial process"[67] can hinder a tribunal's ability to promote access to justice. This is especially true when inquisitorial elements are integrated into a larger adversarial model at different times and haphazardly, resulting in adjudicative processes that fail to work together cohesively and/or require parties to pivot back and forth between adversarial and inquisitorial positions.[68]

Further, although many tribunals often have broader investigative powers and greater flexibility to adopt non-adversarial approaches to adjudication than the courts,[69] in many instances when a tribunal's "hybridized" model begins with an adversarial "backbone", the tribunal's overall approach to adjudication will end up not being markedly different than a traditional adversarial court model.[70] As many tribunals have been specifically created and designed to be different than courts, it is counter-productive for tribunals to be designed in a way that exactly mirrors a court.[71]

In response to these concerns, it has been proposed that an alternative adjudicative model specific to tribunals be developed in order to reflect the unique nature of administrative adjudication.[72] One example of such a proposed adjudicative model is "active adjudication".[73]

Active adjudication has been described as an adjudicative model that "occupies a broad swath between adversarial and inquisitorial norms",[74] with a specific focus on problem-solving and the fulfillment of mandates.[75] In general, active adjudication involves adopting a flexible and responsive adjudicative approach that takes into account both the needs of parties and the issues being

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65 *Ibid.*, at 71 and Inquisitorial, *supra*, note 48, at 262.

66 Inquisitorial, *ibid.*, at 262-263 and Jacobs & Baglay, *supra*, note 61, at 14.

67 Thomas, *supra*, note 60, at 61.

68 Salter & Thompson, *supra*, note 45, at 116.

69 Thomas, *supra*, note 60, at 55.

70 Sossin, *supra* note 4 at 2 and David Mullan, "*Tribunals Imitating Courts — Foolish Flattery or Sound Policy?",* (2005), 28 Dalhousie L.J. 1 [Mullan] at 3.

71 Sossin, *ibid.*, at 8.

72 Thomas, *supra*, note 60, at 52.

73 Green & Sossin, *supra*, note 56, at 80-81.

74 *Ibid.*, at 71.

75 *Ibid.*, at 75.

determined so that meaningful access is ensured.[76] The model recognizes that fairness does not necessarily require adjudicators to be passive during a proceeding, and in fact, in certain circumstances, intervention is essential to ensuring justice.[77]

More specifically, active adjudication can include an adjudicator taking an active role in eliciting and testing evidence during a proceeding, or focusing the issues to be determined.[78] It can also involve an adjudicator altering the typical hearing format, such as determining that opening statements are not necessary, or deciding that the examinations in chief of every witness should be conducted by the adjudicator.[79]

Active adjudication has been recognized as being particularly helpful to level any potential unfairness when parties are not equally represented or only one party is participating. Active adjudication is also particularly well-suited for adjudication that advances a complex statutory mandate.[80]

In light of its flexibility and responsiveness, the active adjudication model has been proposed as the "new norm" for tribunals to utilize in order to promote access to justice.[81] The Human Rights Tribunal of Ontario[82] and the Refugee Protection Division ("RPD") [83] of the Immigration and Refugee Board of Canada ("IRB") are two examples of tribunals which both utilize active adjudication to maximize accessibility and fairness in response to their particular institutional realities and user needs.

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[76] Michelle Flaherty, "*Best Practices in Active Adjudication*", (2015), 28 Can J Admin L & Prac 291 [Flaherty] at 300.

[77] *R. v. Brouillard*, 1985 CarswellQue 7, 1985 CarswellQue 793 (S.C.C.) at 44.

[78] Green & Sossin, *supra*, note 56, at 72.

[79] Flaherty, *supra*, note 76, at 294.

[80] Green & Sossin, *supra*, note 56, at 72 and 92.

[81] *Ibid*., at 71. For example, the OLRB's consultation process is premised on "active adjudication" and allows adjudicators to take the lead in proceedings and ask questions — see *Tsoi v. UNITE-HERE, Local 75*, 2014 ONSC 1108, 2014 CarswellOnt 1968 (Ont. Div. Ct.) at para. 5.

[82] The HRTO relies on its broad statutory procedural powers and the express statutory language in ss. 41 and 43 of the *Human Rights Code*, R.S.O. 1990, c H.19, in order to engage in active adjudication which can include the right to define or narrow issues to be determined in an application as well as the power to limit the evidence and submissions of parties on such issues; the right to examine or cross-examine witnesses, examine records or make such other inquiries as the Tribunal considers necessary in the circumstances; and the right to require parties or other persons to produce documents, information or things as deemed reasonably necessary or provide statements.

[83] The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, allows the RPD to adopt an inquisitorial process which is particularly helpful in addressing the lack of an opposing party participating in most hearings considering a claim for refugee protection — see *Thamotharem v. Canada (Minister of Citizenship & Immigration)*, 2007 FCA 198, 2007 CarswellNat 2817, 2007 CarswellNat 1391 (F.C.A.) at para. 35, leave to appeal refused 2007 CarswellNat 4334, 2007 CarswellNat 4335 (S.C.C.) [*Thamotharem*].

Overall, active adjudication is one example of a user-focused and broadly flexible approach to adjudication that can help avoid unnecessary "legalization" of tribunal proceedings and level inequality between parties.[84] Regardless of the specific adjudicative approach or model adopted by a tribunal, however, there are certain principles that should underlie all tribunal adjudication.

First, a tribunal's adjudicative approach should attempt to promote access to justice, utilizing flexibility and innovation, when available, to reduce unnecessary formality, complexity and delay.[85] Second, a "one size fits all" adjudicative approach should be avoided,[86] with proportionate processes tailored to the needs of a particular case replacing court-like procedures imposed by traditional adversarial design.[87] Finally, no matter what adjudicative design is chosen, in all cases, the process must always be fair and allow a just substantive outcome to be reached.[88]

4. RE-EXAMINING THE DUTY OF FAIRNESS AFTER *HRYNIAK*

There is no question that a duty of fairness applies to the decisions of administrative adjudicators. The duty is meant to not only ensure meaningful access to the participants in tribunal adjudication, but also to preserve the integrity of a tribunal's proceedings. However, when unnecessary procedural protections are incorporated into tribunal adjudication in the pursuit of fairness, the meaningful participation of parties can actually be hindered rather than enhanced.

Accordingly, a tribunal's duty of fairness must be interpreted carefully to ensure that the "creep of legalism that threatens the distinctiveness of administrative justice"[89] is avoided.

In this section, taking into account the broad shift in the entire Canadian justice system towards proportionality, responsiveness and flexibility, and in particular the principles articulated in *Hryniak*, it is suggested that there is potential value in rethinking how the content of a tribunal's duty of fairness is defined and assessed.

(a) The Duty of Fairness

In the 2008 decision, *Dunsmuir v. New Brunswick*,[90] the Supreme Court of Canada stated that procedural fairness[91] is a "cornerstone of modern Canadian

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84 Green & Sossin, *supra*, note 4, 7 at 92.

85 McLachlin Remarks, *supra*, note 1, *Rasanen*, *supra*, note 4, and Jacobs & Baglay, *supra* note 62 at 3.

86 Mullan, *supra*, note 70, at 22.

87 *Davies v. Clarington (Municipality)*, 2015 ONSC 7353, 2015 CarswellOnt 17929 (Ont. S.C.J.).

88 *Hyrniak, supra*, note 5, at para. 23.

89 Green & Sossin, *supra*, note 56, at 75.

administrative law",[92] and confirmed that administrative decision-makers must act fairly when making decisions that affect the interests of individuals.[93]

In general, a tribunal's duty of fairness consists of:

I. A party having the right to be heard and know the case that they must meet; and
II. A party having the right to a hearing by an independent, disinterested and unbiased decision-maker.[94]

Related to these two principles is the equally important requirement that decisions should only be made by adjudicators that have actually heard the presentation of the entire case, including evidence and legal arguments.[95]

The overarching purpose of the duty of fairness is not only to ensure that tribunal adjudicative decisions are made utilizing a fair process, but also to maintain the integrity or overall justness of the decision and proceeding.[96] As acknowledged by Abella J.A. (as she then was) in *Rasanen*, although tribunal adjudication is meant to be faster, less formal and therefore more accessible, it is not intended to be any less credible or effective than adjudication by a court.[97]

In order for tribunal proceedings to be fair and credible, it is critical that parties be provided with a meaningful opportunity to be heard.[98] In general, this means providing parties with a "real" opportunity to present their views and submit evidence.[99]

However, it has also been recognized that a tribunal's duty of fairness is flexible and variable. Therefore, what will be required in any specific proceeding

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[90] *Dunsmuir*, *supra*, note 39.

[91] References to natural justice are often utilized interchangeably with references to procedural fairness and it has been recognized that there is no longer any reason to differentiate between the two concepts— Huscroft, *supra*, note 40, at 150.

[92] *Dunsmuir, supra*, note 39, at para. 79.

[93] *Ibid.,* at paras. 79 and 90.

[94] These two components have been described as a modern "restatement" of the well-recognized principles of natural justice set out in *Kane v. University of British Columbia*, 1980 CarswellBC 1, 1980 CarswellBC 599 (S.C.C.) at p. 1114, quoting *Kanda v. Malaya*, [1962] A.C. 322 (Malaysia P.C.) and *S.C.F.P., Local 301 c. Québec (Conseil des services essentiels)*, 1997 CarswellQue 82, 1997 CarswellQue 83 (S.C.C.) at para. 73 — see Huscroft, *supra*, note 40, at 151.

[95] *Consolidated-Bathurst, supra*, note 39, at 330, quoting *Doyle v. Canada (Restrictive Trade Practices Commission)*, 1985 CarswellNat 26F, 1985 CarswellNat 26 (Fed. C.A.) at 368-369, leave to appeal refused 1985 CarswellNat 1020 (S.C.C.) and *I.B.E.W., Local 894 v. Ellis-Don Ltd.*, 2001 SCC 4, 2001 CarswellOnt 99, 2001 CarswellOnt 100 (S.C.C.) at para. 66.

[96] *Dunsmuir*, *supra*, note 39, at para. 90.

[97] *Supra*, note 4.

[98] *Consolidated-Bathurst*, *supra*, note 39, at 298-299.

[99] *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 CarswellNat 1124, 1999 CarswellNat 1125 (S.C.C.) [*Baker*] at para. 22.

will depend on the unique circumstances of the adjudication,[100] as well as the institutional constraints of the tribunal generally.[101] This means that practically, what is required for adjudication to be fair in one tribunal proceeding will not necessarily be what is required in another proceeding, even when comparing proceedings taking place within the same tribunal. What matters is whether the parties have been given a substantive opportunity to present their position.[102]

It must also be emphasized that tribunals do not necessarily need to adopt court-like adjudicative processes to be procedurally fair. As stated in the majority judgment in the 1990 *Knight v. Indian Head School Division No. 19*[103] decision, the goals of fairness are neither to import "rigid" court requirements into the administrative context, nor to achieve "procedural perfection". Instead, the duty is meant to ensure that tribunals adopt adjudicative approaches that are fair while at the same time reflective of the tribunal's mandate and users.[104]

In *Baker*, the Supreme Court of Canada again emphasized the flexibility and variability of the duty of fairness. While the participatory rights contained within the duty help ensure that tribunals make decisions in a fair and transparent manner, the procedures utilized by a tribunal must also appropriately reflect the type of decision being made and the statutory, institutional, and social context.[105]

In *Baker*, the Court provided a non-exhaustive list of factors to consider when determining the content of the duty of fairness required in a particular context, including:

i. **The nature of the decision and the process that is followed when the decision is made.** The Court stated that the more the decision and processes resemble "judicial" decision-making, the more likely it is that the duty of procedural fairness will require protections similar to those provided in a Court.[106]
ii. **The statutory context.** For example, if there is no right to appeal found in the administrative agency's governing statute, the requirements of the duty of procedural fairness will likely be greater.[107]

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[100] *Ibid.,* at para. 21.

[101] *Consolidated-Bathurst*, *supra*, note 40, at 320. For example, in the *Consolidated-Bathurst* decision, the majority of the Court provided approval of the full board meeting consultation process adopted by the Ontario Labour Relations Board ("OLRB") subject to a number of necessary safeguards being incorporated into the consultation process.

[102] 1990 CarswellSask 146, 1990 CarswellSask 408 (S.C.C.) [*Knight*].

[103] *Ibid.*

[104] *Ibid.*

[105] *Baker, supra*, note 99, at paras. 22 and 28.

[106] *Ibid.*, at para. 23.

[107] *Ibid.,* at para. 24.

iii. **The importance of the decision.** The requirements of the duty of procedural fairness will increase in proportion to the importance of the decision to those affected by the decision.[108]

iv. **The legitimate expectations of parties, particularly with respect to procedures.** If a party has a "legitimate" or reasonable expectation that a certain procedure will be followed, in most cases, the duty of procedural fairness will require that this procedure is adhered to. It is accepted that in general, it is unfair for well-established procedures to not be followed.[109]

v. **The procedural choices made by the administrative agency.** Particularly when an administrative agency is provided with broad powers to determine its own practice and procedure or has specialized expertise, the agency's determinations with respect to the appropriate procedure should be given consideration when determining the duty of fairness.[110]

In *Baker* the Court stated that underlying all these factors is the goal to ensure that administrative decisions are made in a fair, transparent and appropriate matter, allowing parties an opportunity to put forward their views and evidence in full to be considered by the decision-maker.[111]

Other factors relevant to the fairness of a tribunal's adjudication are timeliness and transparency. Undue delay in administrative proceedings can impair the fairness of a hearing when it prevents parties from being able to fully present their position.[112] Accordingly, finding the right balance between providing a meaningful opportunity to participate, while maintaining an efficient process, is critical.

Transparency is also essential to fairness, and helps support important rule of law values, such as minimizing arbitrary government decisions. The more information that parties have about processes or the manner in which decisions are made, the more likely the procedures will be perceived as fair.[113]

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[108] *Ibid*., at para. 25.

[109] *Ibid.,* at para. 26. The Court noted that while the doctrine of legitimate expectations cannot create substantive rights outside the procedural realm, it will generally be determined to be unfair if an administrative adjudicator does not follow established procedure or "backtracks on substantive promises" without providing significant procedural rights – see para. 26.

[110] *Ibid*., at para. 27.

[111] *Ibid*., at para. 22.

[112] *Blencoe, supra*, note 2, at para. 102. As recently recognized by the Supreme Court of Canada in the decision, *R. v. Jordan*, 2016 SCC 27, 2016 CarswellBC 1864, 2016 CarswellBC 1865 (S.C.C.) at para. 1, "Timely justice is one of the hallmarks of a free and democratic society."

[113] Wendi J. Mackay, "*Administrative Institutions from Principles to Practice: Guidelines for Review and Design*" (2006) 19 Can J Admin L & Prac 63 at 72.

(b) The *Hryniak* Adjudication Culture Shift — Time to Refine *Baker*?

It is not uncommon for tribunals to have broad statutory procedural powers and flexibility, resulting in significant discretion to determine what adjudicative procedures should be adopted, and ultimately, what is required to ensure fairness.

In combination with statutory and common law developments, one potential consequence of this broad discretion is the incorporation of unnecessary procedural "protections" into a tribunal's adjudicative processes, rendering tribunals almost indistinguishable from regular courts.[114] Described as a "due process explosion", the superfluous adoption of traditional court-like procedures is particularly common when a tribunal attempts to "correct" the fairness of its procedures following scrutiny through judicial review.[115] At a certain point, despite the good intentions underlying this approach, the incorporation of additional procedural protections can actually hinder a tribunal's ability to fulfill its important role in the promotion of access to justice and provide fair adjudication.[116]

As mentioned previously, in *Hryniak*, the Supreme Court of Canada expressed clear support for the promotion of access to justice by supporting the adoption of proportionality in adjudicative processes. The Court also recognized the need for an adjudicative culture shift away from emphasizing conventional, adversarial hearing processes to recognizing the validity, justness and fairness of alternative methods of adjudication.[117] The Court emphasized that there are a wide range of possible "judicial" processes that can be utilized, depending on the specific circumstances of the case, and that unnecessary process can actual hinder fairness.[118]

The promotion of proportionality in *Hryniak*, and the acknowledgement that what will constitute a fair and just process will depend on the circumstances, is overall consistent with the general principles regarding the duty of fairness set out in previous administrative jurisprudence, such as *Knight* and *Baker*.

However, by expressly endorsing proportional adjudication and shifting focus from conventional adjudicative processes to alternative methods, *Hryniak* affects the understanding of what constitutes a "judicial" proceeding. Specifically, *Hryniak* challenges the assumption that the more typically adversarial and traditionally court-like a proceeding is, the more "judicial" in nature it should be considered and thus the more deserving of fairness which is

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[114] Mullan, *supra*, note 70, at 3.

[115] *Ibid*., at 2-3.

[116] *Ibid*., at 3.

[117] *Supra*, note 5, at paras. 27 and 28.

[118] *Ibid*., at para. 24. The principles articulated in *Hryniak* are also consistent with the general recognition that how similar to or different a tribunal is from a traditional, adversarial court is no longer a significant consideration when determining the "status" of a tribunal — see Green & Sossin, *supra*, note 56, at 75.

best achieved through the incorporation of additional traditional procedural protections.

The Court's direction in *Hryniak* also leads to the question of whether it is still necessary or helpful to consider how "judicial" a tribunal's adjudication is when determining the content of the duty of fairness, particularly as it is recognized that the incorporation of additional processes will not necessarily result in more fairness. Depending on the circumstances, and particularly the specific needs of the involved parties, even when it is determined that a significant duty of fairness is owing, the incorporation of traditional adversarial processes will not necessarily ensure or enhance fairness. A more modern approach, reflecting the Supreme Court of Canada's guidance in *Hryniak*, could be to instead consider:

i. Does the adjudicative approach or process ensure that the participants in this particular matter will have a meaningful opportunity to participate, i.e. present evidence and express their views? and
ii. Does the adjudicative approach or process allow the decision-maker to be confident in his or her decision in this particular matter, i.e. obtain the necessary evidence and information to make a well-informed decision?

In a similar fashion, the promotion of proportionality in *Hryniak* also calls into question whether the determination of the content of the duty of fairness should still include a consideration of the importance of the decision to those affected by it in isolation.

During the Supreme Court of Canada's hearing of the recent "trilogy",[119] one issue raised during the proceeding was whether there are any administrative proceedings that could be considered unimportant to those involved, acknowledging that in most cases, a party will not attempt to pursue relief unless the issue holds some importance to them.

Proportionality is premised on the time and expense of a proceeding being relative to what is objectively viewed as being at stake in a proceeding, which typically involves a consideration of the jurisprudential importance of the matter, as well as its complexity.[120] However, even if a proceeding is "objectively" considered to be important, the best way to ensure fairness in the particular

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[119] In 2018, the Supreme Court of Canada identified three appeals, *Minister of Citizenship and Immigration v. Alexander Vavilov*, Doc. 37748 (S.C.C.), *Bell Canada, et al. v. Attorney General of Canada*, Doc. 37896 (S.C.C.) and *National Football League, et al. v. Attorney General of Canada*, Doc. 37897 (S.C.C.) as providing a good opportunity to consider the nature and scope of judicial review of administrative action. The Court invited the appellants and respondents to address the question of standard of review in their written and oral submissions and also granted permission to a large number of interveners to make written submissions, and a smaller group of interveners to also make oral argument. I acted as co-counsel for a coalition of five Workers' Compensation Appeals Tribunals and attended the three days of hearing in December 2018. At the time of writing this article, the Court's decision had not yet been released.

[120] Osborne Report, *supra*, note 15, Part 19, Proportionality and Costs of Litigation.

circumstances will not necessarily be the incorporation of more traditional procedural protections. For example, in a claim regarding potential workplace harassment and discrimination, which will usually be objectively viewed as important, the claimant could be particularly vulnerable, making the utilization of conventional court-like procedures a hindrance to meaningful participation, rather than an enhancement. Overall, regardless of how important a decision is, the needs of the parties may necessitate an alternative approach for the proceedings to be fair.

Therefore, instead of trying to weigh the importance of the decision to those affected by it and then incorporating traditional adversarial processes depending on this assessment, another option is to consider whether an adjudicative process is both objectively proportional to what is at stake as well as responsive to the circumstances of the individual participants. This approach would not only be consistent with the overall promotion of proportionality, it would also be "user-centric", which is critical for true access to justice to be achieved.

Overall, the underlying premise that the content of the duty of fairness is flexible and variable must be maintained, as this approach is not only reflective of the unique nature of tribunal adjudication, it is directly relevant to tribunals being able to adopt a user-centric approach in support of access to justice.

The nature of the statutory scheme is also clearly still relevant to the determination of the duty of fairness for tribunals. Similarly, there is value in taking into account the legitimate expectations of the parties and the procedural choices of the tribunal, as these factors are consistent with the promotion of proportional and user-centric adjudicative approaches. However, there is potential value in moving away from the consideration of how judicial and subjectively important a matter is, to what is proportionate and makes sense in the circumstances for both the users and the decision-maker. A change in approach would not only coincide with the Supreme Court of Canada's guidance in *Hryniak,* but also would be consistent with the overall shift in the Canadian legal system towards flexibility, responsiveness and proportionality generally. There will obviously always be circumstances where a traditionally adversarial process is warranted, but in many matters, particularly those adjudicated by tribunals, other processes might be more suitable to fulfill the tribunal's fairness obligations.

5. OPTIMIZING TRIBUNAL ADJUDICATION AND ACCESS TO JUSTICE THROUGH "STRUCTURED FLEXIBILITY", RESOURCES AND ASSISTANCE

There are many factors that are relevant to determining the best adjudicative approach for a tribunal to adopt. One of the more obvious factors to consider is the statutory scheme and mandate of the tribunal.[121] As "creatures of statutes",[122] a tribunal's governing legislation ultimately controls the

[121] Sossin, *supra*, note 4, at 6 and 13-15.

adjudicative approaches or processes that a tribunal can utilize. The broad discretion given to many tribunals, particularly with respect to the admission of evidence, order of procedures or investigation,[123] allows for innovative and flexible adjudicative procedures. However, not all tribunals have this type of discretion or flexibility. When examining the governing legislation, it is important to consider whether the statutory scheme aligns with the tribunal's mandate, as well as the broader shifts toward accessible and proportionate adjudication, and if not, whether statutory changes would be beneficial (and possible). The tribunal's historical approach to adjudication, and the context surrounding it, is also important to consider. Any adjudicative approach adopted must obviously also take into account the institution's realities and resources[124] and any relevant government policies and priorities.[125]

(a) Thinking Outside the Hearing Box when Considering the Needs of Users

User-centric adjudicative design is critical to the promotion of access to justice.[126] Therefore, a factor that must be given significant consideration when determining the best adjudicative approach for a tribunal to adopt is the needs of the "users" of the tribunal.[127]

Factors that are generally important when assessing the needs of the users that the tribunal serves include:

- Who are the parties that usually appear before the tribunal?
  - Are these parties typically vulnerable?
  - Are the parties "institutional" litigants?[128]
- Are parties usually represented?
  - If yes, what is the general quality of representation?

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[122] *Cooper v. Canada (Human Rights Commission)*, 1996 CarswellNat 1693, 1996 CarswellNat 1694 (S.C.C.) at para. 54.

[123] For example, some tribunals have procedural powers similar to the powers set out in ss. 4 and 5 of the *Inquiries Act,* R.S.C. 1985, c. I-11, which is applicable to many administrative tribunals, such as the Federal Veterans Review and Appeal Board (see the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18, s. 14), the Immigration and Refugee Board (see the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 165), and the specific powers provided in the governing legislation of the HRTO (see s. 43 of the *Human Rights Code*) and the OLRB (see s. 111 of the *Labour Relations Act, 1995*).

[124] This can include the expertise of decision-makers, length of appointments, and whether the tribunal is a distinct agency or part of a "cluster" of tribunals, for example, as contemplated in the Ontario *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009,* S.O. 2009, c. 33, Sch 5 in ss. 15 to 19.

[125] Sossin, *supra*, note 4, at 18.

[126] *Ibid*., at 1, 3 and 6. See also Winkler, *supra*, note 44, at 6.

[127] Sossin, *ibid*., at 1.

[128] Institutional litigants include governments that routinely appear to defend the denial of a benefit, as well as other parties that frequently appear, such as employers and unions, as compared to individuals who seek relief on a one-time or at least infrequent basis.

- How many parties usually participate in proceedings (one or more)?
- If more than one party usually participates, is it typical for there to be inequality between the parties, specifically with respect to their ability to present evidence, make submissions and generally participate? Particularly relevant to this determination is whether one party is an institutional litigant that frequently appears before the tribunal and is therefore well-versed in the tribunal's processes, etc.

The perspective of all parties, including those responding, must be taken into account when assessing needs, rather than just the views of the party seeking relief.[129]

Once the typical characteristics of a tribunal's users have been determined, it is then important to consider how the meaningful participation of these users can best be promoted.

Suggestions for promoting access to justice in legal systems often focus on the way in which matters are adjudicated during an actual hearing. However, in order to truly promote meaningful participation by all users, it is important that a tribunal's entire adjudicative process from start to finish be examined. As discussed previously, the application of an "inquisitorial gloss" to an essentially adversarial process will likely not be effective in achieving meaningful access for all parties. Therefore, it is important to promote access and proportionality from when a claim begins to when it is resolved.

In general, for adjudication to be simple, convenient and accommodating, and relief to not be denied on the basis of minor technicalities, procedural and/or evidentiary flexibility, as well as powers of investigation, must be taken advantage of as much as possible and as early as possible.[130] Consistent with *Hyrniak*, traditional in-person hearings must also be viewed more as a "last resort", rather than the "ultimate" end goal of an adjudicative process, recognizing that a traditional hearing is not always required to ensure procedural fairness,[131] and that the process required in a complex claim will likely not be necessary when adjudicating a more straight-forward matter.[132]

The British Columbia Civil Resolution Tribunal ("CRT") is one example of an adjudicative agency that has been specifically designed "end-to-end"[133] to promote access to justice. Taking into account the CRT's mandate, jurisdiction and user needs, each of the different stages of the CRT's dispute resolution process encourage resolution as early and efficiently as possible, with the final stage of adjudication only being engaged in if necessary.[134]

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[129] Osborne Report, *supra*, note 15, Introduction.

[130] Statement, *supra*, note 46, at 2 and 4.

[131] *Supra*, note 5, at para. 43.

[132] Salter & Thompson, *supra*, note 45, at 123-124.

[133] *Ibid.* at 127.

[134] *Ibid.*

Other factors relevant to promoting the meaningful participation of all users in an adjudicative system include:

- Avoiding or limiting the need for parties to characterize their dispute in a highly adversarial manner at the onset of the adjudicative process which helps avoid the problems associated with a typical "u-shaped"[135] adjudicative process. When utilizing different processes, it is always important to consider how the different adjudicative approaches work together, trying to adopt a cohesive approach that avoids awkward transitions or unnecessary delay.[136]
- Encouraging dialogue between parties and decision-makers as early as possible, particularly by asking for general information at the start of the process. This may not only help all participants understand the issues arising in a particular claim in a less adversarial manner, but allows for realistic assessments of claims by parties and decision-makers and resultantly, earlier and more responsive case management by the tribunal.
- Considering adjudicative options beyond just mediation and a traditional hearing,[137] which includes:
  - Exploring different options for hearing evidence (written statements, affidavits, videos) and receiving submissions, and abandoning the perception of a strict written versus oral hearing dichotomy.[138]
  - Adopting active adjudication approaches, particularly when parties are unequally matched or there is only one party participating.[139]

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[135] A "u-shaped" adjudicative process is characterized by the parties typically spending a great deal of time preparing and characterizing their dispute in a highly adversarial manner at the start of a legal proceeding, followed by a lull of inactivity until the hearing approaches, when the parties must again spend a considerable amount of time and expense preparing and participating. This pattern of frenzied, adversarial activity contrasted with inactivity often necessitates duplicative work as parties and representatives are essentially required to prepare twice (or more) for the same matter — see Salter & Thompson, *supra*, note 45, at 120.

[136] *Ibid.*, at 116.

[137] Mullan, *supra*, note 70, at 14.

[138] The OLRB's consultation procedure is an example of an adjudicative process that is less formal than a traditional hearing, with the decision-maker playing a much more active role and evidentiary rules being relaxed, although the precise format of the consultation will depend on the individual circumstances of a case — see http://www.olrb.gov.on.ca/english/hearing.htm#Consultation.

[139] It is always important to be mindful that the adoption of an active adjudication approach does not mean that an adjudicator is no longer required to be neutral. As acknowledged in the decision, *Im v. BMO Investorline Inc.*, 2017 ONSC 95, 2017 CarswellOnt 48 (Ont. S.C.J.), adjudicators have a responsibility to facilitate access to justice, but they must also remain neutral and impartial. Adjudicators must also balance fairness to all parties, even if one of the parties that could be affected is not directly participating in the proceeding — see para. 4.

- o Utilizing technology as well as alternative hearing formats, such as telephone or video conference, to adapt the adjudicative process to the needs of users. [140]

Ultimately, in every case, the decision-maker must determine what process is required to allow users to meaningfully participate and allow her or him to efficiently and fairly consider the position of parties and reach a confident, well-informed decision. Different types of adjudicative processes both before and during the hearing should be viewed as potential tools that can be utilized in a flexible and responsive manner depending on the circumstances of the case and needs of users. Two potential tools, "structured flexibility" and the provision of information and assistance, are considered below.

(i) "Structured Flexibility"

Flexibility is crucial to being able to utilize proportionate adjudicative methods to respond to individual circumstances of a procedure. When embracing flexibility in adjudication it is important to ensure that:

i. Parties have adequate certainty with respect to the adjudicative processes that will be utilized, and
ii. Similar issues will be addressed in a similar manner.

As recognized in the *Thamotharem* decision, effective adjudication often involves striking a balance between certainty and consistency on the one hand, and flexibility and responsiveness on the other.[141]

One way in which a tribunal can achieve these potentially competing objectives is through the adoption of "structured flexibility". In general, "structured flexibility" involves establishing what types of tailored adjudicative options are appropriate to a tribunal's general and specific circumstances of adjudication, and then, transparently explaining the underlying rationale for why a particular adjudicative approach will be utilized, as well as when the process might be varied depending on the specific needs of users.

For a structured flexibility approach to be successful, comprehensive screening of cases is critical and will ideally be done as early in the adjudicative process as possible.

Enhanced screening specifically allows for:

- The identification and determination of preliminary issues that should be resolved before the merits of a case are determined, including procedural (ex. witnesses) and substantive (jurisdiction) issues.
- The identification of additional evidence that would be beneficial to obtain so that a full record is available to the decision-maker, and

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[140] The use of alternative hearing formats as well as electronic resources is very relevant to the promotion of access to justice but a thorough discussion about the benefits and best practices is beyond the scope of this article.

[141] *Thamotharem*, *supra*, note 83, at para. 55.

- An earlier identification of the appropriate adjudicative process to adopt (or vary), depending on user needs, which in turn allows for the parties to be provided with earlier and better notice about how the adjudication will proceed and a better opportunity for parties to meaningfully participate.

Decisions as to how a matter will be adjudicated must ultimately be made by the final decision-maker, with or without assistance from staff, as it is the adjudicators who will be ultimately responsible for deciding whether a particular adjudicative process will promote meaningful participation and allow him or her to have confidence in their decision.

As a "structured flexibility" adjudicative approach is premised on available processes being established in writing and transparently communicated, it is also important to ensure that any resulting guidelines, rules of procedure, etc. setting out the available adjudicative methods do not compromise the independence of the tribunal's decision-makers. The *Thamotharem* decision provides important guidance with respect to how to appropriately balance a tribunal's institutional interest in consistency with the independence of its adjudicators.

In *Thamotharem*, *Guideline 7: Concerning the Preparation and Conduct of a Hearing in the Refugee Protection Division* ("Guideline 7"), a guideline established by the Chairperson of the IRB, was challenged as being both unfair and of compromising the independence of the RPD members. The Guideline established a standard procedure for questioning in RPD hearings that was responsive to only one party participating. The Guideline was intended to create a more uniform approach to questioning claimants at RPD hearings,[142] recognizing that claimants should be entitled to expect a consistent procedure to be followed, regardless of the place of the hearing or assigned adjudicator. It was also believed that hearings would be more expeditious if claimants were generally questioned first by the RPO or the member instead of being questioned in chief by the claimant's own counsel, which could lead to lengthy and sometimes unnecessary questioning.[143]

Ultimately, the Federal Court of Appeal determined that the process set out in Guideline 7 was fair and did not compromise the independence of the decision-makers.[144] With respect to the Guideline itself, the Court stated that a guideline explaining how discretion will usually be exercised is not enough to unlawfully fetter an adjudicator's discretion provided that it does not preclude the standard

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[142] Specifically, the RPD established a standard practice for refugee protection officers ("RPO") to question claimants. If there was no RPO at the RPD hearing, the member deciding the claim could also start the questioning of the claimant and provide an opportunity for the claimant's counsel to ask questions later. However, in exceptional circumstances, the order or method of questioning could be varied — see *Thamotharem, supra*, note 83, at para. 2.

[143] *Ibid.,* at paras. 20 and 21.

[144] *Ibid.,* at para. 37.

practice being varied in response to the individual circumstances of the proceeding.[145]

Overall, tribunals must be able to devise processes for ensuring an acceptable level of consistency in their decision-making.[146] "Structured flexibility" allows for tribunals to promote consistency, without sacrificing adjudicative independence or the ability of individual decision-makers to respond to the needs of parties in a particular proceeding.

(ii) Provision of Information and Assistance

When examining how to ensure the meaningful participation of parties, it is also important to consider what help users may need to be able to prepare and present their cases, particularly before the hearing[147] Part of serving "users" and promoting accessibility in legal proceedings requires that "a reasonable modicum of resources and assistance" be available to parties.[148]

Procedural and Substantive Information (Not Legal Advice)

An important part of maximizing access to justice, as well as efficiency, includes ensuring that parties and stakeholders have meaningful access to legal information in a form that they can understand.

Therefore, an adjudicative agency's rules and procedures should be confirmed in writing to enhance stability, predictability and overall accessibility, and also promote transparency and procedural fairness.[149] Procedural information should also be written in the simplest terms possible, avoiding technical words, defined phrases and acronyms.[150] It can be particularly helpful to the overall adjudicative process when guides or checklists summarizing what type of evidence is usually relevant in the adjudication of a certain type of issue is provided to the parties as early as possible and also made publicly available, ideally on a tribunal's website.

It has also been recognized that in addition to providing information about procedures, there is value in providing substantive legal information that provides guidance about how issues are generally approached and determined by the tribunal to stakeholders.

For example, in 2017, the Government of Canada's Department of Justice made internally developed legal information about the *Charter* available to the public through the publication of its "*Charterpedia*". This online document includes information about the purpose of each section of the *Charter*, a

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[145] *Ibid*., at para. 78.

[146] *Ibid.,* at para. 83.

[147] Sossin, *supra*, note 4, at 9, quoting Andrew Leggatt, *Tribunals for Users: One System, One Service, Report of the Review of Tribunals*, March 2001, at para 1.2.

[148] Osborne Report, *supra*, note 15, at Section 6, Unrepresented Litigants.

[149] Salter & Thompson, *supra*, note 45, at 133.

[150] *Ibid.,* at 124.

summary of the analysis or test in relation to each section developed through jurisprudence, and links to Supreme Court of Canada decisions.[151]

Overall, the provision of procedural and substantive information is very relevant to promoting access to justice as it helps all participants in the adjudication, including parties and decision-makers, to have a better understanding of what is at issue in the proceeding, the evidence required and the relevant legal principles.

Assistance from Tribunal Staff, including Tribunal Counsel

There are a few options for tribunals to provide assistance to users, both before and during the actual adjudicative proceeding.[152] One option for pre-hearing assistance is to designate staff to help users who require assistance to complete forms or to find applicable laws and rules, particularly as some parties do not have a representative when a matter is first initiated. Staff can also provide assistance by helping to direct parties to sources of legal representation.

Another option for assistance is through the utilization of "Tribunal Counsel". Although Tribunal Counsel can support adjudication at a tribunal in a number of different ways,[153] one option particularly well-suited to the promotion of access to justice is the provision of neutral legal assistance during a tribunal's adjudication. This type of assistance typically involves Tribunal Counsel helping to question witnesses and/or making submissions on legal and procedural issues during the actual hearing. It may also involve Tribunal Counsel providing procedural assistance pre-hearing, such as liaising with parties and identifying and streamlining procedural and legal issues as much as possible.

Although there are different views as to the extent that a tribunal, and more specifically its staff and Counsel, should provide assistance to parties in proceedings, it is well accepted that tribunal staff and adjudicators must not step into the role of an advocate when providing assistance.[154] As tribunals wrestle with how to best promote meaningful participation of all users, however, there are more agencies willing to push the traditional boundaries of providing assistance. Some examples include tribunal staff providing parties with a non-binding neutral assessment of a claim pre-hearing, or directing what sort of evidence would best support a particular claim. Ultimately, the best way for both staff and Tribunal Counsel to be utilized will depend on the unique

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[151] Government of Canada, Department of Justice, Charterpedia website, Introduction section: http://www.justice.gc.ca/eng/csj-sjc/charter-charte/check/intro.html The Human Rights Law Section ("HRLS") of the Department of Justice was created in 1982 and an important part of its work has been developing Charter-related knowledge-management tools. The "Charterpedia" is built on "Charter Checklists" that were first published in hard copy by the HRLS in 1991.

[152] One hearing option already discussed is "active adjudication".

[153] A thorough discussion about the possible roles of Tribunal Counsel and relatedly, the appropriate scope of these roles, is also beyond the scope of this article.

[154] Statement, *supra*, note 46, at 11.

circumstances of the tribunal, especially the specific needs of its users and decision-makers, and the tribunal's mandate and available resources.[155] However, there is no doubt that when utilized appropriately, staff and Tribunal Counsel can meaningfully contribute to decision-makers having as complete a case as possible when making their decision and the overall promotion of access to justice.

When there is an expectation that staff, including Tribunal Counsel, will be interacting with parties in a more direct manner, it is important to be mindful of the necessity of providing proactive, comprehensive training to ensure consistency and overall fairness. For example, staff designated to provide information to users during the pre-hearing adjudicative processes should receive training to make sure that they understand and are comfortable with their role to provide legal information and not advice.[156] It is also beneficial to develop protocols and scripts in relation to common situations to ensure a consistent approach.[157]

Similarly, if an active adjudication approach is being implemented, it is important to provide appropriate training to decision-makers proactively, especially to avoid allegations of bias or unfairness. This training should include an overview of the best way to lead questioning, particularly in relation to vulnerable parties, as well as information about active listening techniques and cross-culture sensitivity.[158]

Finally, the relationship between staff and decision-makers must be considered. Unnecessary or technical separations of staff and decision-makers, whether in relation to processes or structures, can lead to inconsistent procedures and outcomes, as well as inefficiency. Therefore, it is important to examine how a tribunal's different groups and departments work together to ensure that there is appropriate collaboration, with work being done in a logical and deliberate fashion. This includes examining how information is shared and utilized, how decisions are made, implemented and communicated, and the best way to adopt a cohesive approach to internal education so that staff and adjudicators are on "the same page". Tribunal administrative work must be done in conjunction with adjudication. Overall, collaboration between all participants in a tribunal's adjudication is essential to achieving consistent, accessible, efficient and fair adjudication.

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[155] An alternative option to utilizing tribunal staff and Counsel to provide assistance to parties is for a separate agency to be created that is solely responsible for providing legal assistance to users within the particular legal system. Such an option will of course be dependent on whether there are available resources to fund the agency. The Ontario Human Rights Legal Support Centre ("HRLSC") is an example of such an agency. The HRLSC is an independent agency funded by the Government of Ontario that provides legal services to individuals who have experienced discrimination.

[156] Statement, *supra*, note 46, at 11.

[157] *Ibid.*, at 8.

[158] Thomas, *supra*, note 60, at 61 and *Thamotharem, supra*, note 83, at paras. 38 and 39.

6. CONCLUSIONS

Tribunals have a critical role to play in the promotion of access to justice in the Canadian legal system. As it becomes more accepted that fairness is neither directly linked with how judicial a proceeding is, nor ensured through the incorporation of additional procedural protections, the duty of fairness must be re-examined so that it coincides with the fundamental shift away from emphasizing traditional, adversarial court-like adjudicative methods.

Excessive "legalism" in tribunal adjudication must also be avoided as it impedes one of the reasons that tribunals have often been created. Instead, in every case, what is necessary in the individual circumstances and in particular, required by the needs of the parties must be considered to ensure that the process utilized to reach the decision is fair, as well as proportionate. The utilization of "structured flexibility" and staff and Tribunal Counsel are just a few examples of ways in which tribunals can be proactively responsive to the needs of the users that it serves. Overall, a tribunal's focus must be on achieving just outcomes through fair processes, rather than ensuring the strict adherence to rules and technicalities, or the achievement of a "perfect" but unreasonably complex adjudicative process.