

Are Administrative Tribunals Effective in Delivering Justice?

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Perhaps the most interesting thing about this question is that it is still being posed as the twentieth century draws to a close. The answer on a quick consideration appears too obvious.

The Honourable Mr. Justice R. Roy McMurtry, in a recent (November 20, 1997) address to the Conference of Ontario Boards and Agencies said of administrative tribunals :

It is appropriate to acknowledge that the justice system must now be understood as comprising two distinct components — the judicial justice system and the administrative justice system — with the administrative justice system and its various components being, for a large proportion of our population, the custodian of the justice that is most commonly relevant to their affairs. It is in fact the face of justice (to use Professor Ratushny's phrase) that is most commonly seen, as administrative tribunals and agencies directly affect many more citizens than do decisions of the courts.¹

And further on he noted :

A moment ago I suggested that the administrative justice system was the custodian of the justice most commonly sought and the face of justice most commonly seen. While this is generally true for both individuals and business, it is perhaps disproportionately true for racial and other minorities, women, aboriginal people and those with literacy, learning and other disabilities.²

Mr. Justice McMurtry was in part responding to the use and prevalence of administrative tribunals. He was acknowledging their evident success in making themselves useful and accessible and in providing important and necessary services. Mr. Justice McMurtry's comments were in spirit echoed in a January 1997 Law Reform

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1. The Honourable R. Roy McMurtry, Chief Justice of Ontario, address to the Conference of Ontario Boards and Agencies, November 20th, 1997 [unpublished] at 2.

2. *Ibid.* at 4.

Commission of Nova Scotia Report on the Reform of the Administrative Justice System in Nova Scotia.³ That Report indicated :

*In terms of the number of people affected, the influence of some decision makers is far greater than that of the courts, for example, human rights tribunals, labour boards, workers' compensation boards, social benefits boards, and disciplinary or licensing committees for a number of occupation.*⁴

The simple and direct answer to the question is yes, tribunals are effective. They continue to be used, and they are used more and more, hence they succeed in the market place. They are not costly, they are accessible. They have won the respect of their clientele. They have earned the respect and deference of the judicial system. They are useful and, with a bit of care and attention to their structure and operations, carry the promise of even greater usefulness.

The approach followed here will therefore not be to defend tribunals but to endeavour to explain their success and their weaknesses and to try to introduce a more textured consideration of the role and functioning of tribunals and of their role in the justice system. The reader may then consider and decide whether and why, when all is added in, tribunals do improve the effectiveness of the system of justice. Inevitably, questions will arise concerning why tribunals are not even more effective and what can be done to improve their functioning and usefulness even further.

One approach to posing more textured questions about the effectiveness of administrative tribunals in delivering justice may be found in a short work written originally in the 1930's, but first published in book form in Canada's Centennial Year. In his short book entitled *Legal Fictions*, Professor Lon L. Fuller⁵ observed that legal fictions, are hypothesized. He also pointed the way to a better consideration of administrative tribunal decision making and dispute settling. A quote or two from Professor Fuller may explain this better :

[...] I can best express the nature of this interest by suggesting that the fiction represents the pathology of the law. When all goes well and established legal rules encompass neatly the social life they are intended to regulate, there is little occasion for fictions [...] Only when legal reasoning falters and reaches out clumsily for help do we realize what a complex undertaking the law is.

3. Law Reform Commission of Nova Scotia, *Final Report, Reform of the Administrative Justice System in Nova Scotia* (Halifax : Law Reform Commission of Nova Scotia, January 1997) (hereinafter *Nova Scotia Report*).

4. *Ibid.* at 2.

5. L.L. Fuller, *Legal Fictions* (Stanford, Ca. : Stanford University Press, 1967).

Fuller also observed :

Changing the figure, we may liken the fiction to an awkward patch applied to a rent in the law's fabric of theory. Lifting the patch we may trace out the patterns of tension that tore the fabric and at the same time discern elements in the fabric itself that were previously obscured from view. In all this we may gain a new insight into the problems involved in subjecting the recalcitrant realities of human life to the constraints of a legal order striving toward unity and systematic structure.⁶

Administrative tribunals, it is here suggested, are in their time much like legal fictions were in the nineteenth and previous centuries. As the role of law in society has expanded, problems and deficiencies have developed and been perceived, and administrative tribunals have met them. Approaches utilizing tribunals have been developed to allow and facilitate the expansion of the law and its functioning. While the general framework and structure of the legal system have been set for some time, as the role of law has increased in importance, it has been necessary to accommodate more and more activities. At a time when legal fictions were the approach used to bring about many changes in the laws, judges who constructed the entire foundation of the common law on a case by case basis, were fond of denying that they made law. It was suggested they merely followed existing precedents. This approach and other legal fictions allowed the role and function of law to expand while maintaining the validity of the notion that judges were simply explaining or discovering existing legal standards, applying precedent, but not making laws. Legal fictions allowed certain realities to be accommodated and new needs to be met. At the same time, the then current notions of the constitutional status of the judiciary and its place within the system of government were maintained. In the meantime, although there was change and growth in the legal system, the appearance was that the status quo was being maintained.

Unfortunately, we have carried the notion that the legal system undergoes only limited change or modification even to the present day. The reality, however, is somewhat different.

In the twentieth century, particularly in the past fifty years, administrative tribunals have provided significant additional instrument for expanding the role of the law, for its development and change, and for repairing certain legal pathologies. The administrative decision making process has done this rather directly because tribunals are created by legislation, the one agent that legal theory admits can change the system significantly. However, because the process had been one of change, it has created real strains, like the legal fiction process. There are different reasons for this; one is the innate caution of the common law. The common law evolved in a society in which the role of government was limited and in which the primary function of law was to govern relationships between individuals. The common law developed incrementally and was cautious about larger scale legislative changes. As the role of government expanded, the task of lending legal substance and structure to governmental actions and interventions

6. *Ibid.* at viii.

had to be accomplished. Governments create new rights and directives by legislation and their enforcement fell to the tribunal community to accomplish. Nevertheless, the existing legal system had not yet formulated a conceptual and intellectual basis upon which to respond, neither doctrines nor structures within which to welcome and accommodate the legal activities of tribunals. The legislation that created tribunals rarely explicitly set out how they were to be assimilated or accommodated within the existing system and how they were to work together with established institutions when inevitable conflicts arose. The statutes that created administrative tribunals did not, and very probably could not have carefully and rationally defined the relationship of tribunals to the existing legal system.⁷

It should be recalled that administrative tribunals nevertheless took on their tasks within the structure of the pre-existing legal system. Even in the early years of the privative clause conflict, administrative tribunals were not perceived as fully independent in attempting to deliver justice. From the outset, the relationship of tribunals to the courts was not carefully defined and, from their beginnings, tribunals were not integrated into the broader legal system or system of justice. There were many fundamental uncertainties concerning where tribunals were to fit.

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7. The roots of the court-tribunal-legislature hostility go deep. A favourite article of the author on all this hostility is found in W.Z. Estey, Q.C. (as he then was) "Usefulness of the Administrative Process" (1971) L.S.U.C.S.L. 307. There are many interesting comments in addition to an observation that the first privative clause dated from the early 1800's. Some samples :

"The trend in administrative law, legislatively speaking, has been against granting right to appeal on the misguided theory that the administrative board brings to the subject a characteristic or inherent expertise and therefore they are better equipped, and used to handle the problem, than a court or some other collection of human beings. I think that all of our boards almost every day demonstrate the fallacy of that assumption." At 307 and 308.

and :

"There is some evidence, however, that the courts have developed a second chapter of the theory namely that the board always exceeds its jurisdiction when it reaches a decision with which the court disagrees." At 308.

and :

"May I say in closing that my tips to administrative lawyers, and all lawyers have to be whether we like it or not, is that the first thing you have to do if you are consistently before a Board is to issue a writ of certiorari once in a while just to make them keep their heads up [...] My second tip is that if you have the slightest grounds for legal argument before one of these administrative boards, a genuine, small but important point of law, never make the mistake of underplaying it. Proceed through your unstapled mass of xeroxed cases with the air of a man (sic) on his way to an application to the High Court for an order in certiorari." At 315.

Needless to say, lawyers are still following the Honourable Mr. Justice Estey's wisdom these many years later.

Tribunals then had to be located within the system of justice. What this paper is suggesting is that the most difficult components of this work are now accomplished. That is not to suggest that further work to locate them more precisely may not usefully be undertaken. The task of defining justice is well beyond the scope of this paper, but in thinking of tribunals as part of a system, it is useful to ponder, in a superficial way, what we mean when we speak of justice and of the justice system. "System" is perhaps an easier word and may be defined as "a regularly interacting or interdependent group of items forming a unified whole." "Justice" is a difficult term but can be defined as "the maintenance or administration of what is just, especially by impartial adjustment of conflicting claims or the assignment of merited awards or punishments." To better consider the efficiency of administrative tribunals, then, they should be seen as a part of a system defined as a regularly interacting unified whole designed to reconcile competing claims.

Seen as a part of a system, administrative tribunals, if the suggested "patch" analogy to legal fictions holds up, are somewhat analogous to duct tape;⁸ they are an all purpose device used to shore up, repair and support the other elements or components of the system. In this respect, like legal fictions, administrative tribunals are part of the repair mechanism of the legal system. They also may be seen as innovative devices used to allow an expansion of scope or orientation to meet new problems. They are also used to undertake significant legal reform.⁹

Fuller was sensitive to the use of legal fictions as a tool for legal reform and for accommodating the need to introduce new legal notions and theories. Using fictions, new laws, new legal approaches or reforms could be introduced in the guise of the old. *Stare decisis* could be maintained, but the law could adapt to new reality. It is argued here, therefore, that like legal fictions, administrative tribunals, to the extent that they have been effective in delivering justice, have allowed necessary adaption, have opened up the legal system to essential reforms and have allowed pathologies in the law to be cured.

This role of tribunals is easy to test. In the area of labor law, for example, they have allowed new rights to be asserted in different ways, and have allowed new conceptions of societal relations to be developed. As public law has developed notions of public interest, tribunals have allowed a third party, the broader interests of the public, to be present at many proceedings; for instance, in the areas of broadcasting, in respect of the use of our energy sources, in the regulation of communications and in the control of environmental hazards.

8. There has recently been a spirited national discourse on duct tape and its functions on the CBC program "As it Happens."

9. The article by Mr. Justice Estey, *supra* note 7 begins :

Administrative law, as the term is generally understood, is probably the last frontier in the growth of the body and practice of the law.

In areas like food and health, tribunals have protected the public safety. In respect of minimum employment standards, millions take their statutory holidays, collect their pay and enjoy their vacations under the protection of employment standards processes and tribunals. In these and similar areas, tribunals have rescued the courts from crushing volumes of routine matters in which difficult and complex legal issues did not arise. The sophisticated and complex adversarial procedures of the courts have been reserved for more complex and serious matters. The use of tribunals has enabled a lower and less costly order of legal procedures to be matched with higher volume, created a swifter, less cumbersome process for less serious matters, and has increased the accessibility of legal continuing actions to many at low cost.

Obviously, administrative tribunals are not, as legal fictions tended to be, instruments of pure theory. Rather than repairing legal theory, what tribunals do is to provide practical mechanisms for making legal rights real; they patch the institutional fabric of the legal system to provide practical solutions, to meet institutional deficiencies and to resolve them in a manner somewhat analogous or parallel to the way legal fictions were used to support tottering theory. That is not to say that tribunals do not indirectly support and promote the development of legal theory; it is only to suggest that this is only one of their many functions.

The answer to whether administrative tribunals deliver justice then, should be formulated in a context that respects their institutional role and their historical development, as well as their relationship to the other elements of the legal system. If that role is clearly perceived as assisting the other actors in the system in providing accessible, speedy justice, in meeting the future, in allowing the law to change or in repairing gaps in the institutional fabric of the law, the efficiency of tribunals is more easily assessed. If one misperceives the tribunal role as independent of, or as a competitor to, the other components in the system, accurate assessment of their role becomes more difficult. If their purposes are assimilated to those of courts, tribunals may be found particularly wanting since they do not always do as well as courts those functions that are particularly court-like. There is a risk of reawakening old, fruitless conflicts. Tribunals may not be the best places to protect and defend individual rights. Their processes may not meet the highest procedural standards of adversarial process. Tribunals should not be expected to do things by the constitution assigned to the courts. They are not responsible to maintain the overall fabric of our legal structure. They should not be expected to act in the way that courts do.

Because we sometimes look to tribunals for these things, and ask the wrong questions about their functioning, the role of tribunals, their utilization and their effectiveness within the system of justice may be more limited than should be the case. Tribunals are often not as secure and as functional as they have the potential to be. Equally, courts and tribunals sometimes act like neighbours more interested in putting each other out of the neighbourhood than cooperating in their mutual interest.

Comparing them with courts can also lead one to the conclusion that all tribunals, like courts, operate generally in the same way. It is dangerous to attempt to group tribunals or to suggest the same considerations apply to them all. Administrative tribunals are not all the same; they do not do the same things and often do not proceed in the same way. Neither do they meet only a narrow range of needs. They have proven effective in meeting a broad range of needs within the legal system.

The legal system and legal actors, viewed broadly, include legislatures, courts, the executive of government and tribunals. While administrative tribunals may sometimes serve to supplement or to assist the court system in meeting certain needs, they may also come to the aid of the legislative and executive branches of government. While the gaps which they fill more typically are gaps in the adjudicative system, they may equally be called upon to the assistance of other components of the legal system or even of the broad system of government. Again, however, it should be remembered that in the common law system, administrative justice is not a component essential to the fundamental structure. Like so much of the common law system, administrative justice may be best understood only in its historical context. Administrative justice was added to the common law legal system only in this century. Basic needs were already being met. The administrative justice system, while now integral to an effective, functioning legal system, is therefore best seen not as that part of the framework designed to meet basic needs, but as an approach or modification directed to supporting that system and making it more effective. It should be seen as part of the finishing touches of a system that already was meeting critical and essential legal needs when administrative tribunals were first invented and put to use. If tribunals are viewed in this way, and also take this view of their own role, there is likely to be less anxiety about their deployment. If their success in working with the other components of the system is considered a primary criterion of effectiveness, the question of whether they are effective in delivering justice is more appropriately addressed. What this perspective reveals is that there have been problems in fitting administrative justice into the larger system. Ironically, however, the persisting problems which have resulted more from a clash between the legislature and the judiciary than from the actions or fault of tribunals. Tribunals themselves have not been directly involved. Initially, the clash between the courts and legislatures was because administrative justice was viewed suspiciously by common law lawyers, as a possible threat to individual rights and as an encroachment by government on the power of the courts.

In considering the development of administrative tribunals within the justice system, it is useful to recall the McRuer Commission¹⁰ and the reasons for it. The Commission reported in 1964 at a time when unrestricted legislative supremacy was still the perceived orthodoxy. The courts relied upon techniques of legislative interpretation, a non-binding Bill of Rights, and a strict view of jurisdiction as their tools to control legislatures in their promotion of the use and growth of tribunals. The courts also sought, by these techniques, to maintain the coherence of the justice system.

10. *Ontario Royal Commission of Inquiry into Civil Rights* (Toronto : Queen's Printer, 1968) (Commissioner : The Honourable J.C. McRuer).

Because the McRuer Commission was the last comprehensive and disciplined study of the relationship of the statutory decision maker and the traditional judiciary, it is a particularly useful point of departure. Its fundamental orientation was the preservation of individual human rights. The McRuer Report quite correctly outlined the importance of preserving the scope of the exercise of judicial power and functions. In the McRuer view, it was essential that the role and function of the section 96 common law courts of general jurisdiction be maintained. Mr. Justice McRuer was concerned that the growth of statutory decision making might lead to unjustified encroachment on the personal liberties, rights and freedoms of individuals as these had traditionally been guaranteed by the courts. It is interesting to recall that while Mr. Justice McRuer was concerned with the place or function of the system of administrative justice, he was not particularly concerned with its effective functioning.

Justice McRuer was not alone in this legal education at the time concerned itself with mastering the intricacies of the prerogative writ system in order to allow better control of the many emerging statutory decision makers.

Importantly, the McRuer Report reviewed the interaction of the judiciary and of statutory decision makers with the legislative, administrative and executive components of government. He saw the key to an appropriate interaction and to the preservation of individual rights as a matter of locating and maintaining the right balance. While the matter of preserving individual rights must still remain a concern, the preservation of individual rights is no longer a matter of such urgent importance because of the Charter of Rights and recent jurisprudence which have clearly preserved and constitutionalized the judicial role and clarified the primacy of the section 96 courts in our system. The issue of balance should take a different focus. Given our legal and constitutional development, it is time to abandon the defense mounted by the courts against administrative encroachment, and take a new look at the balance and functioning of the system. The primacy of the constitutional functions of the judiciary, and their role in defining the legal framework for interactions between the components of the legal system, is now well recognized. With the constitutionalization of individual rights in the Charter, they may now be more easily maintained by the courts. Substantive rights have replaced interpretive techniques. Fundamental systemic roles are now more clearly defined. We are all on surer ground and it should now be possible to focus on a new range of issues. The task that should now be addressed is the task of refining the balance that most appropriately insures that our legal systems will function most effectively and most beneficially in the interests of the broader society which we serve.

The defensive posture, when seen today in the courts, seems particularly outmoded. With the *Crevier* case,¹¹ the constitutional role of the courts in upholding the rule of law and of adjudicating respecting fundamental legal standards has been clearly recognized. The primacy of the courts in dealing with Charter Rights and other issues of fundamental rights has never been subject to any real doubt. The place of the administrative tribunal has been defined in such a way that the essential role of the courts as guarantors of essential legal values, including their role as arbiters of jurisdiction, is now well established in jurisprudence and in administrative and functional reality. Given

11. *Crevier v. (A.G. Quebec)*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1, 38 N.R. 541.

this, it is time to abandon the disposition described by the late Chief Justice Laskin in *Crevier* when he spoke of the history of judicial review and of the interpretation of privative clauses designed to limit judicial intervention in the work of tribunals.

*This Court has hitherto been content to look at privative clauses in terms of proper construction and, no doubt, with a disposition to read them narrowly against the long history of judicial review on questions of law and questions of jurisdiction.*¹²

This quote is of interest because it captures a sense of the historical interaction between the legislatures and the courts over the issue of the tribunal role. The long and difficult history, and the judicial practice of construing the statutes setting up tribunals narrowly and of restricting their jurisdiction, is openly acknowledged.

The power of the courts in such circumstances appears to have been protection of the integrity of the justice system and its centuries of tradition and of defending their jurisdiction against erosion. However, our more modern administrative tribunal system should not be seen as competing with, or replacing other components involved in the enterprise of delivering justice, but should be viewed as working with them to meet needs. While such needs may be met in other ways, they will not be met so precisely, effectively, economically or quickly by other elements in the justice system, as they can be by the administrative justice component. Unfortunately, this has not always been the historical view, and the perception of competition rather than the now more appropriate issue of balancing, has characterized a good deal of the discourse and indeed the jurisprudence about tribunals up to the relatively recent past.

That is not to suggest that the constitutional role of the courts should be abdicated in any way. It is merely to observe that a sophisticated appreciation of the status, function and role of administrative tribunals need no longer, in Canada, be seen as a threat to the constitutional order and to the role of the courts. An appreciation of this, and a capitalization upon the consequent opportunity, may lead to a great enhancement of the capacity of the system to provide justice to individual members of society.

To an extent this process has already begun.

Recently, the climate of competition between the legislatures and the courts on the issue of the use and place of administrative justice has been replaced by a clear acceptance of the administrative tribunal role and a move towards its better definition. The pragmatic and functional standard of *Bibeault* has replaced the concerns of *McRuer*.

However, some of the attitudes of the old competition between tribunals and the courts, much of the jurisprudence, and some of the intellectual underpinnings of it, remain. The reality of the development of a strong framework of judicial theory concerning the role of the courts as protectors of individual rights and of the rule of law in Canadian Society had not as yet been fully absorbed into our jurisprudence and consciousness. That

12. *Ibid.* at 237.

reality is that the central role of the courts has reached the point of being an unchallenged constitutional principle. The language of the Supreme Court of Canada has begun to reflect the fact that the critical issues facing the administrative justice system are the quality and efficiency of the justice provided. To a certain extent, the interventions and jurisprudence of the lower courts still feature a rearguard action against encroachment on judicial territory.¹³

The jurisprudence on the application of the Charter of Rights by tribunals is one illustration of the failure to fully accept tribunals as a necessary and integral part of the justice system, but there are many. The courts now recognize that administrative tribunals can and do have a role in the delineation and recognition of Charter of Rights, but the recognition that this was a part of the tribunal role did not develop easily nor particularly rapidly. As it should be, there is now no doubt that in interpreting and applying the Charter to their circumstances, tribunals must be correct and that it is the courts that will determine the correctness or lack of correctness of their application.¹⁴

Nor is gradual and reluctant acknowledgement and accommodation of the tribunal role restricted to the courts. The *Report of the Canadian Bar Association Task Force on Systems of Civil Justice*, despite the broad wording of its title, chose not to include tribunals among the systems considered.¹⁵

It is important as well to be aware that the difficulty and procedural complexity of reviewing tribunal decisions utilizing the old prerogative writ system is now largely behind us. The procedures to allow for judicial review and control of tribunals have been

13. An interesting example of this has been chosen from here in Saskatchewan. In *Kindersley and District Co-Operative Limited and Retail, Wholesale and Department Store Union et al* (1996), (1997) 37 C.L.R.B.R. (2d) 145, Mr. Justice Klebuc of the Saskatchewan Court of Queen's Bench reviews the authorities on judicial review. In his view,

The standard for judicial review appears to swing on a pendulum which has judicial ennui and total abdication of judicial responsibility at one apex and unrestrained judicial review without regard to limitations embodied in the legislation giving rise to the statutory tribunal at the other.

Mr. Justice Klebuc, on the basis of this and the following analysis characterizes the Saskatchewan Labour Relations Board as "patently unreasonable" in preferring his own interpretation of the *Saskatchewan Trade Union Act*. The author's views are hopefully manifest from this article and would prefer the notion that the courts are careful progress in attitude to judicial review to that of the swing pendulum.

14. A useful contemporary view of court/tribunal issues including a matter of fact acceptance of tribunal Charter application is set out in the Honourable Mr. Justice G.V. LaForest "The Courts and Administrative Tribunals: Standards of Judicial Review of Administrative Action" (1992) L.S.U.C.S.L. 1.

15. Canadian Bar Association, *Report of the Canadian Bar Association Task Force on Systems of Civil Justice*, (Ottawa: Canadian Bar Association, August 1996). The omission of tribunals was intentional and express, and the result of a decision to focus on the courts only. It is of course suggested here that it is self defeating to undertake such purportedly comprehensive studies of a single isolated component of an interrelated system.

legislatively clarified, procedural barriers generally removed and the accessibility and implicitness of procedural access to judicial review is greater at present than it was at the time of the McRuer report. Given the constitutional and jurisprudential framework, and given that the fundamental jurisprudential issues seem to have been clearly resolved, including the issue of the limited efficacy of privative clauses to arrest review, it is suggested that the time for a more mature examination of the issue of whether administrative tribunals are really delivering justice and how the rest of the legal and judicial system may assist in this endeavour, is at hand. Almost unconsciously, the Canadian legal system has, for the better part of a century, organized itself and made adjustments to accommodate the ongoing conflict. However, it is time to accommodate to a new reality. Like the Cold War, this struggle is over.

The issues that should now be considered are the issues of the accountant, the auditor, the statistician and management consultant. In assessing tribunals, while retaining concern about the quality of justice, it is time to move as well to questions of timeliness, cost, accessibility, efficiency, fairness and productivity. As these issues are addressed, it is important to recall that issues of independence, quality, training and accountability remain to be fully resolved.¹⁶ As previously noted, these questions should not be viewed from the perspective of tribunals alone but should see tribunals as part of a broader system.

In looking at that system, a practical, intelligent and functional division of the work to be completed should be of concern. The *Systems of Civil Justice Report* noted earlier was critical of the court process. Concerns were identified respecting court inflexibility, formality, complexity, backlogs, lengthy trials, procedural abuses, slow adaptation of modern technology, procedures and standards, poor management and lack of accountability. The displacement of a common sense, problem solving orientation by an overly adversarial process and procedures was also noted. There is an awareness that access to the court system is a problem for many, and that legal aid costs are spiralling and insupportable. More and more, as the need for adjudication sensitive to context becomes evident, there are demands that courts and adjudicators possess specialized expertise. In these circumstances, the division of labour between courts and specialized tribunals, and the extent to which tribunals may provide a part of the solution to the challenges faced by the courts, should receive careful consideration.

At the conceptual level, recently the courts have seriously undertaken the task of improving the utilization of tribunals within the justice system in no small measure. The courts have now defined the notion that rather than closely supervising the activities of administrative tribunals, it is more appropriate for them to capitalize upon the expertise, and other advantages of tribunals, and to defer to the exercise of tribunal functions by tribunals, and to their decisions, in a pragmatic and functional way. Judicial review now

16. There are many, many useful studies to serve as touchstones. The best reference source to serve as a starting point is a truly seminal review by Margot Priest who remembers and considers studies even the authors have forgotten. See M. Priest, "Structure and Accountability of Administrative Tribunals" (1992) L.S.U.C.S.L. 11. The *Nova Scotia Report*, *supra* note 3, is a later report not included in her article, and a very useful statutory expression of wisdom is contained in a subsequent Quebec Statute, *An Act Respecting Administrative Justice*, S.Q. 1996, c. 54.

occurs within a whole new approach, and a whole new frame of reference which takes into account the need for judicial restraint and the need to accommodate the differences between tribunals. The courts will exercise restraint in reviewing the decisions of tribunals where it is pragmatic and functional to do so in view of the statutory functions and purposes of the tribunal being considered.

It is helpful to recall the well known passage in the *Bibeault* case¹⁷ that signalled the passage across this conceptual barrier.

*The formalistic analysis of the preliminary or collateral question theory is giving way to a pragmatic and functional analysis, hitherto associated with the concept of the patently unreasonable error. At first sight it may appear that the functional analysis applied to cases of patently unreasonable error is not suitable for cases in which an error is alleged in respect of a legislative provision limiting a tribunal's jurisdiction. The difference between these two types of error is clear : only a patently unreasonable error results in an excess of jurisdiction when the question at issue is within the tribunal's jurisdiction, whereas in the case of a legislative provision limiting the tribunal's jurisdiction, a simple error will result in a loss of jurisdiction. It is nevertheless true that the first step in the analysis necessary in the concept of a "patently unreasonable" error involves determining the jurisdiction of the administrative tribunal. At this stage, the Court examines not only the working of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal. At this initial stage, a pragmatic or functional analysis is just as suited to a case in which an error is alleged in the interpretation of a provision limiting the administrative tribunal's jurisdiction : in a case where a patently unreasonable error is alleged on a question within the jurisdiction of the tribunal, as in a case where simple error is alleged regarding a provision limiting that jurisdiction, the first step involves determining the tribunal's jurisdiction.*¹⁸

The evolution in the jurisprudence of judicial review signalled by this standard is significant. Intellectually at least, questions of practicality and function have replaced formalism and questions of jurisdiction in the process of assessing what issues should be avoided by the courts and left to be resolved by tribunals. The basic constitutional and human rights standards must continue to apply, but there is now a clear recognition that in examining the actions of administrative tribunals, there is another range of questions that must be addressed. It is suggested that a key question now to be addressed is what these pragmatic issues are, and how should they be given an appropriate place on the justice agenda. When is it pragmatic and functional to defer to the administrative tribunal system, and when should the courts therefore leave their work undisturbed? How can courts and tribunals communicate to legislators the importance of the quality and efficiency of the administrative justice system? What contribution is required from each of us to do this? In short, how can cooperation substitute for competition in the broader enterprise of delivering justice effectively?

17. *U.E.S. Local 298 v. Bibeault* [1988], 2 S.C.R. 1048.

18. *Ibid.* at 1088.

This of course is a very big question, and one that will be the subject of much judicial and other consideration in the years to come. It is however, a far better question than that which to an extent has preoccupied judicial decision making for the last half century, that of the possible threat of constitutional and judicial independence and the rule of law. It will not be possible of course in the brief time available here, to examine such a question in detail; the purpose of this note is merely to introduce some of the considerations that may have to be borne in mind. Incidentally, of course, this exercise will confirm, it is submitted, the utility of administrative tribunals and their role in the broader system of justice and support the conclusion that tribunals are indeed necessary and effective within the broader system. In doing this, it is useful to recall the judicial review standard developed by the courts.

Although the decision has been taken to defer to tribunals in a "pragmatic" and "functional" way, the key words were unfortunately left undefined. "Pragmatic" is not defined in *Blacks Law Dictionary*. The adjective "functional" is not found either, but "function" can be discerned to be "the nature and proper action of anything"

In Merriam Webster's Collegiate Dictionary, "pragmatic" is [...] *relating to matters of fact or practical affairs often to the exclusion of intellectual or artistic matters*. "Functional" is [...] *used to contribute to the development or maintenance of a larger whole*.

A person looking at the functions of tribunals in a pragmatic and functional way, will ask primarily one question : Do they do what they were designed to do? Do they work? One way of putting this question, now that competition is ceasing and cooperation is to set the standard, is to view the existence of these tribunals and their functioning simply from the perspective of whether resolution of the matter in question is best carried out by the tribunal. This, it is suggested, is the first important new perspective which recent jurisprudence has opened up. How may the work of the legal system be most effectively allocated between the elements of the system, the legislature, the courts, the executive and the administrative tribunal community? With the advent of a global economy in which competitiveness, including the broad competitiveness of nations, will be a significant factor in determining the collective well being, this is becoming an important question. Countries with systems that are inefficient in the delivery of justice and in the settlement of disputes may expect to pay the price.

The task of improving the efficiency of our legal system by utilizing administrative tribunals should not rely on the assumption that they are all the same. Some tribunals are more expert, more like judicial adversarial decision makers, and some are less. Careful attention and thought should be given to the statutory context, history and even the jurisprudence of tribunals, in defining their relationships to the courts and in deciding when and with respect to what spheres of their activities they are best left alone.

In this too, the recent work of the courts has been thoughtful and has advanced the overall work of the legal system. The recent jurisprudence on judicial review, the application of the Charter by tribunals, and their necessary independence, has reflected an appreciation of their differences and functions. For instance, the tendency to try to identify a simple, single standard of review has recently been replaced by the recognition that judicial restraint or intervention is not a straightforward issue depending upon only one factor, but upon numerous factors, and that the standard of deference must be found upon a continuum or spectrum. The tools and the determination to look at all the factors that should affect judicial review are a modern and practical judicial invention.

There is a growing recognition, too, that the legislative purpose expressed by the constituting statute of the tribunal is often not a single nor simple thing. In *Southam*¹⁹ Iacobucci, J. captured a notion that too often escapes the legal mind in its search for rules, tests and standards. He noted :

*[...] A balancing test is a legal rule whose application should be subtle and flexible, but not mechanical.*²⁰

He added :

*[...] As a general matter, in cases like this one, the aims and objectives of the statute may not be served by assigning principal or overriding importance to any one factor.*²¹

There is much wisdom in these notions about what is practical and reasonable to leave to tribunals. The issue of what functions will be assigned to tribunals as opposed to the courts is now generally acknowledged to be for the courts themselves to determine. They should use such flexible, sophisticated and sensitive tools in doing so. The courts, given one constitutional structure, must take on this task in accordance with standards that they set themselves. The courts, however, should not attempt to do this in isolation, whether the isolation be imposed by a lack of communication or by the ivory tower of impracticable theory. It appears that a first step is a clear, cold, hard look by the judiciary at what each of the components of the system does best. Efforts must be made to communicate and to discuss strengths honestly. What can most effectively be left to be done by tribunals should be assigned to them, given an expressed statutory purpose. This consideration should not focus on the wording of the privative clause, but should be based upon a full contextual interpretation of the statute.

19. *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

20. *Ibid.* at 770.

21. *Ibid.* at 781.

The most productive work of the courts in this context, while leaving tribunals to their work, is to tend to the integrity of the broader umbrella of constitutional and legal principle and to assign the right places to those contributing. The work of specific tribunals must be allowed to carry on upon or within this framework not without any interference, but without undue interference. The work of the courts is to preserve the framework within which specific and individual adaptations appropriate to each tribunal's work with the broad and overall functioning of the legal system. This will not be an easy task. It will call for careful judgement and sophisticated assessment of many factors. Simple tests will be hard to find. A due measure of restraint will be required.

Care must be taken to distinguish and recognize practical concerns as well as issues of legal principle and to reconcile the two. Issues of efficiency and practicality should be allowed to integrate themselves into what were formerly treated as questions of pure legal principle. Resources are not unlimited and must be carefully, pragmatically, and effectively deployed. At the same time that the interaction of tribunals and the courts receives needed further definition, attention must be directed to necessary measures to improve tribunal functioning. Because time and space are limited, this paper will conclude with ten priority suggestions in this regard. It is suggested that if these ten suggestions can be better respected, a more practical and functional division of roles and responsibilities and a more effective system for the delivery of justice by tribunals will result.

The first five of these suggestions are for the courts. The second five are for the legislative and executive branch. None of them is that new.

1. In most cases, the statutory context indicates that the matters before the tribunal are intended by the legislature to be resolved by the tribunal. Courts should seek to support legislative structures that aim at this result in the interest of making tribunals more effective and not allow parties to divert issues to alternative fora.
2. Interpretive devices should not be used in isolation to defeat statutory purposes related to tribunals and their functioning.
3. Deference to tribunals should be in truth practical and functional and based upon a broad appreciation of their statutory function. Undue reliance should not be placed upon the sometimes thin basis for deference to expertise.
4. The courts should continue to be alert to issues of tribunal independence, particularly as respects adjudicative functions.
5. Courts should respect the jurisprudence on natural justice and fairness issues which recognizes that there are procedural differences between tribunals and courts.
6. Legislatures should bear in mind the many substantial and thoughtful reports on tribunal organization and functioning when they are moving to modify tribunals or create new ones.

7. Legislatures should consider the role of tribunals as part of a broader system and carefully deal with integrative issues to provide a more careful and thoughtful basis for the changes made when tribunals are created.
8. There is a proliferation of tribunals with too little attention to the resolution of confusion between their mandates and its impact on accessibility and jurisdictional conflict. Measures to reduce jurisdictional complexity and the number of tribunals are of importance.
9. Legislatures and executives should pay careful heed to the measures necessary to appoint effective members, train them well and support the overall quality of tribunal endeavours.
10. Finally, systems and measures to improve tribunal accountability, including the accountability of members, are of urgent importance.