

New Models in Administrative Hearings: The Human Rights Tribunal of Ontario

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INTRODUCTION

Administrative tribunals¹ were created to provide a speedy, efficient, and more cost effective alternative to court adjudication. However, over the years tribunals have become almost as formalistic as the courts, leading to increased cost and delay for participants. A variety of factors have contributed to the judicialization of the administrative process, including the adversarial nature of administrative hearings. Would a less adversarial, more inquisitorial model of adjudication improve the administrative hearing process? Ontario has embarked on an interesting reform of the Human Rights Tribunal of Ontario to confer more activist hearing powers on tribunal members. In this paper I explain these reforms and assess their likely impact on human rights in Ontario.

I. THE JUDICIALIZATION OF THE ADMINISTRATIVE PROCESS

Since the first administrative tribunal was created, the government has sought to improve the process.² The earliest adjudicative tribunals

¹ By administrative tribunals, I am referring only to those performing *adjudicative* functions such as labour relations boards, human rights tribunals, and securities commissions, which resolve disputes between two private entities or between the government and a private entity.

² The first administrative tribunal was the Board of Railway Commissioners, created by the *Railway Clauses Consolidation Act*, S.Prov. C. 1851 (14-15 Vict.), c. 51, set up to approval rail rates. This was followed by the Galt Royal Commission Report of 1888 which was set up to consider how to improve the functioning of the Board. See the Canadian Bar Association Task Force Report, *The Independence of Federal Administrative Tribunals and Agencies in Canada* (Ottawa: Canadian Bar Association, 1990) at 1 (Chair: Ed Ratushny). For a review of the extensive studies conducted on administrative tribunals in Canada up until 1992, see Margo Priest, "Structure and Accountability of Administrative Agencies," in *Special Lectures of the Law Society of Upper Canada 1992: Administrative Law – Principles, Practice and Pluralism* (Toronto: Carswell, 1992) at 11-62. For a review of more recent studies,

were given broad powers to conduct inquiries and were relieved from the obligation to follow the strict rules of evidence.³ Most constituent statutes did not contain detailed codes of procedure and many tribunals did not develop formal rules of procedure.

This changed with the adoption of procedural codes, such as the *Statutory Powers Procedures Act* in 1971,⁴ following the recommendations of the McRuer Report on civil rights in Ontario.⁵ This was the beginning, Professor Mullan asserts, of the “due process explosion.”⁶ It was certainly a move away from flexible procedures and toward more court-like procedures.⁷

McRuer established the high water mark of the judicialization of the administrative process. It is [...] the insistence on a judicial model as the sole procedure available to resolve the conflicts between the private interest and the public interests, which lies at the root of many of the problems faced by agencies today.⁸

While judges have treated tribunals with considerable deference with respect to the substance of the decision where the Tribunal is acting within its area of competence and expertise,⁹ they have been less deferential with respect to matters of procedural fairness. Courts have

see David Mullan, “Tribunals Imitating Courts – Foolish Flattery or Sound Policy?” (2005) 28 Dal. L.J. 1 [Mullan, “Tribunals Imitating Courts”].

³ For example, the *Labour Relations Act*, R.S.O. 1950, c. 194, s. 67 gave the Labour Relations Board the power to call evidence, enter premises, etc.

⁴ *Statutory Powers Procedures Act*, S.O. 1971, c. 47, now R.S.O. 1990, c. 22 [SSPA]. Although the first statutory procedural *Code* in Canada was the *Alberta Administrative Procedures Act*, S.A. 1966 (now R.S.A. 2000, c. A-3), its provisions did not impose the court-like structures of the Ontario SSPA. Quebec and British Columbia have passed similar procedural codes: *An Act Respecting Administrative Justice*, R.S.Q. c. J-3 and *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

⁵ Ontario, *Royal Commission Inquiry into Civil Rights*, vol. 1 (Toronto: Queen’s Printer, 1968) (Chair: James. C. McRuer) [“McRuer Report”].

⁶ Mullan, “Tribunals Imitating Courts,” *supra* note 2 at 3-6.

⁷ This movement towards more court-like procedures was criticized by John Willis, “The McRuer Report: Lawyers’ Values and Civil Servants’ Values” (1968) 18 U.T.L.J. 351.

⁸ *The Report on the Review of Ontario’s Regulatory Agencies* (Toronto: Queen’s Printer, 1989) at 4-6-4-7 [“MacCaulay Report”].

⁹ *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227; for a review of the judicial evolution of confrontation to curial deference towards tribunals, see the MacCaulay Report, *ibid.* at 4-9-4-12.

suggested that when the issue is procedural fairness or natural justice, the standard is correctness.¹⁰

It may be argued that the Courts possess:

[G]reater competence to adjudicate on the fairness of procedures than they do on the merits of the specialized questions that come before statutory authorities for decisions. Nonetheless, there is also clearly something to the assertion that the design of appropriate procedures is situation-sensitive and that, in many instances, the agency, with a fuller awareness of the nature of the issues that are likely to arise, of the problems of getting at the truth in the area it is regulating, and of its own personnel and budgetary limitations may have a far better appreciation than the courts of what represents an appropriate compromise among the competing claims of fairness, efficiency, effectiveness, and feasibility.¹¹

When courts review the procedure of administrative tribunals against the standard of natural justice and procedural fairness, they tend to impose adversarial court-like procedures on the tribunals.

A second complication is that tribunals tend to over-react to court decisions by unnecessarily adopting more formal procedures than those imposed by the Courts. Mullan¹² gives the classic example of *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*.¹³ Although the Supreme Court held that a probationary police constable was entitled to procedural fairness before his employment was terminated, it did not impose a full adjudicative-type process. The decision specifically stated that the Board had the discretion to proceed orally or in writing. Despite this discretion, the Board held a full oral hearing, where the constable was represented by counsel, was permitted to present evidence and to cross-examine witnesses.

¹⁰ *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221 at para. 65, Binnie J., dissenting, quoting Donald J.M. Brown & John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf, vol. 2 (Toronto: Canvasback, 1998) at para. 14:2300.

¹¹ David Mullan, *Administrative Law: Cases, Text, and Material*, 5th ed. (Toronto: Emond Montgomery, 2003) at 277 [Mullan, "Administrative Law"].

¹² Mullan, "Tribunals Imitating Courts," *supra* note 2 at 5.

¹³ [1979] 1 S.C.R. 311.

Similarly, in *Khan v. University of Ottawa*¹⁴ after the Court held that the failure to give a law student an oral opportunity to be heard when her credibility was an issue, was unfair, universities began adopting more formal and extensive processes for student appeals.¹⁵ In both cases, the response may have been an over-reaction: while effective at ensuring fewer appeals based on procedural claims, it undermined efficiency to an unnecessary degree. That said, it is understandable that tribunals err on the side of complexity; even relatively modest attempts by tribunals to adopt more interventionist, flexible processes are sometimes halted by the courts. The following represent examples where the Court rejected deviations from traditional adversarial processes.

A. QUESTIONING BY THE TRIBUNAL

In *Rajaratnam v. Canada (Minister of Employment and Immigration)*¹⁶ the Federal Court of Appeal expressed concerns as to the propriety of a Board member intervening in the questioning of a claimant. The Court was concerned that the Board member, by her questioning, may have removed her judicial hat and put on the hat of an advocate. The Court cited Lord Justice Denning:

The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: "Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal."¹⁷

¹⁴ (1997), 148 D.L.R. (4th) 577 (Ont. C.A.).

¹⁵ Mullan, "Tribunals Imitating Courts," *supra* note 2 at 5-6.

¹⁶ [1991] F.C.J. No 1271 (F.C.A.) (QL) [*Rajaratnam*].

¹⁷ *Ibid.*, quoting *Jones v. National Coal Board*, [1957] 2 Q.B. 55 at 64 (C.A.) [footnotes omitted].

The Federal Court, in applying these principles in *Rajaratnam*, stated:

It seems to me that these constraints are as applicable to a member of the Board in the exercise of the judicial function at a hearing as they are to a judge even though [...] a power is conferred on the Board and each of its members under subsection 67(2) of the *Immigration Act* to “administer oaths and examine any person on oath” and to “[...] do any other thing necessary to provide a full and proper hearing.”¹⁸

These words may have an unnecessary chilling effect on tribunal members, despite the fact that courts have otherwise confirmed that questioning by tribunal members is quite appropriate, as in *Benitez v. Canada (Minster of Citizenship and Immigration)*: “Thorough questioning has been recognized by the Court as consistent with the Board’s mandate to get at the truth of claims.”¹⁹

B. TRIBUNAL DIRECTING CALLING OF WITNESSES

In *Universal Workers Union, Labourers’ International Union of North America Local 183 v. Ontario (Human Rights Commission)*,²⁰ the Human Rights Tribunal ordered the Commission and the Respondents to call witnesses they did not wish to call. The Ontario Divisional Court quashed the Tribunal’s order:

The *Code* allocates the carriage of the proceedings before the Tribunal to the Commission as a party. It is thus for the Commission to call the witnesses which it believes will establish the facts on which the Tribunal can find for the complainant. It will then be for the respondents to call the witnesses to establish their case. This process is one of the fundamental parts of our justice system. The parties diligently present all the material facts that will support their respective positions and will receive a dispassionate and impartial consideration from the trial judge. A trial is not a scientific inquiry conducted by the trial judge as research director: it is a forum for providing justice to the litigants

¹⁸ *Ibid.*

¹⁹ 2006 FC 461, [2007] 1 F.C. 107 at para. 97.

²⁰ 2006 CanLII 126, 39 Admin. L.R. (4th) 285 at para. 14 (Ont. Div. Ct.) [emphasis added].

[...] *The centrality of the adversary system is not confined to trials, but is inherently part of administrative hearings as well [...]* That was a case of a judicial review of the decision of a university grievance committee in which the Court of Appeal stressed that such hearings invariably are disputes between parties: there is a list to be decided. *Under our system, the driving force in the hearing is the adversary system which assumes the parties will bring the evidence and the tribunal will reach a decision based on that evidence. It is not the normal function of the tribunal to search out evidence and judges are criticized if they interfere so as to become advocates.* The Court of Appeal agreed that the duty of a tribunal is to decide on the evidence before it, to draw appropriate inferences from the failure of a party to call available evidence, but not to insist that evidence be called, and concluded that “It would be a distortion of our system to have the tribunal determining what evidence is to be called and what persons are to be invited to intervene, notwithstanding the desires of the parties [...].”

C. FAILURE TO ADMIT RELEVANT EVIDENCE

In *Université du Québec à Trois-Rivières v. Larocque*²¹ the Supreme Court of Canada overturned an arbitration decision where the arbitrator refused to admit evidence of employee performance to support the employer’s argument that the employee’s work performance was inadequate. The arbitrator had previously ruled that the employer could not raise the new ground (inadequate performance) at the hearing stage of the proceeding. The Court agreed that it was properly for the arbitrator to decide the scope of the hearing, and that the arbitrator could properly limit the employer’s ability to assert cause:

[T]he necessary corollary of the grievance arbitrator’s exclusive jurisdiction to define the issue is his exclusive jurisdiction then to conduct the proceedings accordingly, and that he may *inter alia* choose to admit only the evidence he considers relevant to the case as he has chosen to define it.²²

²¹ [1993] 1 S.C.R. 471 at para. 34.

²² *Ibid.* at para. 34.

The Court nonetheless held that the arbitrator erred in refusing to permit the employer to call evidence of employee performance, because such evidence was relevant to the employer's underlying argument of "lack of funds." It is arguable that the Court undermined the arbitrator's authority to define the scope of the proceeding at least indirectly by interfering with the arbitrator's holding on relevance.

D. LIMITING CROSS-EXAMINATION

In *Township of Innisfil v. Vespra Township*,²³ the Supreme Court of Canada held that Ontario Municipal Board erred when it refused to allow a party the opportunity to cross-examine a representative of the Minister regarding a letter, regardless of whether the Board or even the Court believed that such cross-examination would actually advance its case:

It is within the context of a statutory process that it must be noted that *cross-examination is a vital element of the adversarial system* applied and followed in our legal system, including, in many instances, before administrative tribunals since the earliest times. Indeed the adversarial system, founded on cross-examination and the right to meet the case being made against the litigant, civil or criminal, is the procedural substructure upon which the common law itself has been built. *That is not to say that because our court system is founded upon these institutions and procedures that administrative tribunals must apply the same techniques.* Indeed, there are many tribunals in the modern community which do not follow the traditional adversarial road. On the other hand, where the rights of the citizen are involved and the statute affords him the right to a full hearing, including a hearing of his demonstration of his rights, one would expect to find the clearest statutory curtailment of the citizen's right to meet the case made against him by cross-examination. In *Wigmore on Evidence* (Chadbourne Rev. 1974) vol. 5, p. 32, para. 1367, the following analysis of the role of cross-examination appears:

For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief

²³ [1981] 2 S.C.R. 145.

that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.

Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth.

If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure.²⁴

This traditional attitude toward cross-examination makes it difficult for administrative tribunals to restrict or limit sometimes excessive cross-examination, despite explicit statutory authority to do so,²⁵ and despite other court decisions specifically affirming that limiting cross-examination is not necessarily a breach of natural justice.²⁶

²⁴ *Ibid.* at 166–167.

²⁵ For example, s. 23(2) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S-22 states that a tribunal may reasonably limit further examination or cross-examination of a witness where it is satisfied that the examination or cross-examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the proceeding.

²⁶ *National Ballet of Canada v. Glasco* (2000), 49 O.R. (3d) 230 (Ont. Sup. Ct.); *Masters v. Ontario* (1994), 18 O.R. (3d) 551 (Ont. Div. Ct.); *Semchuk v. Regina School Division No. 4 (Saskatchewan Board of Education)* (1986), 37 D.L.R. (4th) 738 (Sask. C.A.); *Y.U.B. v. R.W.* (1985), 17 Admin. L.R. 99 (Ont. Div. Ct.); *MacInnis v. Canada (A.G.)* (1996), 41 Admin. L.R. (2d) 22 (F.C.A.), leave to appeal to the S.C.C. refused (1997), 46 C.R.R. (2d) 375.

E. LIMITING EVIDENCE

Courts have also overturned decisions of administrative tribunals to control evidence. In *Timpauer v. Air Canada*²⁷ the Canada Labour Board decided that secondhand smoke did not constitute an “imminent danger” within the meaning of the *Canada Labour Code*. Although the Board accepted the worker’s evidence of how the smoke affected him, he was not permitted to call his doctor to testify about the immediate impact of tobacco smoke on his health. The Federal Court of Appeal held that this amounted to a denial of natural justice, despite the statutory direction in the statute for the Board to proceed “without delay and in a summary way.”²⁸

The combination of administrative over-caution and court intervention has led many tribunals to adopt extensive pre-hearing discovery requirements,²⁹ entertain numerous preliminary motions,³⁰ schedule lengthy hearings, receive evidence from numerous lay and expert witnesses, and receive lengthy closing arguments. Similarly, administrative members have adopted the traditional non-interventionist approach of the judge. The result in many cases is that administrative hearings have become increasingly more adversarial, complex, time consuming and expensive.

II. TIME FOR A NEW APPROACH: INQUISITORIAL VERSUS ADVERSARIAL SYSTEMS

One way to address the problem may be to adopt a more interventionist, quasi-inquisitorial approach to administrative adjudication.

²⁷ (1986), 18 Admin. L.R. 192 (F.C.A.).

²⁸ S. 82.1(9) of the *Canada Labour Code*, R.S.C. 1970, c. L-1, provides that “the Canada Labour relations Board shall, where a decision of a safety officer is referred to it pursuant to s. (8), inquire into the circumstances of the decision and the reasons therefore without delay and in a summary way.”

²⁹ Mullan, “Tribunals Imitating Courts,” *supra* note 2 at 6, notes that some courts and agencies have adopted the *R v. Stinchombe*, [1995] 1 S.C.R. 794 criminal process rules of full pre-trial discovery of the fruits of the investigation.

³⁰ For example, the Human Rights Tribunal of Ontario issued 21 procedural interim decisions in 2006, 1 adjournment *sine die*, 3 clarifying post-decisions and only 9 final decisions on the merits. This information is obtained from a review of the published decisions previously available from the Tribunal’s website, and now available through CanLII.

Generally speaking, in an inquisitorial proceeding, the judge/decision-maker determines the facts and issues in dispute, the manner (oral or documentary) and order in which evidence is taken, and evaluates the weight of the evidence, free from the strict rules of evidence. There is traditionally less reliance on oral evidence, and little emphasis on cross-examination. In an adversarial proceeding, by contrast, the parties develop their own theory of the case and gather and present their own evidence. The judge/decision-maker remains passive and decides the case based solely on the evidence and arguments presented by the parties.³¹

There has been little empirical evidence comparing the inquisitorial versus the adversarial systems of law in terms of efficient or effective resolution of civil disputes³² and in any event it is doubtful whether jurisdictional choice of procedure will depend on such empirical evidence. History, tradition, and evolving legal culture play a significant role in how a jurisdiction chooses to design its dispute resolution proceedings.

The major arguments in support of an adversarial system of civil procedure include:

- the use of cross-examination better tests the credibility of witnesses;³³

³¹ This is a very simplified description of adversarial versus inquisitorial proceedings. The procedure varies for criminal versus civil proceedings, and different civilian systems adopt different processes. For a description of German civil procedure, see Duncan W. Glaholt and Maerkus Rotterdam, "Toward an Inquisitorial Model for the Resolution for Complex Construction Disputes" (1998) 26 C.L.R. (2d) 159. For a description of French criminal procedure, see Felicity Nagorcka, Michael Stanton and Michael J. Wilson, "Stranded between partisanship and the truth? A comparative analysis of legal ethics in the adversarial and inquisitorial systems of justice" (2005) 29 Melbourne U.L. Rev. 448.

³² Francesco Parisi, "Rent-seeking through litigation: adversarial and inquisitorial systems compared" (2002) 22 Int'l Rev. L. & Econ. 193–216. The author suggests that judicial intervention may reduce procedural costs, but acknowledges there are social benefits from party directed litigation. Michael K. Block *et al.*, "An Experimental Comparison of Adversarial Versus Inquisitorial Procedural Regimes" (2000) 2:1 Am. L. & Econ. Rev. 170, online: Social Science Research Network <<http://ssrn.com/abstract=713111>>, attempts to study whether the inquisitorial or adversarial method produces more factual information to the decision-maker.

³³ Jon Clark, "Adversarial and Investigative Approaches to the Arbitral Resolution of Dismissal Disputes: A Comparison of South Africa and the UK" (1999) 28:4 Indus. L.J. 319 at 326–27.

- the parties may be more willing to accept the results of the process when they are given control;³⁴
- the judge will be better informed about the case by the parties;³⁵ and,
- there will be less cost to the public purse.³⁶

The disadvantages include:

- the increased costs must be borne by the parties;
- delay;
- the resources of the parties may affect the outcome; and,
- the judge has no duty to ascertain the truth.³⁷

The adversarial system is resolutely devoted to process as the handmaiden of justice, rather than to truth *per se*. Indeed, as observed by Lord Denning:

[W]hen we speak of the due administration of justice this does not always mean ascertaining the truth of what happened. It often means that, as a matter of justice, a party must provide his case without any help from the other side.³⁸

Some of the arguments in favour of a more inquisitorial or interventionist model include:

- the outcome less dependent on resources of the parties;³⁹ and,
- there is greater procedural efficiency.

³⁴ Parisi, *supra* note 32 at 209.

³⁵ *Ibid.* at 209.

³⁶ Tom Thawley, "Adversarial and Inquisitorial Procedures in the Administrative Appeals Tribunal" (1997) 4 *Austl. J. Admin. L.* 61.

³⁷ J.A. Jolowicz, "Adversarial and Inquisitorial Models of Civil Procedure" (2003) 52 *I.C.L.Q.* 281 at 283.

³⁸ Per Lord Denning, in *Air Canada v. Secretary for State for Trade*, [1983] 2 A.C. 394 (H.L.), as quoted by Jolowicz, *ibid.* at 284.

³⁹ Clark, *supra* note 33 at 323; Clark also notes at 324 that the caveat made by the 1987 Justice Committee on UK Tribunals that that an adversarial approach backed with equal resources for the parties might be more appropriate in race or sex discrimination cases.

In the administrative context, there may be additional reasons for favouring an activist approach:

- proper administrative review aids good government;
- the interests of good administration require the correct or preferable decision be made;⁴⁰ and,
- expertise of administrative decision-makers is more conducive to an interventionist approach than is true of the general court system.⁴¹

Disadvantages or concerns about the inquisitorial system include:

- the difficulty of the decision-maker keeping an open mind;⁴² and,
- the lack of sufficient incentives for decision-makers to do a proper job finding the facts.⁴³

Interesting, there are indications that the judicial system itself is moving towards a more interventionist, less passive stance. Jolowicz⁴⁴ identified three features of the shift:

First, judges are moving towards a relaxation of the rules of evidence. This is similar to the inquisitorial model where all evidence is admitted, and the judge determines the relevance and credibility of the evidence as well as the weight to be accorded the evidence.

Second, the model of the traditional passive decision-maker assumed the judge would enter the courtroom without any prior knowledge of the case. The current the trend, however, is towards judges becoming extensively involved in actively managing the case by holding case management meetings to identify and focus the issues and evidence.

Third, there has been considerable movement away from adversarial litigation towards co-operative mediation.

⁴⁰ Joan L. Dwyer, "Fair Play the Inquisitorial Way: A Review of the Administrative Appeals Tribunals' Use of Inquisitorial Procedures" (2002) 22 J. Nat'l Ass. Admin. Law Judges 81 at 90.

⁴¹ In civilian legal systems, the judiciary tends to be more specialized, sitting exclusively on labour or family or criminal cases. This increased expertise may lend itself to a more interventionist approach.

⁴² Parisi, *supra* note 32 at 51, n. 51.

⁴³ Parisi, *ibid.* at 207, n. 45.

⁴⁴ Jolowicz, *supra* note 37.

The National Judicial Institute of Canada is also promoting a less adversarial, less passive, more informal approach and encouraging judges to speak directly to the parties and become actively involved in problem-solving.⁴⁵

III. WOULD AN ACTIVIST APPROACH WORK IN AN ADVERSARIAL LEGAL CULTURE?

Given the longstanding nature and durability of our adversarial system, would an interventionist approach by decision-makers be accepted by the parties or the courts? This is in part determined by whether the change is generated formally or informally. Formal and direct law reform would be ideal because clear statutory direction to depart from adversarial type procedures trumps conventional common law procedural rules: the “legislature has the right to override common law administrative law principles relating to natural justice,”⁴⁶ although “to abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.”⁴⁷ Whether express statutory directions to adopt a more interventionist model would survive constitutional challenge depends on specifics of the law and the particular factual context but the constitutional minimum is any administrative decisions affecting the life, liberty or security of the person must be made in accordance with the principles of fundamental justice.⁴⁸

There have been a variety of legislative attempts to give decision-makers in some areas of law the power necessary to be more interventionist; see for example, the Ontario *Labour Relations Act*,

⁴⁵ Susan Goldberg, *Judging for the 21st Century: A Problem-Solving Approach* (Ottawa: National Judicial Institute, 2005), online: NJI <<http://www.nji.ca/nji/Public/documents/Judgingfor21scenturyDe.pdf>>.

⁴⁶ *Horsefield v. Ontario (Registrar of Motor Vehicles)* (1999), 44 O.R. (3d) 73 at para. 65 (Ont. C.A.), upholding the legislative scheme for driver suspension without a right to a hearing. See also *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781 in which the Supreme Court upheld the statutory scheme of appointing members to the Liquor Appeal Board “at pleasure.”

⁴⁷ *Knight v. Board of Education of Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 677–678.

⁴⁸ See generally Sara Blake, *Administrative Law in Canada* (4th ed.) (Toronto: LexisNexis Butterworths, 2006) at 25 and cases cited at n. 136; and *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350.

1995,⁴⁹ the *Immigration and Refugee Protection Act*,⁵⁰ as well as the provisions in the *Criminal Code*⁵¹ dealing with the Mental Health Review Boards. In the following sections I discuss each of these to illustrate the intent and extent of the reform initiatives.

A. ONTARIO LABOUR RELATIONS ACT, 1995

Subsection 110(18) of the *Labour Relations Act, 1995* authorizes the Chair to make rules to expedite proceedings for specified disputes. In those cases, the Board is not required to hold a hearing, it may limit the parties' opportunity to present their evidence and to make their submissions, and it may make such inquiries as it considers necessary in the circumstances. Pursuant to this authority to develop more expeditious proceedings, the Labour Board developed a "consultation process."⁵² A consultation is less formal and meant to be less costly to the parties than a hearing. The Vice-Chair or panel plays a much more active role in a consultation. The goal of the consultation is to allow the Vice-Chair or panel to expeditiously focus on the issues in dispute and determine whether any statutory rights have been violated.

A good example of how consultations are conducted may be found in *Teamsters Local Union No. 938 v. Patrolman Security Services Inc.*⁵³ The dispute involved an application for interim relief to reinstate two employees who had allegedly been improperly dismissed during a union certification drive. The employer opposed the requests for interim reinstatement. The applications for interim relief were received by the Board on September 19, 2005; the consultation was held October 4th 2005 and the parties were directed to bring the persons who had signed the depositions supporting the applications.

During the consultation, the Board personally questioned each of the deponents. Each party was permitted to question the deponents as well, but only on those issues raised by the Board. The parties were permitted an opportunity for argument and the hearing was completed that

⁴⁹ S.O. 1995, c. 1, Sched. A.

⁵⁰ S.C. 2001, c. 27 [*IRPA*].

⁵¹ R.S.C. 1985, c C-46.

⁵² Online: Ontario Labour Relations Board <<http://www.olrb.gov.on.ca/english/hearing.htm>>.

⁵³ 2005 CanLII 38038 (OLRB).

day. The decision ordering interim reinstatement of the two employees was issued October 6, 2005.

The Board's consultation process recently withstood a judicial challenge. In *International Brotherhood of Electrical Workers, Local 1739 v. International Brotherhood of Electrical Workers*,⁵⁴ the losing party challenged the Board's consultation process as a violation of procedural fairness. The Court concluded that the Board had complied with the duty of procedural fairness in proceeding by way of a consultation, notwithstanding it abridged the opportunity to call witnesses and conduct cross-examination.

B. IMMIGRATION AND REFUGEE PROTECTION ACT

The *Immigration and Refugee Protection Act* provides that Board members have the powers and authority of a commissioner under Part I of the *Inquiries Act*,⁵⁵ and permits members to do "any other thing they consider necessary to provide a full and proper hearing."⁵⁶

The Immigration and Refugee Board issued a Guideline directing members to conduct the first examination of a refugee, even where the refugee was represented. The Board member retained the discretion to permit the representative to lead the questioning in certain cases. Several applicants challenged the guideline. In *Thamotharem v. Canada (Minister of Citizenship and Immigration)*⁵⁷ the Federal Court held that because the guideline was a mandatory requirement, it unfairly fettered the adjudicator's discretion. The opposite conclusion was reached a few months later in *Jones v. Canada (Minister of Citizenship and Immigration)*⁵⁸ and the Federal Court of Appeal resolved the conflicting jurisprudence by upholding the validity of the Guideline.⁵⁹ The appellants argued that "Guideline 7 thrusts RPD members hearing refugee protection claims "into the fray" and that "the initial questioning of claimants by members is liable to give to an apprehension that members hearing

⁵⁴ 2007 CanLII 65617, 86 O.R. (3d) 508, (Ont. Div. Ct.).

⁵⁵ R.S.C. 1985, c. I-11.

⁵⁶ *IRPA*, *supra* note 50, s. 165.

⁵⁷ 2006 FC 16, [2006] 3 F.C. 168.

⁵⁸ 2006 FCA 279, 272 D.L.R. (4th) 274.

⁵⁹ 2007 FCA 199, [2008] 1 F.C. 155.

refugee claims are not impartial.” The Federal Court of Appeal rejected this argument, noting the inquisitorial procedural model used for hearings:

As I have already noted, a determination of the content of the principles of fundamental justice must take into account the decision-making context from which the dispute arises. In the present appeals, the context includes the inquisitorial procedural model established for hearings of the RPD [Refugee Protection Division]A consideration of context is as relevant for determining what constitutes disqualifying bias as for determining the extent of a person’s right to participate in the decision-making process.⁶⁰

C. MENTAL HEALTH REVIEW BOARDS

Under section 672.54 of the *Criminal Code*, where a verdict of “Not Criminally Responsible” on account of mental disorder has been rendered, the Court or Review Board may direct that the accused be discharged absolutely, discharged subject to conditions or detained in custody in a hospital. In interpreting the powers of the Review Board, the Supreme Court of Canada stated in the *Winko*⁶¹ case that the proceeding before Review Board is not adversarial. If the parties do not present sufficient information, it is up to the Review Board to seek out the evidence it requires to make its decision. In a follow-up decision known as *Mazzei*,⁶² a Review board in British Columbia required the Director of Adult Forensic Psychiatric Services to provide an independent evaluation of the accused’s diagnosis, treatment and clinical progress, and an independent evaluation of his public safety risk. The Director appealed, arguing that the Review Board lacked the jurisdiction to make such an order. The Supreme Court of Canada upheld the Board order on the basis that it constituted a valid exercise the Board’s power. In an Ontario case, *R v. LePage*,⁶³ the Ontario Court of Appeal allowed an appeal against the Ontario Review Board. The Court held that the Board bore the burden of reviewing all relevant evidence on both sides of the case. The Board *had the duty to search out*⁶⁴ and consider evidence not only favouring

⁶⁰ *Ibid.* at para. 18.

⁶¹ *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625.

⁶² *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, [2006] 1. S.C.R. 326.

⁶³ *R. v. LePage*, 2006 CanLII 37775, 214 C.C.C. (3d) 105 (Ont. C.A.).

⁶⁴ *Ibid.* at para. 22.

restricting the Not Criminally Responsible accused, but also evidence in his or her favour. There was nothing in the record to indicate that the Board adverted to the inquisitorial nature of its process. On the particular facts of the case it was *an error of law for the Board to fail to recognize its inquisitorial role*⁶⁵ and to consider making further inquiries.

These cases indicate that courts are receptive to inquisitorial methods where the statute and the context justify the procedure.

D. INTERNATIONAL NON-ADVERSARIAL MODELS

Other common law, traditionally adversarial, jurisdictions have also experimented with a more interventionist model:

Australia adopted the *Administrative Appeals Tribunal Act of 1975* that created a special review tribunal with jurisdiction to review decisions under almost 300 pieces of legislation. It was hoped that the Tribunal would pioneer the use of inquisitorial procedures.⁶⁶

That hope was not fully realized although various Administrative Appeals Tribunals have proven interventionist in several ways:

- raising issues not raised by the parties;⁶⁷
- directing that witnesses be called;⁶⁸
- ordering investigations be undertaken;⁶⁹ and,
- providing assistance to and questioning of unrepresented applicants.⁷⁰

Some of the difficulties in adopting a consistently interventionist approach included:⁷¹

- lack of judicial support;

⁶⁵ *Ibid.* at para. 25.

⁶⁶ Gillian Osborne, “Inquisitorial Procedure in the Administrative Appeals Tribunals – A Comparative Perspective” (1982) 13 Fed. L. Rev. 150.

⁶⁷ Dwyer, *supra* note 40 at 97-103.

⁶⁸ *Ibid.* at 103-05.

⁶⁹ *Ibid.* at 105-115.

⁷⁰ *Ibid.* at 115-120.

⁷¹ *Ibid.*

- optional, rather than mandatory, inquisitorial powers;
- lack of an established inquisitorial culture;
- conflicting messages from the courts;
- lack of training in the inquisitorial method; and,
- no budget for inquiries.

In the United Kingdom, a 1987 Report by the Committee of Inquiry on UK Industrial Tribunals recommended that UK employment tribunals adopt a less adversarial and more investigative approach in dismissal cases.⁷² A recent study of the process describes the dominant approach as follows:

- arbitrator appointed;
- cases presented without parties or witnesses swearing an oath;
- hearings last 2 to 3 hours;
- awards are confidential, unpublished and not legally binding;
- parties provide written submissions and documents prior to case;
- legal representation is permitted but rare;
- arbitrator introduces parties and asks them for opening statements and summary of case; then arbitrator asks questions;
- the arbitrator will invite further comment or question; and,
- closing statements are made.

The study reports a high level of satisfaction by the parties to this process. This may be partly attributable to the fact that the process is completely voluntary and the arbitrators highly respected.⁷³

There is movement towards adopting more interventionist approaches in traditionally adversarial legal systems, especially in the administrative tribunals setting.

⁷² Clark, *supra* note 33 at 321, n. 5.

⁷³ Clark, *ibid.* at 329–332.

IV. AN ACTIVIST TRIBUNAL MODEL: THE HUMAN RIGHTS TRIBUNAL OF ONTARIO

One of the more innovative statutory reforms in Canada can be found in the recent amendments to the *Ontario Human Rights Code*.⁷⁴

Until recently, the basic procedural approach to resolving complaints of discrimination was similar across North America.⁷⁵ A human rights commission is charged with investigating and attempting to conciliate complaints of discrimination. If no resolution is reached, the commission will decide whether to refer the complaint to an adjudicative hearing.⁷⁶ The adjudicative hearing tends to follow the more formal structure of a civil trial.

The delays involved in the Commission investigation process, the gatekeeper function of the Commission and the multiplicity of roles played by the Commission, are some of the reasons behind calls for reform of human rights statutes.⁷⁷ British Columbia was the first jurisdiction in Canada to provide a model of “direct access” to a decision-maker.⁷⁸

Ontario has taken the reform process even further. The Ontario *Code* provides applicants may file applications alleging discrimination directly with the Human Rights Tribunal. In addition to maintaining the role of the Commission as defender of the public interest⁷⁹ and implementing a Legal Support Centre,⁸⁰ the *Code* provides for an interventionist, non-adversarial method of procedure.

⁷⁴ *Human Rights Code Amendment Act, 2006*, S.O. 2006, c. 30 (Bill 107) received Royal Assent December 20, 2006. June 30, 2008 has been named by proclamation as the day on which ss. 1-5, 7-9 come into force. The current Code citation is R.S.O. 1990, c. H.19 [Code].

⁷⁵ See Kaye Joachim, “Reform of the Ontario Human Rights Commission” (1999-2000) 13 *Can. J. Admin. L. & Prac.* 51 for a review of the human rights regimes in Ontario, British Columbia, Quebec and the US.

⁷⁶ This referral is made where the evidence warrants and the procedure is appropriate.

⁷⁷ See Joachim, *supra* note 75, for a review of the various reports on reform of human rights commissions.

⁷⁸ See Heather M. MacNaughton, “The Role of Mediation *in* Human Rights Disputes,” at 47, this volume.

⁷⁹ *Code*, *supra* note 74, Part III.

⁸⁰ *Ibid.* Part IV.1.

The Tribunal has been given the power to determine all questions of fact and law⁸¹ and to develop procedures that “offer the best opportunity for a fair, just and expeditious resolution of the merits.”⁸² The Tribunal is given the power to adopt practices and procedures, “including alternatives to traditional adjudicative or adversarial procedure,”⁸³ even if those rules are inconsistent with this in the *Statutory Powers Procedures Act*.⁸⁴

The Tribunal may make rules governing the practice and procedure before it and may specifically:

- 43(3) (a) provide for and require the use of hearings or of practices and procedures that are provided for under the *Statutory Powers Procedure Act* or that are *alternatives to traditional adjudicative or adversarial procedures*;
- (b) authorize the Tribunal to,
- (i) *define or narrow the issues* required to dispose of an application and limit the evidence and submissions of the parties on such issues, and
- (ii) *determine the order* in which the issues and evidence in a proceeding will be presented;
- (c) authorize *the Tribunal to conduct examinations in chief or cross-examinations* of a witness;
- (d) prescribe the stages of its processes at which preliminary, procedural or interlocutory matters will be determined;
- (e) authorize the Tribunal to make or cause to be made such examinations of records and such other inquiries as it considers necessary in the circumstances;
- (f) authorize the Tribunal to require a party to a proceeding or another person to,
- (i) produce any document, information or thing and provide such assistance as is reasonably necessary, including using

⁸¹ *Ibid.* s. 39.

⁸² *Ibid.* s. 40.

⁸³ *Ibid.* s. 41.

⁸⁴ *Ibid.* s. 42.

- any data storage, processing or retrieval device or system, to produce the information in any form,
- (ii) provide a statement or oral or affidavit evidence, or
 - (iii) in the case of a party to the proceeding, *adduce evidence or produce witnesses* who are reasonably within the party's control.⁸⁵

In addition, the Tribunal may appoint *a person to conduct an inquiry* to obtain evidence to achieve a fair, just and expeditious resolution of the merits of the application.⁸⁶

The only restriction is that the Tribunal may not dismiss an application without giving the applicant an opportunity to make "oral submissions" in accordance with the Rules.⁸⁷ The Tribunal is protected by strong privative clause.⁸⁸

Although the Tribunal has adopted Rules under subsection 43, it is too early to assess how interventionist the Tribunal will be, whether the parties will accept an activist approach, and whether a less adversarial model will improve the speed, efficiency and effectiveness of the hearing process.

CONCLUSION

Alternative models of dispute resolution should be encouraged. If the activist model adopted in the *Code* proves to provide effective, efficient justice then it will hopefully be adopted in other administrative settings as well.

⁸⁵ *Ibid.* s. 43 [emphasis added].

⁸⁶ *Ibid.* s. 44 [emphasis added].

⁸⁷ *Ibid.* s. 43(2)1.

⁸⁸ *Ibid.* s. 45.8.