

# Evaluating the Impact of Remedial Authority: Adjudicative Tribunals in the Health Sector\*

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Lorne SOSSIN\*\* and Steven J. HOFFMAN\*\*\*

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\*\* Dean, Osgoode Hall Law School, York University.

\*\*\* Faculty of Health Sciences, McMaster University, Hamilton, Ontario, Canada.



## INTRODUCTION

Adjudicative tribunals are given statutory authority to provide parties with remedies in order to fulfill statutory purposes. How do we know, however, whether the remedies ordered by a tribunal actually do advance those purposes? In other words, how can the success of an adjudicative tribunal be subject to meaningful empirical validation? That is the question we explore in this brief study. It is likely that this question, while broad in theory, can only be addressed by looking to the practice of a particular board or boards, in the context of a particular statute or statutes. This study takes as its case study the role of adjudicative tribunals in the health system in Ontario.

Adjudicative tribunals play an important role in the health sector, yet their actual influence as part of the health system remains largely unknown.<sup>1</sup> Most evaluations of their work have focused on internal measures of accountability and independence rather than external indicators of societal impact. When their effectiveness is examined, assessors tend to utilize anecdotes from various experts and stakeholders rather than the rigorous empirical data that is almost certainly better suited for the purpose. As efforts to reform health systems continue internationally, it will be increasingly important to truly understand the benefits, costs and implications of adjudicative tribunals for providers and consumers of health care services as well as the institutional structures on

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<sup>1</sup> Adjudicative tribunals may be defined in a number of ways. This category could include: (1) any administrative body engaged in adjudication, including regulatory bodies whose principle function is policymaking but who also engage in adjudication; (2) both administrative and judicial bodies which engage in adjudication; or (3) only those bodies whose primary or only function is adjudication. We adopt the latter interpretation, but rely on studies and empirical approaches drawn from the regulatory and judicial environment as well, with necessary adaptation to the sphere of administrative bodies whose primary statutory function is adjudication. Ron Ellis, for example, has identified 27 of such tribunals in the Province of Ontario in Canada which engage in “rights adjudication”: R. Ellis, *Executive Branch Justice: Canada’s ‘Official Courts,’* (Ph.D. Dissertation. York University, 2009), at p. 77.

which they rely. The dynamic, independent and powerful oversight mechanism of administrative bodies, and their dispute resolution potential, may only be realized with further information on the ways in which they interact with the rest of the complex health system and the impact they have within it. A strong and accountable health system may depend upon it.

In this context, empirical evaluations are an opportunity to inform health policymaking through the collection of objective data regarding the impact of adjudicative tribunals on the health system. Empirical research includes quantitative and qualitative investigations on the effects of enacted or proposed interventions—including laws, regulations and policies—on economic, social or health outcomes. It may be distinguished from other types of research by its reliance on data and its use of the scientific method of inquiry.<sup>2</sup> Empirical study designs range from experimental (e.g., randomized controlled trials) to quasi-experimental (e.g., interrupted time-series studies) to observational (e.g., cohort, case-control and cross-sectional studies), with data often gathered from surveys, interviews, focus groups, statistical inventories, performance data or documentary analyses.

Empirical research, however, is not new to the health or legal spheres. For health, experimentation, observation and the scientific method have all been at its core for over a hundred years, with modern “evidence-based medicine”<sup>3</sup> even going as far as prioritizing the “conscientious, explicit and judicious use of current best evidence in making decisions about the care of individual patients” over all other possible inputs.<sup>4</sup> In the legal arena, empirical research has also started to expand both in general<sup>5</sup> and for health-related studies specifically.<sup>6</sup>

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<sup>2</sup> M.M. Mello and K. Zeiler. “Empirical Health Law Scholarship: The State of the Field” (2008), 96 *Georgetown Law Journal* 649.

<sup>3</sup> Evidence-Based Medicine Working Group, “Evidence-Based Medicine: A New Approach to Teaching the Practice of Medicine” (1992), 268 *Journal of the American Medical Association* 2420.

<sup>4</sup> D.L. Sackett, W.M. Rosenberg, J.A. Gray, R.B. Haynes, and W.S. Richardson. “Evidence Based Medicine: What It Is and What It Isn’t” (1996), 312(7023) *British Medical Journal* 71, online: British Medical Journal <<http://www.bmj.com/cgi/content/full/312/7023/71>> (accessed 8 January 2009).

<sup>5</sup> T.E. George, “An Empirical Study of Empirical Legal Scholarship: The Top Law Schools” (2006), 81(1) *Indiana Law Journal* 141, online: Indiana University Maurer School of Law, <[http://www.law.indiana.edu/ilj/volumes/v81/no1/8\\_George.pdf](http://www.law.indiana.edu/ilj/volumes/v81/no1/8_George.pdf)> (accessed 15 January 2009).

<sup>6</sup> *Supra* note 2.

However, when compared to the health sphere, it is clear that empirical methodologies in studies of legal institutions have been relatively underutilized. This can perhaps be explained by the complexity of legal interventions, the dearth of large-scale accessible data sets upon which to rely, and the heterogeneity of legal interventions which prevent natural experiments of cross-jurisdictional comparisons.<sup>7</sup>

In addition to these general challenges faced by all empirical legal researchers, any attempt to evaluate the impact of a health-related adjudicative tribunal faces additional hurdles. Not only has such an assessment never before been comprehensively undertaken, but the most suitable research methodology to do so remains highly elusive. Much of empirical health research, for example, relates to patient outcomes and the costs associated with achieving these outcomes. In the setting of adjudicative tribunals, these metrics may not apply. A proceeding before a health tribunal may take place after the outcome for the patient already has occurred, and for this reason the tribunals in fact may impose additional costs on the health system without directly yielding improved health outcomes. While those additional costs may well lead to better practices and procedures on the part of other actors in the health system (e.g., regulatory colleges, insurance plans, hospitals), this type of benefit is indirect, may only become apparent over time, and is inherently difficult to measure.

Distinctions in statutory mandate and the absence of clear statutory language setting out the purposes of adjudicative tribunals leave no final target outcomes against which services can be evaluated. Further, as creatures of statute that serve quasi-judicial functions, adjudicative tribunals sit at the intersection of the legal and health worlds. These tribunals operate within these two paradigms—a dichotomy of process and outcomes—whose goals may sometimes diverge. Indeed, these administrative bodies are expected to preserve the legal focus on process, fairness and individual-level dispute resolution while at the same time working to improve health-related outcomes by enhancing the overall effectiveness of the health system.<sup>8</sup> The tension between a process- and a

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<sup>7</sup> *Ibid.*

<sup>8</sup> While this process-outcomes dichotomy between the legal and health worlds is certainly evident when comparing their respective research literature, it is important to recognize that both types of work are conducted within both realms. Mello and Zeiler (2008), for example, highlight several socio-legal studies that gathered outcome-related data, and health researchers frequently address questions of ethics and resource allocation that are more procedural in nature.

substance-based mandate presents distinct challenges for empirical evaluation, especially as evaluations of either dimension would be difficult. The complex co-dependence and interconnectedness of these tribunals with the health system's constituent elements ensure that simple appraisal techniques cannot be effectively utilized. To the extent that adjudicative tribunals have an impact on the health system, it is likely to be linked to a host of other variables. The fact that evaluation is not easy, however, does not detract from its importance.

The absence of any comprehensive empirical evaluations on the impact of adjudicative tribunals, and the potentially significant benefits of undertaking such an evaluation, certainly provide sufficient justification for further exploring this possibility. Empirical research, for example, is the only way to accurately assess the population's needs, capture stakeholders' perceptions, test the effectiveness of new initiatives, and verify improvements over time. It can help identify areas of strength and weakness, point to opportunities for growth or improvement, and facilitate a continual process of enhancements so as to better serve the tribunals' constituents and strengthen the health system.

Despite these benefits and recognized importance, the evaluation and accountability of adjudicative tribunals is also one of the least scrutinized areas of administrative law. The topic necessarily engages the issue of administrative independence, the statutory environment within which all adjudicative tribunals operate, the policy priorities of government which funds tribunals, the complexity of the health system, and the role of the court in supervising health-related adjudicative tribunals through the mechanisms of judicial review. Evaluating impact in the health sector is also necessarily a contextual exercise. As Peter Cane observed in the administrative law context:

[T]he impact of judicial review needs to be studied in a contextualised way by reference to judicial review's objectives and functions. Also, it should not be assumed that, when we discuss the impact of judicial review, we are all talking about impact of the same thing or, at least, of a single institution with a single set of objectives and functions.<sup>9</sup>

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<sup>9</sup> P. Cane, "Understanding Judicial Review and its Impact" in M. Hertogh and S. Halliday eds., *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*, (Cambridge, UK: Cambridge University Press, 2004), at pp. 15–42. See also M. Sunkin, "Conceptual Issues in Researching the Impact of Judicial Review on Government Bureaucracies" in the same volume at pp. 43–75.

A similar approach is necessary for health-related adjudicative tribunals but has never been systematically followed.

This paper aims to explore the context, challenges and opportunities for empirically evaluating the impact of adjudicative tribunals in the health sector. First, we will discuss the purpose, function and importance of these bodies within the health system, including their statutory mandates and policy goals. Second, we will examine the various ways in which their performance could potentially be assessed and will justify why there is a need to develop empirical approaches for the assessment of adjudicative decision-making. Third, we will identify the extensive barriers to empirically evaluating the societal impact of adjudicative tribunals, which we situate in three distinct categories: (1) complexity of the health system; (2) methodological complications; and (3) realities of the legal profession and the environment in which it currently operates. Finally, based on this analysis, we will advance what we believe to be the most constructive path forward for the empirical assessment of adjudicative decision-making. We hope that this work will encourage and inform future empirical evaluations of adjudicative tribunals in the health sector that will help to improve their performance, enhance health decision-making, advance patient safety goals and facilitate the achievement of population health goals.

The focus of this analysis is on Ontario's two adjudicative health tribunals in Canada, the Ontario Health Professions Appeals and Review Board ("HPARB")<sup>10</sup> and the Health Services Appeals and Review Board ("HSARB"). Both HPARB and HSARB have statutory mandates to review important health decisions that intimately affect the lives of their constituents. Using these two bodies as case studies for exploring the context, challenges and opportunities for evaluating adjudicative tribunals may enrich our understanding of administrative tribunals throughout other sectors as well.

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<sup>10</sup> Health Professions Appeal and Review Board, *Recommendations to Health Professions Regulatory Advisory Council* (Toronto: Health Professions Appeal and Review Board, 2008), online: Health Professions Appeal and Review Board, <<http://www.hprac.org/en/projects/resources/hprac-1457May30HPARB.pdf>> (accessed 28 March 2009).

## **I. THE CONTEXT OF ADJUDICATIVE TRIBUNALS IN THE HEALTH SECTOR**

Adjudicative tribunals are administrative bodies that are created by statutes and exercise delegated decision-making powers of the executive branch for the purposes of achieving certain policy goals. They serve as an oversight mechanism for lower-level decision-makers and apply legal and normative principles to resolve disputes between conflicting parties. They are independent—operating at arm’s-length from the government—and serve quasi-judicial functions otherwise fulfilled by the formal judicial system. This independence, however, also has limits; their members are appointed by the executive branch of government (in the case of HPARB and HSARB, the power of appointment is effectively in the hands of the Minister of Health) which also sets their staffing allowances and budgets. Their decisions, while often final, must be authorized by their enabling statute and are subject to judicial review by the courts. Governments pursue policies in relation to these bodies for a host of reasons. The government may, for example, wish to remove the need for court intervention, facilitate opportunities for settlement, enhance access to efficient and effective dispute resolution mechanisms, or promote fairness.

In the health sector, adjudicative tribunals may be involved with resolving disputes regarding medical malpractice claims, insurance coverage for health care services, determination of mental capacity, licensing decisions for health care facilities, and patient safety procedures. They serve as an oversight and accountability mechanism for lower-level health decision-makers and ensure they follow appropriate processes and act according to their respective statutory mandates. They aim to boost public confidence in the credibility of decision-making within the health system, facilitate better and more consistent decisions, and reduce the risk of errors that in this context can have deadly consequences. Finally, they promote fairness and justice within health care, militate against self-interest and corruption, and provide opportunities to address wrongs through redress.

HPARB, for example, is an integral part of Ontario’s self-regulating health professional system. It helps to ensure that the health professions are regulated in the public interest, that appropriate standards of practice are created and maintained, that patients have access to the health professional of their choice, and that they are treated with respect and sensitivity by health professionals. HPARB was established as a



response to two related phenomena in the early 1970s: first, the recommendation arising out of the Report by the Honourable James Chalmers McRuer's Royal Commission Inquiry into Civil Rights (the "McRuer Report") which emphasized the need for public interest oversight over self-regulating professional bodies; and second, the Committee on the Healing Arts tabled by the government on April 28, 1970 (the "Healing Arts Report"), which also emphasized the primacy of public interest regulation of health professionals. Under the Province of Ontario's *Regulated Health Professions Act* ("RHPA"), people may appeal the decision of a self-regulated health professional college to not pursue a disciplinary proceeding to HPARB.<sup>11</sup> If the appropriate statutory processes were not followed by the relevant college, the Board is empowered to send the matter back to the college for reconsideration. HPARB also hears appeals from adverse decisions by the colleges in relation to registration requests. The remedies available to HPARB panels focus on the regulated colleges, as opposed to the parties. For example, if a complaint was dismissed and an HPARB panel finds that the investigation was inadequate or the decision to dismiss the complaint was unreasonable, the complaint usually will be sent back to the college to reconsider its reasons or investigate the complaint further. Recommendations to the college may also be provided where the issues raised on a complaint review are more systemic. Parties, however, are not entitled to damages, or to an apology, or to any other individual remedy they may seek or to which they may feel entitled. For this reason, it is not uncommon to find parties who both seek a complaint review from HPARB and simultaneously pursue civil remedies against health professionals or health facilities arising from the same factual circumstances.

HSARB similarly is a part-time Board providing oversight for the decisions of various actors within the health system. Its broad jurisdiction arises from fourteen different statutes and includes reviewing decisions concerning payment for health care services under the Ontario Health Insurance Plan ("OHIP"), eligibility for housing in long-term care facilities, licensing of nursing homes and other independent health

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<sup>11</sup> *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, s. 3. Also see R. Steinecke, *A Complete Guide to the Regulated Health Professions Act*. (Toronto: Canada Law Book, Looseleaf). The RHPA is one of several statutes administered by HPARB.

facilities, and the decisions of public health officials.<sup>12</sup> By contrast, HSARB provides individual remedies, ordering, for example, that OHIP fund out-of-country medical services where the statutory test is met.

Both HPARB and HSARB have a full-time Chair,<sup>13</sup> and a roster of part-time members, some of whom have legal training (and, in the case of HSARB, medical training) and some who do not. Both Boards have been held to be expert bodies by reviewing Courts which warrant deference. Their substantive decisions may only be overturned if found to be “unreasonable.”<sup>14</sup>

As indicated above, a key aspect of evaluating tribunals created by statute is to assess whether a tribunal is fulfilling its statutory objective(s). This may be especially challenging, for example, if the specific goals of the relevant tribunal are diffuse and ambiguous in their enabling legislation. Ontario’s RHPA, for example, does not detail the purposes of the Board, so this must be inferred from the powers and authority with which it has been provided. For example, as indicated above, HPARB has the power to review decisions of regulated health colleges not to refer complaints to a full hearing to determine if a health professional has engaged in misconduct warranting discipline on grounds of the reasonableness of the college’s decision and the adequacy of the college’s investigation.<sup>15</sup> HPARB has broader jurisdiction to review decisions by colleges to deny registration to applicants.<sup>16</sup> Thus, while HPARB’s role is generally to ensure public interest accountability over decision-making by regulated health colleges, HPARB’s role in reviewing complaints suggests a different purpose, and a more deferential standard of review, than its role in reviewing denials of registration. Evaluation needs to be responsive to these differences of statutory mandate and remedial discretion.

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<sup>12</sup> C. Pitfield and C.M. Flood, “Section 7 ‘Safety Valves’: Appealing Wait Times Within a One-Tier System” in C.M. Flood, K. Roach and L.Sossin eds., *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada*, (Toronto: University of Toronto Press, 2005), at pp. 477–501.

<sup>13</sup> Since 2008, the same individual has served as Chair of both Boards.

<sup>14</sup> See, with respect to HPARB, *Botros v. Beadle* (2007), 228 O.A.C. 75, and with respect to HSARB, *Flora v. Ontario (Health Insurance Plan, General Manager)* (2008), 91 O.R. (3d) 412.

<sup>15</sup> See s. 29(2) of the *Health Professions Procedure Code*, Schedule 2 to the RHPA.

<sup>16</sup> See s. 22(1) of the *Health Professions Procedure Code*, Schedule 2 to the RHPA.

## II. THE CONTEXT FOR EVALUATING ADJUDICATIVE TRIBUNALS

Assessing the work of these adjudicative tribunals and others in the health sector is an inherently complex enterprise. However, evaluations can be thought of and categorized according to their orientation and methodology.

In terms of orientation, evaluations of tribunals can be focused on how they function or what impact they have. The former would analyze the internal operations of a tribunal while the latter would assess the body's external effects on a specified population. Procedural analyses are important to promote coherent internal management structures, good governance, accountability, efficiency and efficacy. External impact evaluations, on the other hand, represent a way to assess the real-world effectiveness of the adjudicative tribunal, its impact on others within the health care system, and the benefits (or consequences) that this impact yields. Such studies can determine whether or not these bodies support and/or enhance the functioning of various health system institutions and decision-makers and whether or not they ultimately influence service provision, access to justice in the health sector, and health outcomes. External impact evaluations require expertise and independence—they are not traditionally conducted by auditors,<sup>17</sup> ombudsmen<sup>18</sup> or internal staff.<sup>19</sup>

A review of several purposively sampled governmental evaluations of administrative bodies highlights very clearly that they tend to focus on issues related to internal operations rather than external impact. The recent report of the Ontario Security Commission's Fairness Committee, for example, examined whether the agency's internal governance structure created a perception or reality of bias in its adjudicative responsibilities.<sup>20</sup> The United Kingdom's National Audit

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<sup>17</sup> J. McCarter, *Annual Report 2008: Office of the Auditor-General*, (Toronto: Queen's Printer for Ontario, 2008), online: Office of the Auditor General <[http://www.auditor.on.ca/en/reports\\_en/en08/ar\\_en08.pdf](http://www.auditor.on.ca/en/reports_en/en08/ar_en08.pdf)> (accessed 22 June 2009).

<sup>18</sup> A. Marin, *Ombudsman Ontario: Annual Report 2007–2008*, (Toronto: Office of the Ombudsman, 2008), online: Office of the Ombudsman, <[http://www.ombudsman.on.ca/media/18971/ar08\\_eng.pdf](http://www.ombudsman.on.ca/media/18971/ar08_eng.pdf)> (accessed 22 June 2009).

<sup>19</sup> Health Professions Regulatory Advisory Council, *HPRAC: Annual Report April 1, 2007 – March 31, 2008*, (Toronto: Health Professions Regulatory Advisory Council, 2008), online: Health Professions Regulatory Advisory Council <http://www.hprac.org/en/reports/resources/HPRACAnnualReport2007-2008.pdf>.

<sup>20</sup> C.A. Osborne, D.J. Mullan and B. Finlay, *Report of the Fairness Committee to David A. Brown, Q.C., Chair of the Ontario Securities Commission*, (Toronto: Ontario Securities Commission, 2004).

Office similarly reviewed the procedures used by its Department of Work and Pensions to medically assess incapacity and disability<sup>21</sup> and to hear appeals of social security benefit decisions.<sup>22</sup> Some reviews examine particular problems that had previously been identified<sup>23</sup> while others focus on users' satisfaction with a tribunal's provision of services.<sup>24</sup> Several assessment efforts have even focused on the internal operations of multiple tribunals or a jurisdiction's entire tribunal system, including the report of Ontario's Agency Reform Commission,<sup>25</sup> the UK's Leggatt

<sup>21</sup> National Audit Office, *Progress in Improving the Medical Assessment of Incapacity and Disability Benefits: Report by the Comptroller and Auditor General. HC 1141, Session 2002-2003, 17/10/2003*, (London: Stationery Office, 2003), online: National Audit Office <[http://www.nao.org.uk/publications/nao\\_reports/02-03/02031141.pdf](http://www.nao.org.uk/publications/nao_reports/02-03/02031141.pdf)> (accessed 12 March 2009).

<sup>22</sup> National Audit Office, *Getting It Right, Putting It Right: Improving Decision-Making and Appeals in Social Security Benefits. HC 1142, Session 2002-2003, 07/11/2003*, (London: Stationery Office, 2003), online: National Audit Office <[http://www.nao.org.uk/publications/nao\\_reports/02-03/02031142.pdf](http://www.nao.org.uk/publications/nao_reports/02-03/02031142.pdf)> (accessed 12 March 2009).

<sup>23</sup> See, for example, Society of Ontario Adjudicators and Regulators, *Towards Maintaining and Improving the Quality of Adjudication: SOAR Recommendations for Performance Management in Ontario's Administrative Justice Tribunals*, (Toronto: Society of Ontario Adjudicators and Regulators, 1995), online: Society of Ontario Adjudicators and Regulators <[http://www.soar.on.ca/soar-perf\\_man.htm](http://www.soar.on.ca/soar-perf_man.htm)> (accessed 12 March 2009); S. Blumenthal and S. Wessely, *The Pattern of Delays in Mental Health Review Tribunals*, (London: Stationery Office, 1993); S. Blumenthal and S. Wessely, "The Pattern of Delays in Mental Health Review Tribunals" (1994), 18(7) *Psychiatric Bulletin* 398, online: Psychiatric Bulletin <<http://pb.rcpsych.org/cgi/reprint/18/7/398.pdf>> (accessed 12 March 2009).

<sup>24</sup> See, for example J. Aston, D. Hill and N.D. Tackey, *The Experience of Claimants in Race Discrimination Employment Tribunal Cases. Employment Relations Research Series, No. 55*, (London: UK Department of Trade and Industry, 2006), online: UK Department of Trade and Industry <<http://www.dti.gov.uk/files/file27818.pdf>> (accessed 12 March 2009); Employment Tribunals Service, *Employment Tribunals Service User Survey 2005*, (London: Employment Tribunals Service, 2005); Confederation of British Industry, *A Matter of Confidence: Restoring Faith in Employment Tribunals*, (London: Confederation of British Industry, 2005), online: Confederation of British Industry <[http://www.cbi.org.uk/ndbs/Press.nsf/0/33f9830ed75f765b8025708800523621/\\$FILE/Tribunals Brief - CBI.pdf](http://www.cbi.org.uk/ndbs/Press.nsf/0/33f9830ed75f765b8025708800523621/$FILE/Tribunals%20Brief%20-%20CBI.pdf)> (accessed 12 March 2009); M.P. Carscallen, W.K. Gray and J.G. Pink, *Regulatory Burden Task Force: Report to the Ontario Securities Commission*, (Toronto: Ontario Securities Commission, 2003), online: Ontario Securities Commission <[http://www.osc.gov.on.ca/About/Governance/Accountability/ga\\_20031212\\_rbtfrpt.pdf](http://www.osc.gov.on.ca/About/Governance/Accountability/ga_20031212_rbtfrpt.pdf)> (accessed 12 March 2009).

<sup>25</sup> G. Guzzo, J. Baird, B. Grimmatt, G. Martiniuk and J. Flaherty, *Everyday Justice: Report of the Agency Reform Commission on Ontario's Regulatory and Adjudicative Agencies*, (Toronto: Government of Ontario, 1998), online: Council of Canadian Administrative Tribunals <[http://www.ccat-ctac.org/downloads/1998\\_Guzzo-report.pdf](http://www.ccat-ctac.org/downloads/1998_Guzzo-report.pdf)> (accessed 12 March 2009).

Review of Tribunals,<sup>26</sup> and the report of the UK's former Council on Tribunals.<sup>27</sup> Academic publications similarly appear to focus on the internal operations of tribunals across various topics—whether they regulate securities,<sup>28</sup> medical malpractice claims,<sup>29</sup> privacy,<sup>30</sup> pensions,<sup>31</sup> or determinations of medical incapacity—<sup>32</sup> and often examine users' experience.<sup>33</sup> While not a single governmental evaluation could be found

<sup>26</sup> A. Leggatt, *Tribunals for Users: One System, One Service*, (London: UK Department for Constitutional Affairs, 2001), online: Review of Tribunals <<http://www.tribunals-review.org.uk/index.htm>> (accessed 12 March 2009).

<sup>27</sup> M. Adler and J. Gulland, *Tribunal Users' Experiences, Perceptions and Expectations: A Literature Review*, (London: Council on Tribunals, 2003), online: Council on Tribunals <[http://www.council-on-tribunals.gov.uk/docs/other\\_adler\(2\).pdf](http://www.council-on-tribunals.gov.uk/docs/other_adler(2).pdf)> (accessed 2 February 2009).

<sup>28</sup> S. Rousseau, *The Québec Experience with an Independent Administrative Tribunal Specialized in Securities: A Study of the Bureau de décision et de révision en valeurs mobilières*, (Ottawa: Expert Panel on Securities Regulation, 2008), online: Groupe d'experts sur la réglementation des valeurs mobilières <<http://www.groupeexperts.ca/eng/reports/research-studies/quebec-independent-adjudicative-tribunal-rousseau.php>> (accessed 12 March 2009); P. Moyer, "The Regulation of Corporate Law by Securities Regulators: A Comparison of Ontario and the United States" (1997), 55(1) *University of Toronto Faculty of Law Review* 43.

<sup>29</sup> G. Siegal, M.M. Mello and D.M. Studdert, "Adjudicating Severe Birth Injury Claims in Florida and Virginia: The Experience of a Landmark Experiment in Personal Injury Compensation" (2008), 34 *American Journal of Law and Medicine* 489, online: Harvard School of Public Health <[http://www.hsph.harvard.edu/faculty/michelle-mello/files/FL-VA\\_PDF.pdf](http://www.hsph.harvard.edu/faculty/michelle-mello/files/FL-VA_PDF.pdf)> (accessed 2 February 2009).

<sup>30</sup> L. Jacobs, *Reconciling Tribunal Independence and Expertise -- Empirical Observations*, (Presented to The Future of Administrative Justice Symposium, University of Toronto, 18 January 2008), online: University of Toronto Faculty of Law <[http://www.law.utoronto.ca/documents/conferences/adminjustice08\\_Jacobs.pdf](http://www.law.utoronto.ca/documents/conferences/adminjustice08_Jacobs.pdf)> (accessed 29 November 2008).

<sup>31</sup> L. Sossin, *The Effectiveness and Efficiency of Pension Regulation in Ontario and in Comparative Perspective*, (Toronto: Expert Commission on Pensions, 2007), online: Ontario Expert Commission on Pensions <<http://www.pensionreview.on.ca/english/summaries/8Sossin.html>> (accessed 29 November 2008).

<sup>32</sup> M. Dolan, R. Gibb and P. Coorey, "Mental Health Review Tribunals: A Survey of Special Hospital Patients' Opinions: (1999), 10 *Journal of Forensic Psychiatry* 264; C. Bradley, M. Marshall and D. Gath, "Why Do So Few Patients Appeal Against Detention Under the Mental Health Act?" (1995), 310 *British Medical Journal* 364, online: British Medical Journal <<http://www.bmj.com/cgi/content/full/310/6976/364>> (accessed 12 March 2009); J. Peay, *Tribunals on Trial: A Study of Decision Making Under the Mental Health Act 1983*. (Oxford: Clarendon Press, 1989).

<sup>33</sup> H. Genn, B. Lever, L. Gray and National Centre for Social Research, *Tribunals for Diverse Users*, (London: UK Department for Constitutional Affairs, 2006), online: UK Department for Constitutional Affairs <[http://www.dca.gov.uk/research/2006/01\\_2006.pdf](http://www.dca.gov.uk/research/2006/01_2006.pdf)> (accessed 29 March 2009).

that focused on the external impact of adjudicative tribunals, at least one academic publication discusses the potential benefits that administrative “health courts” (which resolve malpractice claims) can have on patient safety.<sup>34</sup>

In terms of methodology, assessments of tribunals can either be conducted through expert reviews or empirical evaluations. The first approach would take advantage of the personal experiences and perspective of an investigator, while the second approach harnesses the objectivity of the scientific method and the generalizability of data that was collected from many people. Expert reviews rely upon the contextual and reflective expertise of the authors and are important for probing the etiology of complex challenges within the tribunal system, raising questions of possible concern or future inquiry, indentifying structural problems and possible ways to overcome them, justifying political decisions (either from the past or those planned for the future), and suggesting palatable recommendations for reform. This approach is also more likely to have fewer costs and a faster completion timeline. Empirical evaluations of tribunals, by contrast, utilize scientific methods and can be used to, *inter alia*, quantitatively or qualitatively assess their impact on the health system, identify the factors that determine their successful operations, and track perceptions of them over time. It is important to note, however, that these two methodological approaches cannot in reality be strictly dichotomized, as experts often utilize empirical methods and even the most scientifically rigorous and objective evaluations must be interpreted by individuals—who are preferably experts in their field.

Reviews of adjudicative tribunals have been conducted using both expert and empirical methodologies. Prominent observers, academics and practitioners, for example, have assessed various tribunals’ organizational structures,<sup>35</sup> efficiency,<sup>36</sup> accessibility,<sup>37</sup> independence,<sup>38</sup> performance standards<sup>39</sup> and overall effectiveness.<sup>40</sup> Other reviews feature empirical

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<sup>34</sup> M.M. Mello, D.M. Studdert, A. Kachalia and T.A. Brennan, “‘Health Courts’ and Accountability for Patient Safety” (2006), 84 *Milbank Quarterly* 459.

<sup>35</sup> *Supra* note 21.

<sup>36</sup> *Supra* note 30.

<sup>37</sup> *Supra* note 33.

<sup>38</sup> *Supra* note 34.

<sup>39</sup> *Supra* note 24.

<sup>40</sup> *Supra* notes 32, 31, 38; *infra* note 43.

elements such as: (1) surveys that capture the perceived quality of services offered,<sup>41</sup> stakeholder attitudes towards the tribunal,<sup>42</sup> and the functioning of a certain process;<sup>43</sup> (2) interviews that probe users' experiences with the tribunal,<sup>44</sup> its perceived impartiality,<sup>45</sup> and the effectiveness of a particular procedure;<sup>46</sup> and (3) performance data and documentary analyses for examining key features of a tribunal's caseload<sup>47</sup> and arrangements for how it makes appeal decisions.<sup>48</sup>

The challenge in evaluating health-related adjudicative tribunals, therefore, seems to lie at the intersection of orientation and methodology. Assessments of adjudicative tribunals have focused on both process and impact, and have been conducted using both expert reviews and empirical methods, yet not a single review could be found that empirically evaluated the external impact of an adjudicative tribunal, despite extensive searching. While this lack of research may indicate that such undertakings are not important, interesting or possible, the evidence suggests otherwise: the need for external impact evaluations is evident<sup>49</sup>

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<sup>41</sup> *Supra* note 28.

<sup>42</sup> *Supra* note 29.

<sup>43</sup> P.L. Latreille, J.A. Latreille and K.G. Knight, *Findings from the 1998 Survey of Representatives in Employment Tribunal Cases. Employment Relations Research Series, No. 35*, (London: UK Department of Trade and Industry, 2004), online: UK Department of Trade and Industry <<http://www.berr.gov.uk/files/file11453.pdf>> (accessed 12 March 2009); P.L. Latreille, J.A. Latreille and K.G. Knight, "Making a Difference? Legal Representation in Employment Tribunal Cases: Evidence from a Survey of Representatives" (2005), 34(4) *Industrial Law Journal* 308.

<sup>44</sup> *Supra* note 27; *Supra* note 42.

<sup>45</sup> *Supra* note 37.

<sup>46</sup> *Supra* note 36; *Supra* note 22; *Supra* note 40.

<sup>47</sup> B. Hayward, M. Peters, N. Rousseau and K. Seeds, *Findings from the Survey of Employment Tribunal Applications 2003. Employment Relations Research Series, No. 33*, (London: UK Department of Trade and Industry, 2004), online: UK Department of Trade and Industry <<http://www.dti.gov.uk/files/file11455.pdf>> (accessed 12 March 2009).

<sup>48</sup> *Supra* note 23; *Supra* note 41.

<sup>49</sup> M. Hertogh and S. Halliday, eds., *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*, (Cambridge: Cambridge University Press, 2004); Center for Global Development's Evaluation Gap Working Group, *When Will We Ever Learn? Improving Lives Through Impact Evaluation*, (Washington DC: Center for Global Development, 2006), online: Center for Global Development [http://www.cgdev.org/files/7973\\_file\\_WillWeEverLearn.pdf](http://www.cgdev.org/files/7973_file_WillWeEverLearn.pdf) (accessed 22 June 2009); World Bank, *Conducting Quality Impact Evaluations under Budget, Time and Data Constraints*, (Washington DC: World Bank, 2006), online: World Bank <<http://lnweb90.worldbank.org/oed/oeddoclib.nsf/DocUNIDViewForJava>

and such evaluations have been conducted with success in related settings that also involve the nexus of the health and law sectors and beyond.<sup>50</sup>

The dearth of externally-focused empirical evaluations is not only a missed opportunity; it may also pose a significant risk. The lack of an empirical rationale for the benefits of a tribunal may render it vulnerable to opposition or simply to general cost-cutting initiatives. Without this data, the Boards may lack the baseline measures needed to track changes over time, evaluate the performance of decision-makers and staff, and engage in longer-term strategic planning. In short, without empirical knowledge, how can we be sure that adjudicative tribunals are serving the public interest?

Indeed, it is widely accepted that data-driven strategies are more likely to help decision-makers achieve their goals in a cost-effective way than policies pursued in the absence of evidence.<sup>51</sup> Information gathered by health-related adjudicative tribunals like HPARB and HSARB through empirical methods may be of particular interest to government officials as it can demonstrate performance benchmarks and ensure public funds are being invested and spent effectively. If reform is called for, empirical data will be essential in identifying what needs to change. For academics, it is an under-scrutinized sphere of administrative law and health systems functioning that is both ripe for research and, potentially, reform.

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Search/757A5CC0BAE22558852571770059D89C/\$file/conduct\_qual\_impact.pdf> (accessed 22 June 2009); OECD Development Assistance Committee, *Review of the DAC Principles for Evaluation of Development Assistance*, (Paris: Organisation for Economic Co-operation and Development, 1998), online: Organisation for Economic Co-operation and Development <<http://www.oecd.org/dataoecd/63/50/2065863.pdf>> (accessed 22 June 2009).

<sup>50</sup> *Supra* note 2; N. Jones, H. Jones, L. Steer and A. Datta, “Working Paper 300: Improving Impact Evaluation Production and Use” (2009), online: Overseas Development Institute <<http://www.odi.org.uk/resources/download/3177.pdf>> (accessed 22 June 2009).

<sup>51</sup> World Health Organization, *World Report on Knowledge for Better Health*, (Geneva: World Health Organization, 2004), online: World Health Organization <[http://www.who.int/rpc/meetings/world\\_report\\_on\\_knowledge\\_for\\_better\\_health.pdf](http://www.who.int/rpc/meetings/world_report_on_knowledge_for_better_health.pdf)> (accessed 15 April 2009); K. Chalkidou, S. Tunis, R. Lopert, L. Rochaix, P.T. Sawicki, M. Nasser and B. Xerri, “Comparative Effectiveness Research and Evidence-Based Health Policy: Experience from Four Countries” (2009), 87(2) *Milbank Quarterly* 339, online: Milbank Memorial Fund <[http://www.milbank.org/quarterly/milq\\_87\\_2-final-chalkidou.pdf](http://www.milbank.org/quarterly/milq_87_2-final-chalkidou.pdf)> (accessed 5 September 2009).



### **III. CHALLENGES FOR EMPIRICALLY EVALUATING ADJUDICATIVE TRIBUNALS**

Yet despite the tremendous benefits, empirical impact evaluations of adjudicative tribunals are not being conducted. This absence of assessment efforts is most likely attributable to the various challenges facing anyone who embarks on undertaking such a project. In the context of health adjudicative tribunals, these obstacles can be divided into three categories: (1) complexity in the health system; (2) methodological complications; and (3) legal factors.

#### **A. CHALLENGES WITH COMPLEXITY IN THE HEALTH SYSTEM**

Empirically evaluating the impact of any adjudicative tribunal is a naturally difficult enterprise, as it requires the body's various effects to be isolated from the larger social context within which it operates. This is no doubt complicated for tribunals in every sector because their activities are usually only indirectly related to their existential goals. This challenge, however, may be further exacerbated in the health context due to its overwhelming complexity.

Indeed, health systems are increasingly being recognized as complex adaptive systems that are multi-layered, non-linear and highly sophisticated. They consist of countless sub-systems with immeasurable independent actors, established policies, zealously guarded interests, entrenched professional "silos" and divergent cultures that can all influence each another and even alter their external environments. This web of elements, and the unpredictable interactions among them, ensures that conventional mechanistic or "cause-effect" conceptualizations of the health system are inaccurate and oversimplifications of its complex dynamics.<sup>52</sup>

While scientific knowledge has been greatly advanced by breaking big questions into smaller ones that can be observed, analyzed and understood through rational deduction, this process is severely limited when the studied phenomenon or intervention is located within a system whose constitutive parts are not independent, constant or predictable. The fact that the health system exhibits characteristics of distributed control, co-dependence and nesting of smaller systems within other larger systems

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<sup>52</sup> B. Zimmerman, P. Plsek and C. Lindberg, *Edgework: Insights from Complexity Science for Health Care Leaders*, (Irving, TX: VHA Inc., 1998).

further aggravates this challenge and makes it difficult to fully examine adjudicative tribunals without reference to other actors and institutions (such as adjudicators, staff, government policymakers, regulatory colleges, relevant expert panels, the traditional court system and the public). Isolating and attributing impact is further problematized by the fact that health-related adjudicative tribunals serve diverse functions according to various players within completely different contexts.<sup>53</sup>

## **B. CHALLENGES WITH RESEARCH METHODOLOGY**

Yet in addition to the daunting barriers imposed by health system complexity, there are further methodological barriers associated with such an undertaking. The primary challenge, as highlighted above, is that simple research designs cannot be used to isolate adjudicative tribunals and elegantly locate cause-effect relationships between them and their goals. But above and beyond the various explanations illuminated by the complexity perspective is the fact that efforts of adjudicative tribunals are only indirectly related to their goals. Indeed, health services themselves only partially help meet their goal of improved health for people. Any legal, regulatory or oversight “intervention” that serves to better structure these services would be even further removed from their ultimate goals. Empirical impact studies of such interventions must be expertly designed to account for this complexity.

However, even if simple methods did exist to observe the relationship between adjudicative tribunals and their goals, there is currently a lack of clear evaluative criteria against which particular adjudicative tribunals can be measured. This is because their goals are not easily articulated and have thus not been defined with adequate precision—if defined at all. Desired outcome measures are consequently absent, which ensures that suitable quantitative and/or qualitative research methodologies cannot be matched to them. This problem, however, cannot simply be overcome by brainstorming possible goals of adjudicative tribunals. Indeed, the existential purpose of these bodies may change and evolve over time with new legislators, government policymakers, adjudicators and tribunal staff who can each contribute toward a shift in the focus and priority of their operations over time.

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<sup>53</sup> P.E. Plsek and T. Greenhalgh, “Complexity Science: The Challenge of Complexity in Health Care” (2001), 323 *British Medical Journal* 625.

Various community stakeholders may also perceive the role of a particular adjudicative tribunal in their sector very differently depending upon their own mandate, ideological perspective and unique vantage point. While reference to a tribunal's enabling statute may be informative in crafting an outcome measure, it is not always decisive. In the case of HPARB, legislative provisions suggest this body was created to ensure effective regulation of the health professions in the public interest,<sup>54</sup> yet this goal is not easily quantifiable. Indeed, the ability to empirically evaluate a complex intervention like a health-related adjudicative tribunal depends upon having a desired outcome that is observable, measurable and testable against a null hypothesis.

A desire to empirically “prove” cause-effect relationships between adjudicative tribunals and a particular outcome is also complicated by the impossibility of randomly allocating potential users of existing tribunals into groups that either receive or do not receive their services. Randomized controlled trials—the most rigorous of discrete empirical evaluations—<sup>55</sup> assess the effect of an intervention on a test population in comparison to a theoretically identical population. This method, however, requires a properly-constituted (i.e., randomized) and adequately-sized (i.e., large) control group with both known and unknown confounding factors evenly distributed between them in order to isolate the impact of tribunal services and measure it against a benchmark. Non-randomized retrospective evaluations comparing users of tribunals to non-users (or the situation of the general public in jurisdictions with and without comparable tribunals) may not be an ideal solution to this challenge, as this creates a situation where user-status and outcomes are measured at the same time. This prevents efforts to control for confounding factors, which in turn extinguishes the possibility of making causal determinations.<sup>56</sup>

A penultimate methodological challenge for conducting external impact evaluations of health-related adjudicative tribunals is that there are few examples of past efforts to emulate. As previously mentioned, many empirical studies have examined the internal processes of tribunals, but

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<sup>54</sup> *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18, s. 3.

<sup>55</sup> GRADE Working Group, “Grading Quality of Evidence and Strength of Recommendations” (2004), 328 *British Medical Journal* 1490, online: *British Medical Journal* <<http://www.bmj.com/cgi/content/full/328/7454/1490>> (accessed 10 April 2009).

<sup>56</sup> *Supra* note 2.

none could be found that focused on their societal impact. This is exacerbated by the dearth of obvious empirical data sets which can be analyzed and from which potential evaluators can draw.<sup>57</sup> Whereas hospitals may be able to compare their patient population and its outcomes to those from neighbouring hospitals, adjudicative tribunals are not likely in a position to continually collect data about their past users nor compare this information to existing data sets from the same region or others.

Finally, the identity and background of the researcher(s) evaluating the impact of an adjudicative tribunal must also be considered. While the goal of empirical study is to avoid bias and ideological assumptions, every researcher brings a particular matrix of perspective, orientation, experience and values to their work. Insiders, for example, may bring intuition and experiential judgment, while outsiders may bring independence, fresh eyes and objectivity.

### C. LEGAL FACTORS

As institutions that function within both the health and legal systems, health-related adjudicative tribunals must also overcome the realities of the legal sector that may not be particularly nurturing for empirical impact evaluations. For example, legal actors are often focused more on achieving due process, transparency and good governance than specific societal outcomes (like improved health status which is the goal of direct clinical health care). Excellent process in the legal world is often thought to be the most likely way to achieve the best outcome.

There is also a much greater concern for maintaining independence and avoiding any apprehension of bias. Like impartiality, independence is a common law right of procedural fairness enjoyed by parties who come before administrative bodies in common law jurisdictions (including Canada, United States, United Kingdom, Australia and New Zealand). In Canada, independence for adjudicative tribunals is based on the categories of judicial independence identified by the Supreme Court of Canada in *Valente v. The Queen* (i.e., security of tenure, financial independence and administrative independence over adjudicative matters)<sup>58</sup> and applied to administrative bodies in *Canadian*

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<sup>57</sup> *Ibid.*

<sup>58</sup> *Valente v. The Queen* (1985), 24 D.L.R. (4<sup>th</sup>) 161 (S.C.C.).

*Pacific Ltd. v. Matsqui Indian Band*—albeit in a more flexible and contextually sensitive manner.<sup>59</sup>

Respecting this independence of adjudicative tribunals will naturally influence the process and content of any evaluation in multiple ways. For example, independence suggests that governments should refrain from evaluating tribunals' substantive decisions lest reasonable observers reach the legally-problematic conclusion that tribunals may adjust their decision-making to align with what the government of the day perceives as "successful." Similarly, it may also be difficult for a tribunal to establish evaluative criteria or outcome measures for itself, as this might lead a reasonable observer to conclude that the tribunal may pursue these goals at the expense of fairness to the parties. This concern for independence even questions the extent to which tribunals' staff and members can be directly involved in any evaluation for fear of influencing or interfering with their services, which must remain neutral at all times. Contrary to encouraging self-evaluation as is common within the health sphere, the legal environment may actually discourage adjudicative tribunals from assessing their own external impact, especially since such undertakings are not explicitly part of their statutory mandates.<sup>60</sup>

Finally, as recently highlighted by the Nuffield Inquiry on Empirical Legal Research, the legal academy also suffers from a dearth of empirical competence and capacity to conduct such studies.<sup>61</sup> While the field of empirical health law scholarship has recently grown exponentially,<sup>62</sup> it is generally accepted that current capacity is inadequate and that it may further diminish over time. Empirical legal methodologies are also generally recognized as under-developed relative to doctrinal and

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<sup>59</sup> *Canadian Pacific Ltd. v. Matsqui Indian Band* (1995), 122 D.L.R. (4<sup>th</sup>) 129 (S.C.C.). It should be noted that these standards of independence that are relevant in the adjudicative tribunal context are only a common law right which may be displaced by statute, unlike judicial independence which is a constitutional principle. See *Ocean Port Hotel v. British Columbia*, 2001 SCC 17.

<sup>60</sup> On the other hand, a study which expresses respect for the adjudicative independence of tribunals will likely have greater credibility and attract broader "buy in" than a study which is perceived as inconsistent with it.

<sup>61</sup> H. Genn, M. Partington, and S. Wheeler, *Nuffield Inquiry on Empirical Legal Research: Law in the Real World: Improving our Understanding of How Law Works: Final Report and Recommendations*, (London: Nuffield Foundation, 2006), online: University College London <[http://www.ucl.ac.uk/laws/socio-legal/empirical/docs/inquiry\\_report.pdf](http://www.ucl.ac.uk/laws/socio-legal/empirical/docs/inquiry_report.pdf)> (accessed 27 April 2009).

<sup>62</sup> *Supra* note 2.

theoretical methodologies.<sup>63</sup> The pervasive culture of deference to experts and authority must further diminish the perceived value of objective empirical work and weaken any apparent need for more rigorous research that is higher on the hierarchy of evidence.<sup>64</sup> Again, the focus on elements of process (e.g., bias and independence) rather than impact (e.g., judicial decisions) as indicator of quality and performance must also deter legal scholars from conducting work in this area such that target outcomes are less likely to be assessed.

#### IV. REASONS FOR OPTIMISM

However, despite the challenges faced by potential evaluators of adjudicative tribunals, there is reason for optimism: each of the various identified barriers can be overcome and have indeed been circumvented in similar evaluations. For example, as previously mentioned, many empirical evaluations have been conducted that focus on the internal operations of these bodies. A major literature review in 2007 highlighted much of the work that has been conducted and published in this area.<sup>65</sup> Yet in addition to these studies, empirical evaluations have also been undertaken to assess the external impact of similarly-functioning specialty courts that operate within the judicial system. A systematic review of the research evidence has even been conducted on the societal impact of at least one type of these judicial organs.<sup>66</sup>

Indeed, methodologically, there may be much to learn from external impact evaluations of specialist courts in the judicial sector. For example, “drug courts” have been extensively evaluated in the United States and in other jurisdictions regarding their ability to increase treatment rates, lower criminal recidivism, and enhance cost-effectiveness of prosecution.<sup>67</sup> Domestic violence courts and community courts have

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<sup>63</sup> *Supra* note 85.

<sup>64</sup> *Supra* note 79.

<sup>65</sup> M. Partington, E. Kirton-Darling and F. McClenaghan, *Empirical Research on Tribunals: An Annotated Review of Research Published between 1992 and 2007*, (London: Administrative Justice and Tribunals Council, 2007), online: Administrative Justice and Tribunals Council <<http://www.ajtc.gov.uk/docs/EmpiricalResearch.pdf>> (accessed 9 March 2009).

<sup>66</sup> D.B. Wilson, O. Mitchell and D.L. Mackenzie, “A Systematic Review of Drug Court Effects on Recidivism” (2006). 2 *Journal of Experimental Criminology* 459.

<sup>67</sup> J. Plotnikoff and R. Woolfson, *Review of the Effectiveness of Specialist Courts in Other Jurisdictions. DCA Report Series, No. 3/05*, (London: UK Department for

similarly been assessed for compliance, cost-effectiveness, conviction rates and public perception, and mental health courts have been comprehensively examined for reducing criminal violence, enhancing community safety, conserving fiscal resources and improving clinical outcomes. However, it must be recognized that the context within which these judicial bodies operate is very different from that of health-related administrative tribunals. Not only are they part of the judiciary rather than the executive branch of government, but their existential goals are usually related to diverting complex or special cases from traditional courtrooms rather than supporting the infrastructure of a completely different system (like that of health). Empirically tracking desired outcomes like cost-savings and reduced reoffending rates will naturally be easier in this context when the intervention or service is more directly related to its goal. Yet, alternatively, it may actually be more difficult for these judicial organs to evaluate themselves due to their strict separation from the executive (which has the financial resources to fund such an undertaking) and the likelihood that they will zealously guard their independence.

The possible range of empirical legal research methodologies that can be used in evaluating health-related adjudicative tribunals may benefit from earlier studies. For example, Mello and Zeiler describe the diversity and comparative advantages of various empirical approaches that have been taken by scholars in the health law field to address issues as wide-ranging as medical malpractice reform and motor safety laws.<sup>68</sup> And on the use of randomized controlled trials, for which these two scholars are less optimistic, Pleasence provides an account of such an undertaking in the United Kingdom, highlights the many technical, practical and ethical

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Constitutional Affairs, 2005), online: UK Department for Constitutional Affairs <[http://www.dca.gov.uk/research/2005/3\\_2005.pdf](http://www.dca.gov.uk/research/2005/3_2005.pdf)> (accessed 10 April 2009); *Supra* note 90; United States Government Accountability Office, *Adult Drug Courts: Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes*, (Washington DC: United States Government Accountability Office, 2005), online: Government Accountability Office <<http://www.gao.gov/new.items/d05219.pdf>> (accessed 23 August 2009); B.L. Green, C.J. Furrer, S.D. Worcel, S.W.M. Burrus and M.W. Finigan, "Building the Evidence Base for Family Drug Treatment Courts: Results from Recent Outcome Studies" (2009), 6(2) *Drug Court Review* 53, online: National Drug Court Institute <<http://www.ndci.org/sites/default/files/ncdc/DCR%2C%20Vol.%206%2C%20No.%202.pdf>> (accessed 23 August 2009).

<sup>68</sup> *Supra* note 2.

barriers that were faced, and suggests ways to overcome them in the future.<sup>69</sup>

## V. OPPORTUNITIES FOR MOVING FORWARD

Deliberate and concerted efforts, however, will be necessary—among both individual evaluators and others that must support them—to overcome the numerous barriers to empirical impact evaluations of health-related adjudicative tribunals. The analysis of challenges described above point to several strategies that can be pursued.

At the individual level, potential evaluators of adjudicative tribunals may need to assemble interdisciplinary teams to obtain the necessary methodological expertise, bring an aura of independence and credibility to the work, and save tribunal staff from the potentially uncomfortable situation of relinquishing their perceived independence by evaluating their own performance. Like the process for assessing the effectiveness of complex clinical interventions, evaluators of adjudicative tribunals may then be advised to conceptually map out the way in which their tribunal functions, its interactions and relationships with others in the health and legal systems, and its potential effects on each of them.<sup>70</sup> This will aid in focusing the inquiry, identifying areas in which little is known, generating suitable research questions and determining the appropriate methodology.

Potential evaluators must also thoughtfully consider both the target audience of their research and the overall goal that their particular health-related adjudicative tribunal is expected to help achieve, and then identify the most important targeted outcomes that are relevant to the audience and important for the goal's fulfillment. When such outcomes cannot directly be measured, as may often be the case, evaluators must identify strong surrogate endpoints which are measurements that reflect important outcomes even if they are of indirect or diminished practical

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<sup>69</sup> P. Pleasence, "Trials and Tribulations: Conducting Randomized Experiments in a Socio-legal Setting: (2008), 35(1) *Journal of Law and Society* 8.

<sup>70</sup> N.C. Campbell, E. Murray, J. Darbyshire, J. Emery, A. Farmer, F. Griffiths, B. Guthrie, H. Lester, P. Wilson and A.L. Kinmonth, "Designing and Evaluating Complex Interventions to Improve Health Care" (2007), 334 *British Medical Journal* 455.



importance. Performance indicators can then be developed followed by the corresponding methodologies for tracking changes to them.

In the case of Ontario's health-related adjudicative tribunals, both HPARB and HSARB may describe their overall goal as contributing to the health of Ontarians by enhancing decision-making within the health system. If government officials are the evaluation's intended audience, targeted outcomes could include: (1) confidence in the health system; (2) equity, justice and fairness in health decision-making; (3) strengthened health system institutions; and (4) better health services and patient safety via enhanced regulation and oversight. Since these outcomes would be nearly impossible to measure directly, surrogate endpoints can be developed and could possibly include: (1a) access to adjudicative mechanisms for dispute resolution; (1b) perceived legitimacy of adjudicative decisions; (2a) satisfaction with adjudicative services; (2b) perceived fairness and legitimacy of adjudicative services; (3a) interaction with health system institutions and decision-makers; (3b) existence of support mechanisms for primary health decision-makers; (3c) effective oversight of primary health decision-makers; (4a) better decisions by primary health decision-makers; and (4b) respect for the tribunal's oversight function. Performance indicators and their corresponding empirical methodologies could then range from the public's awareness for the tribunal's existence to the perceived concern among primary health decision-makers that their decisions will be reversed.

Once a system of empirical observation is in place, potential evaluators can establish benchmarks according to which they can track and assess performance. Such comparative points of measurement can be drawn from thoughtful consideration, aspirational goals of leaders, expert judgments on what is possible, data from similar tribunals in other jurisdictions (i.e., comparative analysis), or previous empirical observations from the same tribunal (i.e., interrupted time-series analysis). For experimental methods like randomized, controlled trials that are rarer in socio-legal studies, the control group would serve as the comparative benchmark rather than any observational data that is external to the evaluation. Such comparisons are naturally better because they more accurately represent the counterfactual of what the situation would be like without the tribunal and can help lead to determinations of causation.

But overcoming the identified challenges and systematizing empirical impact evaluations of health-related adjudicative tribunals across time and jurisdictions requires action from stakeholders throughout

the health and legal systems. For example, scholars in the health law field must intensify their efforts to build capacity for utilizing empirical methodologies, enhance the status of such work within legal circles, and overcome any real or perceived problems with maintaining independence. Health system institutions should also start to build policy-relevant databases that are rigorously compiled, comprehensive and publicly-accessible. Finally, health planners and research funders must facilitate (or even catalyze) the continuous improvement of adjudicative tribunals by supporting undertakings to empirically evaluate their impact on society. Initial funding for small-scale evaluations and/or pilot projects would be particularly helpful, as would support for disseminating any lessons learned as widely as possible.

Syntheses of research evidence may be helpful in encouraging stakeholders to support empirical impact evaluations of health-related adjudicative tribunals, especially because they are likely to highlight the current dearth of knowledge in this area. A systematic review on the effect of adjudicative tribunals in the health sector, for example, would be a disciplined and rigorous approach to assessing the current state of research evidence in this area and tracking developments in it over time.<sup>71</sup> This tool applies the scientific method to gathering, appraising and synthesizing what is known (and what is not known) on a particular topic such that publication and selection bias are limited.<sup>72</sup> Such a review has already been conducted, for example, to assess the impact of drug courts on criminal recidivism,<sup>73</sup> and a protocol has been developed to evaluate the influence of these specialist courts on narcotics use in particular and criminal activity more broadly.

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<sup>71</sup> J.N. Lavis, F. Becerra-Posada, A. Haines and E. Osei, "Use of Research to Inform Public Policymaking" (2004), 364 (9445) *The Lancet* 1615.

<sup>72</sup> H. Rothstein, A. Sutton and M. Borenstein, eds., *Publication Bias in Meta-Analysis: Prevention, Assessment and Adjustments*, (West Sussex, England: John Wiley & Sons, 2005); J.N. Lavis, H.T.O. Davies, A. Oxman, J.L. Densi, K. Golden-Biddle and E. Ferlie, "Towards Systematic Reviews that Inform Healthcare Management and Policymaking" (2005), 10 (supplement 1) *Journal of Health Services Research and Policy* 35.

<sup>73</sup> D.B. Wilson, O. Mitchell, and D.L. MacKenzie, *Effects of Drug Courts on Criminal Offending and Drug Use: A Campbell Collaboration Systematic Review Protocol*, (Oslo: Campbell Library of Systematic Reviews, 2007), online: Campbell Corporation <[http://www.campbellcollaboration.org/campbell\\_library/index.php](http://www.campbellcollaboration.org/campbell_library/index.php)> (accessed 29 March 2009).

## CONCLUSION

In summary, adjudicative tribunals serve an essential function within the health sector, yet their contributions and impact on the delivery of health services and society in general are not usually evaluated empirically. The focus of past tribunal assessments on their internal operations limit these bodies' ability to inform continuous quality improvement efforts, enhance the public's confidence in them and maximize their societal impact. Three challenges, however, serve to complicate empirical impact evaluations of health-related adjudicative tribunals. First, the complexity of the health system and its countless independent actors prevents their mechanistic isolation, which is necessary to elegantly find cause-effect relationships between them and their goals. Second, the indirect relationship between tribunal services and their existential purposes—exacerbated by uncertain objectives, difficulties with randomization and a lack of examples to follow—presents methodological barriers that cannot be easily overcome. Third, several realities of the legal profession and the environment in which it currently operates further hinder evaluation efforts, including its dearth of empirical capacity, culture of deference to authority, and focus on process and independence.

There are, however, two main reasons for optimism. Empirical evaluations of similar judicial bodies have been previously conducted and there is currently a rapid expansion of interest in empirical health law scholarship. This analysis of challenges to empirically evaluating the impact of adjudicative tribunals in the health sector highlights several potential ways to help move this agenda forward. Individual evaluators, for example, can assemble interdisciplinary teams, identify their tribunal's overall goal, develop surrogate endpoints and conduct a realistic evaluation that tracks each of them. Stakeholders within the health and legal systems, on the other hand, can support individual efforts by earmarking funds for such empirical impact evaluations, building policy-relevant databases and assisting with cross-jurisdictional learning and dissemination efforts. Syntheses of the research evidence on this topic, and systematic reviews in particular, may be helpful for highlighting the absence of knowledge in this area and building support to capitalize on this otherwise missed opportunity.

Nevertheless, a foundational question remains as to whether it is even the responsibility of adjudicative tribunals like Ontario's HPARB and HSARB to be empirically evaluating their own impact or to help

others in doing so. Besides the limitations imposed upon them by their respective statutory mandates, these bodies and others may not necessarily be concerned about the impact of their decisions and could in fact be preoccupied with maintaining their independence. Further consideration must be given to these issues, and others, so that continuous quality improvement and self-evaluation can become part of tribunals' core mandates, as otherwise it will be impossible for these bodies to provide the best services possible to their users, stakeholders and larger constituency. Any ambitions for self-improvement among health-related adjudicative tribunals, however, must obviously be balanced with the legislative, political and social realities within which they operate.