

# Clustering in Ontario: The DIY Tribunal

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INTRODUCTION .....	197
I. THE ADMINISTRATIVE JUSTICE LANDSCAPE: VITAL NEED, INCOHERENT DESIGN .....	198
A. CLUSTERING: WHAT’S IN THE BOX? .....	202
B. THE HISTORY OF CLUSTERING—EVOLUTION NOT REVOLUTION.....	204
C. A FOCUS ON ENHANCING SUBSTANTIVE EFFECTIVENESS .....	206
II. EXPERTISE .....	209
A. WHAT IS EXPERTISE? .....	210
B. BUILDING EXPERTISE AND CAPACITY: DEPTH AND BREADTH ....	213
CONCLUSION.....	214

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## INTRODUCTION

In 2010, Ontario embarked on an initiative to restructure its administrative justice sector through the creation of tribunal ‘clusters.’ The process had commenced informally a few years previously with the co-location, merger of administrative functions, and the cross-appointment of chairs and members of several tribunals in the labour, health, and environment and land planning disciplines. With the proclamation of the *Adjudicative Tribunals Accountability, Governance and Appointments Act*<sup>2</sup> (the *Tribunals Act*), and the designation of the Environment and Land Tribunals Ontario as the province’s first cluster in early 2010, the redesign project was formally underway.

Clustering, in the Ontario context,<sup>3</sup> brings a specific group of tribunals together within a single organization, but does not merge their statutory mandates or memberships. Clustering follows a trend seen in other jurisdictions over the past 20–30 years to amalgamate or provide a more coordinated framework to what has been called a “kaleidoscope system of administrative agencies, boards and commissions.”<sup>4</sup> Ontario’s approach however is somewhat unique, both in terms of its structure, and that it did not flow from a comprehensive, administration of justice wide policy review and consequential set of recommendations.

This paper explains the Ontario clustering model, its genesis and rationale, and explores some of the ways it may help to achieve fundamental objectives of an administrative justice system. Part II of this paper provides some initial thoughts on expertise and subject matter specialization, and how clustering can enhance, rather than diminish these important administrative justice values.

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<sup>2</sup> SO 2009, c33, Sched 5.

<sup>3</sup> Clustering is not a common term in the field of administrative justice design. The term was used by the New Zealand Law Commission in its 2004 report “Determining Justice for All, A Vision for New Zealand’s Courts and Tribunals,” March 2004, at page 288, but does not have the same meaning as has been used in Ontario.

<sup>4</sup> Lorne Sossin and Jamie Baxter, “Ontario’s Administrative Tribunal Clusters: A Glass Half-Full or Half-Empty for Administrative Justice?” (2012) 12 Oxford University Commonwealth Law Journal 157.

## I. THE ADMINISTRATIVE JUSTICE LANDSCAPE: VITAL NEED, INCOHERENT DESIGN

It is widely accepted that the administrative justice landscape, built without any official plan, coherent jurisdictional zoning, or common design elements, has led to an uncomfortable community of structures, of varying shapes and sizes, which are difficult to service, and even more difficult for citizens to navigate. As confusing and inefficient as the landscape may be, there is equal agreement about the reasons for the proliferation of administrative tribunals, and their essential role in the administration of justice and the administration of the modern democratic state.

In a presentation to the 2005 annual conference of the Australian Institute of Judicial Administration (AIJA), Justice Michael Barker, President of the Western Australia State Administrative Tribunals, observed that:

[T]he growth of tribunals has been attributed to the degree of regulation that arose under the classical 20th century “welfare state.” If one uses the expression ‘welfare state’ as a convenient way of referring to the increased degree of state regulation of economic and social activities in those countries during the course of the 20th century, then this seems self-evidently so. While the tenets of the welfare state have been severely questioned and much of its apparatus dismantled in Australia and New Zealand over the past two decades, and much of the public sector has been ‘corporatised’ or privatised in the process, the number and range of administrative tribunals remain largely undiminished. Indeed, in some respects they may have increased. Very few of the ‘old-style’ administrative tribunals have fallen in the process and not a few new, independent offices have been created to regulate or re-regulate a wide range of market activity.<sup>5</sup>

Justice Barker goes on to quote Professor S.A. de Smith,

Tribunals have not been established in accordance with any preconceived grand design. They have been set up *ad hoc* to deal

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<sup>5</sup> Michael Barker, “*The Emergence of the Generalist Tribunal in Australia and New Zealand*” (Paper delivered at the Conference of the Australian Institute of Judicial Administration, 2005) at 5.

with particular classes of issues which it has been thought undesirable to confide either to the ordinary courts of law or to the organs of central or local government. A tribunal may be preferred to an ordinary court because its members will have (or will soon acquire) specialised knowledge of the subject-matter, because it will be more informal in its trappings and procedure, because it may be better at finding facts, applying flexible standards and exercising discretionary powers, and because it may be cheaper, more accessible and more expeditious than the High Court. Occasionally dissatisfaction with the over-technical and allegedly unsympathetic approach of the courts towards social welfare legislation has led to a transfer of their functions to special tribunals ... though the superior courts retain an ultimate supervisory jurisdiction. There may be disadvantages in leaving powers of decision to ministers; the hearing officer does not normally decide, the decision is not always determined by the weight of the evidence adduced at the hearing, and justice is not manifestly seen to be done....<sup>6</sup>

Tribunals established under a range of public policy statutes have proved to be quite effective in adjudicating large numbers of appeals, quickly and at low cost for both claimants and the government. Procedures are more flexible, and can respond to different adjudicative contexts, such as where only the claimant appears at the hearing or where parties are usually self-represented.<sup>7</sup> In other cases, tribunals may apply scientific and technical knowledge or economic policy to a particular industry or sector in a way which is responsive both to the needs of the stakeholders as well as protecting the public interest.<sup>8</sup>

Arguably, the benefits of assigning decision making responsibility to tribunals have increased in recent years. Access to justice concerns,

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<sup>6</sup> *Ibid*, at 6–7, quoting de Smith, *Judicial Review of Administrative Action*, 2ed (London: Stevens & Son, 1968) at 14. See *supra* note 4, for a discussion of the landscape.

<sup>7</sup> In Ontario the Landlord and Tenant Board receives over 80,000 cases annually, the Social Benefits Tribunal over 14,000. The SBT regularly hears matters where only the claimant is present and is usually self-represented. Approximately 60% of parties appearing before the HRTTO will be self-represented.

<sup>8</sup> For example both the Ontario Municipal Board and the Environmental Review Tribunal (both now part of ELTO) deal with highly technical matters, where parties may be well resourced and represented, but have the overriding responsibility to make decisions which are in the public interest.

including the rising costs of resolving disputes, the increased numbers of individuals who cannot afford legal representation, and the desire to empower individuals, to permit them to navigate legal processes more effectively and make informed choices about their legal rights and responsibilities, are challenges more easily addressed through administrative tribunals. Similarly, a shift towards self-regulation of professions and industry requires independent and competent specialized oversight agencies that are able to garner the respect and confidence of both user groups and the broader public.

But the *ad hoc* manner in which the administrative justice sector has been established, organized, and operated, has raised serious questions about its ability to deliver these stated benefits:

Claimants who come to administrative tribunals in Ontario expecting a convenient forum to resolve their problems may discover that institutional resources and expertise, their own knowledge of the system, and their statutory and legal rights are fragmented between bodies with diverse norms and mandates. At least from a birds-eye view, the tribunal ‘system’ now looks more like an *ad hoc* assortment of isolated institutions than a coherent system of justice. Increasingly, it seems that the very structures and modes of organization behind the delivery of administrative justice in the province may actually post barriers for users.<sup>9</sup>

The lack of any grand design for the administrative justice sector, and the issue specific way in which tribunals are generally created, also leads to overlapping jurisdictions, with the potential for inefficiency, confusion and inconsistent rulings.

There are 12 different agencies that deal with exports. There are at least five different agencies that deal with housing policy. Then there’s my favourite example: The Interior Department is in charge of salmon while they’re in freshwater, but the Commerce Department handles them when they’re in saltwater. I hear it gets even more complicated once they’re smoked.<sup>10</sup>

Even where jurisdiction is clear, the statutory parceling of issues rarely reflects the more complex reality of real life problems. For

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<sup>9</sup> Above note 4 at 158.

<sup>10</sup> President Obama, State of the Union Address, 25 January 2011, quoted in J Freeman and J Rossi, “Agency Coordination in Shared Regulatory Space” (March 2012) 125 Harvard Law Review 1131 at 1131.

example, a tenant on social assistance may face eviction for rent arrears, and have an appeal pending before the Social Benefits Tribunal, which if successful, might alleviate their housing crisis. For the individual it is a single problem. The law, however, slices the issues into different regimes, which (until recently) had no mechanisms to communicate with each other.

The conundrum presented by the need for, and irrefutable benefits of administrative tribunals on the one hand, and their fragmentation, incoherence and inefficiency on the other, has led to a variety of government responses. Australia, New Zealand, the United Kingdom and Québec all established commissions to review their administrative justice sectors.<sup>11</sup>

One of the earliest reform initiatives, which resulted from the Kerr Committee in Australia, was the creation of the Australian Administrative Appeals Tribunal (AAT) in 1975. The AAT is a fully amalgamated ‘super tribunal’ with jurisdiction over more than 400 statutes at the federal level. Subsequently, a number of states in Australia also amalgamated all, or most of their administrative tribunals, and in some cases, incorporated jurisdiction over some civil disputes and judicial review.<sup>12</sup> Amalgamated tribunals at the state level have generally been structured to provide for ‘divisions’ or ‘lists,’ with separate membership along subject matter lines.

In 1998, Québec established the Tribunal administratif du Québec (TAQ), which amalgamated some, but not all administrative tribunals in the province, within four subject area divisions.<sup>13</sup> Britain adopted a different approach, setting up a tribunal service, which provides support and coordination for its administrative justice sector.

Interestingly, some of these reforms have been met with criticism and mistrust. While there is near universal agreement that the traditional, fragmented systems are inefficient and undermine access to justice and other core justice principles such as independence, a number of commentators have questioned governments’ motivation for change, and

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<sup>11</sup> For a useful history of the reform efforts in the common law jurisdictions, see *supra* note 4.

<sup>12</sup> See e.g. Victoria Civil and Administrative Tribunals and the Western Australia State Administrative Tribunal. Note that the constitutional structure in Australia permits the according of judicial review into state tribunals.

<sup>13</sup> See e.g. Hélène De Kovachich, “The Tribunal administratif du Québec: product of the reform of the Québec administrative justice system” (Paper presented at 2012 CIAJ Conference, October 2012).

argue that the reforms are more about cost savings and control. Little real thought, and even less action, addresses the broader systemic problems.<sup>14</sup>

Certainly, fiscal constraints caused by severe budget deficits have prompted governments to look for ways to deliver services more efficiently. ‘Good governance frameworks’ are objectives that have been embraced by governments, often without any real analysis of whether they produce better substantive results. Seeking accountability, without asking ‘for what’ may have little value other than political risk management, and worse, create enormous reporting costs for an organization.

But tribunals are public institutions that operate within the realities of the present day. One aspect of that reality is limited resources and the responsibility to use public funds prudently and effectively. Another is an environment of heightened public scrutiny of public institutions, leading to a focus on accountability measures.

Equally, it will be rare for governments to fully understand the complex web of elements that go into producing an effective administrative justice system. It therefore falls to those who work, and have a direct interest in the sector—tribunal members and staff, practitioners, stakeholders and academics—to define and drive effective change.<sup>15</sup>

In Ontario, there is cause for cautious optimism.<sup>16</sup>

#### A. CLUSTERING: WHAT’S IN THE BOX?

Clustering brings together a selected set of tribunals into a unified organization, with a single chair, but keeps each constituent tribunal’s statutory mandate and membership distinct. Clusters are established through regulation under the provisions of the *Tribunals Act*, and no

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<sup>14</sup> Robin Creyke & John McMillan “Administrative Law Assumptions ... Then and Now” in Robin Creyke & John McMillan, eds, *The Kerr Vision of Australian Administrative Law – At the Twenty-Five Year Mark* (Canberra: Centre for International and Public Law, 1998) 1. See also the report of the Ontario Bar Association on the Ontario *Tribunals Act*.

<sup>15</sup> For an enlightening example of how tribunals can attempt to take charge of the agenda, and define effectiveness, see: Council of Australasian Tribunals, *A Framework for Tribunal Excellence*, February 2012.

<sup>16</sup> Above note 3 and Ewart and Gottheil, above note 1.



amendment is made to each constituent tribunal's 'home statute.' As of the end of 2012 two clusters had been designated, Environment and Land Tribunals Ontario (ELTO)<sup>17</sup> and Social Justice Tribunals Ontario (SJTO).<sup>18</sup> In each case, the clusters, and their constituent tribunals, have been placed within the responsibility of the Ministry of the Attorney General. A third cluster, bringing together several tribunals in the health sector, is expected to be announced in the near future.<sup>19</sup>

The *Tribunals Act* provides that the government may appoint an executive chair, who shall be a member of each constituent tribunal, and has all of the powers, duties and functions of chair of each tribunal under the *Tribunals Act* or any other Act, Regulation or Cabinet Directive. The government may, but is not required to, appoint an associate chair for each of the constituent tribunals, and one or more of the associate chairs may be appointed as alternate executive chair. The executive chair may assign any of his or her powers, duties or functions to any associate chair or vice chair (except the role of ethics executive under the *Public Service of Ontario Act*).<sup>20</sup> Beyond these provisions and notwithstanding that section 16 is entitled 'Governance Structure of Clusters,' neither the *Tribunals Act*, nor any other Act, regulation or policy directive provides for a required structure or organizational design, or gives any indication about how a cluster should operate.

The absence of a detailed policy framework or legislative directives presents challenges to the implementation of clustering but also provides for flexibility. Subject to the need to drive 'efficiency' and

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<sup>17</sup> ELTO is comprised of five tribunals which deal with environmental appeals, land planning, heritage conservation and land valuation: Assessment Review Board, Conservation Review Board, Environmental Review Tribunal, Ontario Municipal Board and the Board of Negotiation.

<sup>18</sup> SJTO comprises seven tribunals: Custody Review Board, Child and Family Services Review Board, Human Rights Tribunal of Ontario, Landlord and Tenant Board, Ontario Special Education Tribunal (English), Ontario Special Education Tribunal (French) and the Social Benefits Tribunal.

<sup>19</sup> At the 2011 SOAR Conference, Attorney General Hon John Gerretsen announced that the government was proceeding with further clustering, including a cluster in the health sector. The government refocused its direction and, in early 2013, designated the Safety Licensing Appeals and Standards Tribunal of Ontario (SLASTO) as the third cluster. SLASTO comprises the Animal Care Review Board, Fire Safety Commission, License Appeal Tribunal, Ontario Civilian Police Commission and the Ontario Parole Board.

<sup>20</sup> *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, SO 2009, c 33, Sch 5, ss 15 and 16.

‘effectiveness,’ which is discussed below, a cluster can evolve in a way that is responsive to the clustered tribunals’ collective mandate, stakeholder needs and size.<sup>21</sup>

## B. THE HISTORY OF CLUSTERING—EVOLUTION NOT REVOLUTION

In 2006, Kevin Whitaker, then Chair of the Ontario Labour Relations Board (now Mr. Justice Whitaker of the Ontario Superior Court) was appointed as facilitator for the Agency Cluster Project. Whitaker’s mandate was “to work with five Tribunals in the municipal, environment and land planning sector to find ways to improve services through cross-agency cooperation and coordination of operations, administration and dispute resolution services while respecting the unique roles and mandates of each.”<sup>22</sup> The final report was presented to the Minister of Government Services and provided 16 recommendations in relation to such matters as physical and virtual co-location, sharing of administrative staff and functions, common adjudicator core competencies, code of conduct and recruitment procedures. It also recommended a range of changes to harmonize rules of procedure, adoption of decision review protocols, and increased use of alternative dispute resolution, and decision review.

When the Report was tabled, the five land and environment tribunals had already implemented some of the recommendations, primarily those relating to facilities and administrative coordination. In 2009, a common chair was appointed for all the tribunals, and in early 2010 ELTO was formally designated as a cluster.

The Report also formed the basis of a number of the tribunal governance reforms introduced in the *Tribunals Act*, and perhaps most significantly the requirement for a merit based appointments process.

Whitaker’s vision was no doubt informed by his experience as Chair of the Ontario Labour Relations Board (OLRB), which had seen clustering, by any other name, in a variety of forms. In 1998, the College Relations Commission and the Education Relations Commission, both agencies with small caseloads and subject matter jurisdiction closely

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<sup>21</sup> For a discussion of the various challenges and opportunities, see Ewart and Gottheil, above note 1, at 168–174, and note 4 at 181–186.

<sup>22</sup> Final Report, Agency Cluster Project, at: <http://www.mgs.gov.on.ca/stdprodconsume/groups/content/@mgs/@aboutmin/documents/resourcelist/111869.pdf>.

related to the Board's, were effectively merged with the OLRB. While their distinct statutory identity remained unchanged, the OLRB Chair was appointed the Chair of both Commissions. The Commissions are housed within the OLRB offices, and have no separate administrative staff. The OLRB Registrar acts as registrar of the Commissions. A few part-time members with particular expertise in the subject area are appointed, but would not sit alone.

A second model is the Pay Equity Hearings Tribunal (PEHT). Again, the PEHT is administratively merged and co-located with the OLRB. The PEHT Chair (or Chief Presiding Officer) has been the OLRB's Alternate Chair, and the Deputy Presiding Officers are all full time Vice Chairs of the OLRB. There are several part-time members who are appointed for their subject matter expertise as labour or management representatives, and are assigned to tri-partite panels, as needed.

Finally, adjudications under the *Employment Standards Act*, which have been handled administratively by the Ministry of Labour and assigned to roster arbitrators until the late 1990s, were brought within the jurisdiction of the OLRB. Since there was no free-standing tribunal, the approach here was to fully integrate the previously separate jurisdiction. OLRB rules provide for a separate procedure for *ESA* appeals.

A similar transformation occurred in 2008 with two tribunals in the health sector. In April of that year, the Chair of the Health Professions Appeal and Review Board was cross-appointed as Chair of the Health Services Appeal and Review Board. The Boards then began streamlining processes, procedures and realigning staff responsibilities to reflect the new model. Over time, most of the members were cross-appointed. The Boards, known informally as the 'Health Boards,' now also include the Ontario Hepatitis C Assistance Plan Review Committee and the Physician Payment Review Board.

Clustering, as established under the *Tribunals Act*, can support any one of these restructuring models, and likely several others. Integration can evolve over time, allowing cultures to develop, and stakeholders to become comfortable, and confident that the single organization is able to effectively meet the particular statutory responsibilities.

### C. A FOCUS ON ENHANCING SUBSTANTIVE EFFECTIVENESS

If flexibility is one of clustering's defining features, the other is the emphasis on subject matter effectiveness.

Clustering was introduced as part of a broader tribunal reform package. *The Tribunals Act* requires all tribunals to prepare and publish a range of documents outlining core structural elements. The required documents include a tribunal's mission, mandate, qualifications for members, service standards, complaints policies, ethics plans, and other similar matters.<sup>23</sup>

Perhaps most significantly, the *Tribunals Act* requires that appointments of members of an adjudicative tribunal be made on the recommendation of its chair following a merit-based competition<sup>24</sup> employing statutorily defined competencies. Re-appointments are also to be made on the recommendation of the chair, based on performance.<sup>25</sup>

The power to cluster is specifically addressed in section 15 of the *Tribunals Act*. In addition to affirming the legislative authority to designate a cluster, section 15 contains important messages about the focus and objectives of a cluster. Two or more tribunals may be designated 'as a cluster' only if the matters they deal with are such that "they can operate more effectively and efficiently as part of a cluster than alone."<sup>26</sup>

Thus, before creating a cluster the government must have considered the mandate and nature of each tribunal and determined that those matters are better dealt with in a clustered structure than if the tribunals continued to operate alone. In the Ontario approach to clustering, the distinguishing rationale for a cluster accordingly lies in the capacity to achieve both improved efficiency and better substantive resolutions of the matters dealt with by the cluster's constituent tribunals.

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<sup>23</sup> See above note 20 at ss 3–8.

<sup>24</sup> *Ibid* at s 14(1). The government may make exceptions to this. See s 2 of *Appointment to Adjudicative Tribunals*, O Reg 88/11, where the requirement for a competition in a number of circumstances including re-appointments and cross-appointments is waived. See also above note 6.

<sup>25</sup> *Ibid* at s 14(4). See s 3 of *Appointment to Adjudicative Tribunals*, above, which waives this requirement when a Chair's appointment or re-appointment is in issue.

<sup>26</sup> *Ibid* at s 15.

The purpose is not just to achieve efficiencies, co-location, administrative integration, or shared resources. The goal is also equally to achieve improved effectiveness in resolving the various matters within the jurisdiction of the clustered tribunals.

There are two key, interconnected concepts at work here:

- a) efficiencies in relation to services; and
- b) effectiveness in relation to substance.

The Ontario approach to clustering goes beyond seeking to improve outputs; it is also intended to improve outcomes for those who use, or are affected by, tribunal services. As a result, the responsibility of a cluster's leadership, and indeed all of its staff and members, is to develop the organization in a way that will share experiences, enhance expertise, develop linkages, and encourage synergies across the matters dealt with by a cluster, subject only to respecting the unchanged statutory mandates of the constituent tribunals.

The Legislative directive to improve subject matter effectiveness presents an array of opportunities that begins with an examination of the things which link the clustered tribunals. These may be the substantive subject areas, as with land, environment and heritage within ELTO; or human rights, disability support, and education accommodation at SJTO. It may be the nature of the parties that traditionally use the clustered tribunals. For example, a large proportion of SJTO users are individuals who live in poverty, are low income or are otherwise socially or economically disadvantaged. Some clusters will deal regularly with a high percentage of parties who are self-represented. Identifying the linkages allows a cluster to develop initiatives to meet the particular needs of users, and to develop processes and adjudicator skills which will produce better results. As well, it will provide opportunities for adjudicators to expand their knowledge base and enrich their expertise.

In the 18 months since SJTO was designated, the organization has developed and instituted a number of initiatives to further the cluster's mandate. As a starting point, the SJTO defined its Statement of Objectives and Principles for Clustering:

**Transformation Objective:**

To redefine/redesign previously distinct individual tribunals into a single, integrated administrative justice organization, with

recognizable component parts based, at least in part, on the original tribunals.

**Principles of Clustering:**

The guiding principles of clustering and the internal organizational design of the cluster are:

- the needs of the cluster's users and broader public;
- the desire to enhance efficiency, subject matter effectiveness and expertise, and access to justice;
- the desire to provide a common and positive face of justice to the public;
- an understanding that the government clustered these tribunals for reasons which include:
  - the underlying potential connectedness of the context in which disputes dealt with by the tribunals arise, and the impact of their decision,
  - the connectedness of the public policy objectives of the legislation the tribunals are responsible for administering,
  - these public policy objectives can be better achieved by the constituent tribunals operating together in a cluster, than alone.

More practically, the SJTO developed and has begun to implement a number of initiatives:

- a) Common web portal, integrated regional offices;
- b) Common legal services and professional development departments;
- c) Annual cluster wide professional development institute;
- d) Strategic cross-appointments;
- e) Working groups: mental health and capacity, children and youth; and
- f) SJTO rules committee which will work towards the harmonization (not standardization) of rules, practice directions and policies.

The success of these initiatives will be measured against their effect in achieving the SJTO's transformational objective; in achieving efficiencies in relation to services; and in supporting and enhancing the

delivery of fair, effective, timely, accessible and high quality dispute resolution.

## II. EXPERTISE

One of the fundamental building blocks of any justice institution is its adjudicative membership. Not that adjudicators are singularly important. Operational and administrative infrastructure provides critical support for the work of a court or tribunal. The registrar's office, and its case processing and case management staff, also play a central role in ensuring accessibility for users, and that cases move through the system efficiently and effectively. At least in the tribunal world, case management staff and adjudicators need to work as an integrated team in order that this is done.

But judges and members are the justice institution's most valuable resource. They are the most expensive resource, and ultimately, it is they who are responsible for hearing the parties and resolving the disputes.<sup>27</sup>

For tribunals, whose *raison d'être* is subject matter expertise and specialized alternative dispute resolution models, we want the membership to be 'expert' in the particular subject area. We want the tribunal to have overall capacity.

But what do we mean by an expert tribunal? What is the expertise we look for, or should look for, in an individual to be appointed to a tribunal? And even if we can articulate answers to these questions, what tools does a tribunal need to build, maintain and enhance the quality of its and its members' expertise?

Administrative justice reform presents an additional dimension to these questions. Some may legitimately worry that amalgamation will undermine expertise. 'Super tribunals' become generalists<sup>28</sup> with the risk of diluting subject matter expertise, standardizing rules and processes and becoming unresponsive to stakeholder needs.

However, viewed from a different perspective, administrative justice redesign, and in particular clustering, can address several of the concerns that have been raised about the traditional, fragmented structures

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<sup>27</sup> In tribunals that use staff mediators, they too may be included in this category.

<sup>28</sup> See above note 54.

discussed earlier: a potential to become insular and self-referential; the potential for capture by the host ministry and often particular stakeholders; and a potential to lose the capacity to incorporate, in their work, evolutions in public policies, societal values, tribunal design, demographics and technical or legal approaches. As well, siloed tribunals may offer limited caseload variety or professional development for adjudicators, and, where the caseload is small, may simply lack the resources to support an effective and modern administrative justice organization despite sincere efforts to achieve that goal.

Properly conceived and implemented, clusters can become ‘multidisciplinary’<sup>29</sup> rather than ‘generalist.’ They can enrich both substantive expertise and procedural competency of the whole, and each constituent part.

#### A. WHAT IS EXPERTISE?

Ask an administrative law practitioner whether a tribunal is expert, and they will likely begin by looking at judicial review cases. Tribunal expertise is a central question in determining whether it will be afforded deference on judicial review of its decisions. Traditionally, the court will determine expertise by reference to a tribunal’s statutory jurisdiction and purpose.<sup>30</sup>

In *Pushpanathan*, Justice Bastarache, quoting Iacobucci J. in *Southam*, explained that expertise was:

(...) “the most important of the factors that a court must consider in settling on a standard of review,” this category includes several considerations. If a tribunal has been constituted with a particular expertise with respect to achieving the aims of an Act, whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act, then a greater degree of deference will be accorded. In *Southam*, the Court considered of strong importance the special makeup and knowledge of the *Competition Act* tribunal relative to a court of law in determining questions concerning competitiveness in

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<sup>29</sup> TAQ describes itself as multi-disciplinary.

<sup>30</sup> *Dunsmuir v New Brunswick*, 2008 SCC 9 at 55. See also *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557.



general, and the definition of the relevant product market in particular.<sup>31</sup>

Professor Robert Hawkins has argued that defining expertise by reference to a tribunal's statutory jurisdiction is too narrow and risks becoming tautological.<sup>32</sup> He suggests a number of elements courts should use to determine the expertise of a particular tribunal:

- a) Evidence of the method of tribunal appointments; How are they made? How are they advertised? Is there a detailed job description? Does security of tenure exist?
- b) Evidence of the credentials; What is their training and expertise prior to appointment?
- c) Evidence of 'on the job' experience; What kind of involvement do they have in hearings? How often do they sit in hearings?
- d) Evidence of institutional support available to members; Does the tribunal have an implicit set of objectives? Does it have a developed and published body of jurisprudence? Are member's duties clearly understood?
- e) Evidence of evaluation methods and promotion policies.<sup>33</sup>

Other indicators of expertise such as ongoing professional development provided to members might also be considered. At an institutional level, expertise can be de-scribed as the capacity of a tribunal to respond effectively to caseload complexity and user needs through specialized procedures, alternative hearing and dispute resolution approaches, and strategic assignments of members.

A full discussion of whether, or how, a Court should evaluate these elements of expertise is a question I will leave for another discussion. Certainly, where legislation prescribes qualifications for tribunal members, this will permit a court, as it did in *Southam*, to be confident in the specialized expertise of a tribunal.

However, the mere fact that a legislature has assigned a particular jurisdiction to a particular tribunal may tell us very little about whether it

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<sup>31</sup> *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 32.

<sup>32</sup> RE Hawkins, *Reputational Review I: Expertise, Bias and Delay* (1998) 21 Dalhousie LJ 5.

<sup>33</sup> *Ibid* at 4–5.

is, in fact, expert, as we might qualify an expert witness. Rather, and at least from the perspective of the architecture of justice, the assignment of jurisdiction speaks to the responsibility of tribunal leadership to build expertise and capacity, and to the obligation on the legislature and government to ensure that tribunals have the tools, authority and resources to do so.

There are a number of other factors that should be considered.

First, as mentioned earlier, expertise should not be seen as solely related to the particular skills, experience and competencies of its individual members. Tribunal members are not *ad hoc* appointees. They are responsible for making decisions independent of undue influence, but they are members of a tribunal, which has a legitimate institutional interest in consistency and coherence.<sup>34</sup> The mechanisms that support these values, also provide the opportunity for the sharing of knowledge and expertise, and thereby enhance both. It is for this reason that courts have recognized that a member's expertise flows from her membership on the tribunal.<sup>35</sup>

Second, when expertise is seen as existing across the tribunal, as the range of skills, experience and competencies of its membership as a whole, then the tribunal is able to value diversity, and to leverage its inherent capacity. Through professional development, peer review of draft decisions, informal discussions, the tribunal can enhance each member's individual, and the tribunal's collective, expertise. Through strategic case assignments, and composition of panels, the Chair can similarly make best use of the expertise.

Third, expertise can, and should be seen more broadly than technical skill or knowledge. Adjudication is an applied science. Tribunal members, as individuals responsible for the application of public policy statutes, have a responsibility to apply their technical expertise or specialized knowledge consistent with the legislative intent, which generally has a specific or broader public interest. Additionally, adjudicators must conduct hearings in a way which enhances access, and so must be alive to the challenges and realities facing a wide range of parties.

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<sup>34</sup> See *IWA Local 2-69 v Consolidated Bathurst Packaging Ltd.*, [1990], 1 SCR 282; *Tremblay v Quebec (Commission des affaires sociales)*, [1992] 1 SCR 952 and Ewart and Gottheil, above note 1.

<sup>35</sup> *King v Canada (Attorney General)*, 2012 FC 488 at 103.

Finally, unless expressly exempted from doing so, tribunal members must apply the *Human Rights Code* and the *Charter* or *Charter* values where appropriate.<sup>36</sup> This places a high responsibility on tribunal leadership to ensure that there is capacity to adjudicate these fundamental documents.

## **B. BUILDING EXPERTISE AND CAPACITY: DEPTH AND BREADTH**

Clustering, particularly as part of the recent Ontario administrative justice reforms, provides significant opportunities to build capacity and expertise.

Competitive, merit based recruitment, with statutorily defined competencies ensures that appointees will be qualified, either possessing required knowledge and skills, or having the capacity to acquire them.<sup>37</sup> Open, competitive, merit based appointments also build confidence within the stakeholder community and the broader public, with the result that hearings can be conducted more efficiently and decisions respected and accepted. Experience has shown that tribunals receive a better pool of candidates when advertising vacancies, since in the past, many qualified people would not bother to apply, thinking that without political connections, there was no real opportunity for appointment. Reappointment based on performance further enhances security of tenure and similarly increases the likelihood that a broader pool of qualified candidates will apply.

The requirement that tribunals (or clusters) establish member competency frameworks, position descriptions, along with the tribunal chair having effective power of recommendation, permits to some extent the ability of tribunals to identify the range of required skill sets, in general, and at particular points in time. This may allow a tribunal to respond more effectively to changes in legislative mandate, types of cases being filed, or evolutions in dispute resolution approaches such as mediation.

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<sup>36</sup> *Doré v Barreau du Québec*, 2012 SCC 12.

<sup>37</sup> Section 14 provides that the criteria for selection shall include: 1) Experience, knowledge or training in the subject matter and legal issues dealt with by the tribunal; 2) aptitude for impartial adjudication; and 3) aptitude for applying alternative adjudicative practices and procedures that may be set out in the tribunal's rules.

Clustering provides the opportunity to benefit from economies of scale, and indeed can produce a ‘multiplier effect’ because of the linkages between the subject matters of the clustered tribunals or their adjudicative approaches. Many small tribunals lack the resources, or institutional supports that will drive enhanced capacity and expertise. Even in cases where resources may not be an issue, insularity undermines professional development and effective analytical thought. Clusters to date have established unified legal and professional development departments, which have greater reach to support both the individual mandates of the constituent tribunals, and overall training and service.

Similarly, cross-appointments leverage member resources, and enrich expertise and capacity. Members may be cross-appointed to two or more tribunals, based on the same competency criteria as for new members, and where they are, can provide greater regional coverage, and meet caseload fluctuations within the clustered tribunals.

Cross-appointments also permit a chair to make strategic case assignments and compose panels with particular expertise to best address issues in complex cases. On an individual member level, cross-appointments can also form part of a professional development plan, through experiential learning and peer discussion.

In these and other ways, clustering provides potential to build and enrich expertise, build capacity across the cluster, and ensure expertise is real, not presumed. Where expertise is enhanced in this way, it allows tribunals to be more efficient and effective, and to build confidence in their users, and the courts.

## CONCLUSION

For those who are tasked with implementing a cluster, it often feels like having been sold a product which, when you get home and open the box, there are parts missing, the instructions don’t make sense, and the vendor won’t answer the phone, or doesn’t really understand what they’ve sold or how to make it work. At other times, you feel like part of the iconic Apollo 13 NASA engineering team, trying frantically to fix a problem, with an assortment of odds and sods, and only the team’s ingenuity and drive to work with.

The answer: Live with it. Learn to enjoy it.

The tribunal, by its nature, is an elusive, fluid concept. As a legal construct, it has been said to span the constitutional divide between the executive branch of government and the judiciary,<sup>38</sup> and has been described by Justice John Evans as “neither fish nor fowl.”<sup>39</sup> Tribunals, boards and commissions may be purely adjudicative, have regulatory functions, or a mix of both. From the user perspective, tribunals need to be designed in a way which will permit them to be responsive to the particular nature of the disputes and parties’ needs. Tribunals necessarily come in various shapes and sizes.

There is no doubt that clustering does not address all of the challenges that face the administrative justice system. It does not tackle fundamental questions of independence, or the overall coherence (or incoherence) of the administrative justice sector. But Ontario’s unique approach does provide real opportunity for meaningful improvement. It combines flexibility, with an emphasis on maintaining, and enhancing subject area effectiveness.

Clustering is a design/build approach. It gives the builders a rough sketch. It requires certain basic standards. It asks that tribunals, as public agencies, work to be more efficient. It provides tribunals with important tools, like competitive, merit based recruitment, and reappointment processes.

Most importantly, it directs tribunals to seek ways, through innovation and integration, to improve their substantive effectiveness, to build their capacity, to enrich expertise, and enhance access to justice.

Clusters are the do-it-yourself tribunal.

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<sup>38</sup> *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 SCR 781, 2001 SCC 52.

<sup>39</sup> Justice John Evans, Presentation to the 2007 Council of Canadian Administrative Tribunals (CCAT) conference, Vancouver BC.

