

"Access to Administrative Justice and Other Worries" Lorne Sossin¹

Introduction

Remarkably, until recently, texts on administrative law rarely canvassed questions of access to administrative justice. While rule of law concerns and the ideal of one's "day in court" have come to characterize "access to justice", it is less clear what this means in the diverse variety of settings where vulnerable people come before administrative decision-makers. As Lebel J. observed in *Blencoe v. British Columbia (Human Rights Commission)*, "not all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops, and cows! Administrative bodies do, of course, have some common features, but the diversity of their powers, mandate and structure is such that to apply particular standards from one context to another might well be entirely inappropriate."²

Rights and important interests often are at stake in administrative justice, whether before a human rights tribunal, and immigration board or a securities commission. Access to a decision-maker may make the difference between justice and injustice being done. The rule of law is no less significant in an administrative hearing room or decision-making process than a courtroom, and arguably, as I discuss below, it may be more so.

For the community at large generally and for vulnerable communities specifically, it is far more likely that a person's rights and important interests will be at stake in an administrative proceeding than a judicial one. As the Chief Justice of Canada has observed, "Many more citizens have their rights determined by these tribunals than by the courts."³

This chapter builds on a key theme of this volume, which is that administrative law is concerned with the everyday practice of administrative justice, not simply the judicial review of administrative decision-making. How tribunals make policy, how tribunal members are appointed, the resources available for parties before tribunals, and the fairness and quality of administrative justice provided by those tribunals all form part of the core concern of administrative law. While these issues could arise in a myriad of administrative settings, the analysis below will be concerned primarily with adjudicative tribunals.⁴

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² *Blencoe v. B.C. (Human Rights Commission)* 2000 SCC 44, at para. 158, per Lebel J..

³ *Cooper v. Canada (Human Rights Commission)* [1996] 3 S.C.R. 854 at 899-900 per McLachlin J. (as she then was) (dissenting).

⁴ By "adjudicative tribunal", I refer broadly to tribunals whose primary purpose is the impartial resolution of disputes, such as labour boards, human rights tribunals and worker compensation appeal boards. I do not mean to suggest there are no access concerns for other kinds of agencies, boards and commissions, but I believe the issues of access are strongest where the subject matter of a tribunal is primarily adjudicative. For a discussion on classifying tribunals as adjudicative and non-adjudicative, see Ed Ratushny, *The*

What does “access to justice” mean in the context of administrative tribunals? There is no one definition to this concept expressly developed by administrative law, and the analogy of administrative tribunals to courts will sometimes obscure more than it reveals. In this chapter, I will canvass the issue of access to justice before administrative decision-makers from the perspective of those affected by administrative decisions. This perspective requires attention be paid not just to the statutory provisions which empower tribunals or the court decisions which interpret those provisions but also the everyday practice before the tribunal. While I do not suggest this list is exhaustive, it is possible to approach the question of access to administrative justice from this perspective in at least three distinct ways:⁵

1) Access to the tribunal

- How do parties find the tribunal – is it accessible in-person through an office open to the public? If so, is the tribunal housed in a single office or in multiple offices in a range of communities? Is video-conference available for those unable or unwilling to travel to attend a hearing? Is the tribunal accessible through telephone and/or internet services, and if so, are these points of contact made available in the languages spoken by users of the tribunal?

2) Access to legal or other knowledge necessary to obtain tribunal services

- How do parties learn what they need to know to be able to contribute to the proceedings and to support their claims? Are the relevant legislative provisions and regulations setting out the powers of a tribunal publicized to parties? Have guidelines been developed to set out the standards by which decisions will be reached, and if so, have those guidelines been made available to the public? Is tribunal staff available to assist with filling out forms or to assist in preparing a party’s submissions? Again, are

Independence of Federal Administrative Tribunals and Agencies in Canada (Ottawa: Canadian Bar Association, 1990) at 46-47.

⁵ For a helpful conceptual review of “access to justice”, see Rod McDonald, "Access to Justice in 2003: Scope, Scale and Ambitions" in J. Bass, W.A. Bogart and F.H. Zemans, eds., *Access to Justice for a New Century - The Way Forward* (Toronto: Irwin, 2005). McDonald sets out that, “... commentators identify a broad inventory of features that would characterize an accessible justice system: (1) just results, (2) fair treatment, (3) reasonable cost, (4) reasonable speed, (5) understandable to users, (6) responsive to needs, (7) certain, and (8) effective, adequately resourced and well-organized. But, as the experiences of the last four decades illustrate, these are not features of an accessible justice system; [these] are merely features of an accessible dispute-resolution system. These experiences point to two main organizing themes of a comprehensive access to justice strategy: the strategy must be multi-dimensional; and it must take a pluralistic approach to the institutions of law and justice” at 23-24.

guidelines and/or tribunal staff available in languages spoken by users of the tribunal?

3) Access to resources needed to navigate tribunal system

- How do people present their positions before the Tribunal? Is there a right to state funded legal representation? Do fees create barriers and if so is there a procedure for waiving fees? Are previous decisions of the tribunal available, and if so, are they in a form which can be searched and sorted by self represented parties? Is there access to mediation, dispute resolution or settlement services? Are interpreters available?

In the following analysis, I explore each of these ways of addressing access to administrative justice.

1) Access to Administrative Justice: the Tribunal

When we think of the mandate of a tribunal, we often mean its powers, its jurisdiction, and its statutory purposes. We rarely think of this mandate in terms that matter most to those who come before the tribunal – such as, how do I find the tribunal? Where is it located? Can I initiate proceedings, and if so, how is this done? How much will it cost? Will I have a hearing? If so, what will I have to say? Who will help me if I get confused or cannot understand what is expected of me or what I can expect of others in the process?

While the governing statute of a tribunal typically will set out the powers of a tribunal, it will often be left to the tribunal itself to decide what face it will present to the public. There are two aspects to this perspective I wish to explore – first, the issue of standing before a tribunal, and second, the issue of whether a tribunal will hold oral or written hearings, and if oral hearings, whether those hearings are in-person or via other technological means.

(a) Standing

The first aspect of this perspective on access is standing. Who serves as the gatekeeper for administrative justice? This question may have several answers, depending on one's perspective.

For administrative law, the first sense in which standing is understood is the standing to challenge administrative action in court.⁶ Under the historical regime of prerogative writs, standing was limited to those directly affected by state action. To the extent that state action concerned the public interest, remedial authority lay with the Attorney

⁶ See, for example, D. Mullan, *Administrative Law* (Toronto: Irwin, 2001), chapter 18.

General. This approach is also captured in the *Federal Court Act*, which provides standing to the Attorney General or to any party “directly affected” by state action.⁷

It remains the case that not every citizen is entitled, as of right, to challenge administrative action. Judicial review of administrative action is reserved for those who are found to have a sufficient legally recognized interest in the matter to justify the judicial review application. It is said that the test for standing is whether the applicant is a “person aggrieved” by the administrative decision. It has been said that a person aggrieved is one who will suffer some “peculiar grievance of their own beyond some grievance suffered by them in common with the rest of the public”.⁸

These limits on standing are said to promote the efficiency of administrative action, by keeping the administration free from artificial or academic challenges to administrative action. They also, however, serve to respect the rights of third parties. In many cases where the applicant for judicial review cannot show that he or she is directly affected or aggrieved by the challenged administrative act, there will in fact be third parties in the community who are directly affected or aggrieved. The general policy of the court is not to decide issues in the absence of the parties whose rights are most directly affected by the court's decision. In other words, if those who are most directly affected by the administrative decision are content to “live with it,” the court will not permit curious busybodies to bring applications for judicial review in their stead. If, on the other hand, those most directly impacted or “aggrieved” wish to challenge the administrative action, they should be able to do so free from interference.⁹

The concept of discretionary public interest standing also has been applied to challenge the decision-making of administrative bodies in court. The leading case in this area remains *Finlay v. Canada (Minister of Finance)*.¹⁰ In granting public interest standing to a claimant challenging a decision by the federal government not to impose penalties on Manitoba’s for garnishing benefits of a social welfare recipient in apparent breach of the Canada Assistance Plan provisions, the Supreme Court accepted that this form of standing would be available to challenge administrative action and not simply legislation.

Under public interest standing, the test to be applied is threefold:

- (1) is the matter serious and justiciable;
- (2) is the party seeking standing genuinely interested in the matter; and

⁷ *Federal Court Act*, R.S.C. 1985, c.F-7, ss. 18(1) and 28(2).

⁸ See, for example, *Friends of the Oldman River Society v. Association of Professional Engineers, Geologists and Geophysicists of Alberta*, (1997), [1998] 5 W.W.R. 179, rev'd on other grounds 2001 ABCA 107. See also T.A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at 106-108.

⁹ For discussion, see *Alberta Liquor Store Assn. v. Alberta (Gaming and Liquor Commission)* 2006 ABQB 904 at paras. 10-11.

¹⁰ [1986] 2 S.C.R. 607.

(3) is there any other reasonable and effective way for the matter to be adjudicated?¹¹

In *Finlay*, the Court applied this test to grant standing to a recipient of social benefits to challenge the conduct of the Federal Government toward the province of Manitoba under the then Canada Assistance Plan. The applicant raised a serious issue with respect to the legality of the Government's action (or, in this case, its inaction in failing to penalize a province for breaching the conditions of the Plan), and as a recipient of the benefit in question was clearly genuinely interested. Because neither the Federal Government nor the Provinces had an interest in compelling a penalty from the Federal Government, the Court also concluded that there was no reasonable alternative by which the challenge would reach court.

The Court has elsewhere affirmed that the purpose of granting status is to “prevent the immunization of legislation or public acts from any challenge,¹²” and that public interest standing is available in the context of challenges which arise out of administrative tribunals,¹³ but there is some suggestion that the scope of such challenges may be limited to legislative provision and public acts of a legislative character, which would exclude most tribunal decision-making.¹⁴

In contrast to Courts, where the law of standing is governed generally by common law, in the context of tribunals, the scope of standing is set out first and foremost by the statute governing the tribunal. As Robert Macaulay and James Sprague have noted, “There are a number of cases on standing before administrative agencies in Canada, but each of them relies so specifically on the mandating legislation of that agency, or at least upon the interpretation of some judicially-oriented chairperson, that are not really very helpful as a general guide.”¹⁵

David Mullan has observed that the issue of standing before tribunals has become more important as the duty of fairness has been interpreted more expansively in cases such as *Nicholson v. Haldimand Norfolk (Regional) Police Commissioners*¹⁶ One might imagine even more pressure for generous approaches to standing now that the scope of fairness

¹¹ *Ibid.* at 651. This test was developed in a trilogy of public interest standing cases which preceded *Finlay* - see *Thorson v. Canada (Attorney General)*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Canada (Minister of Justice) v. Borowski*, [1981] 2 S.C.R. 575.

¹² *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at para. 252.

¹³ See *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 528.

¹⁴ See *Canadian Bar Assn. v. British Columbia* 2006 BCSC 1342 at para. 41 and 42.

¹⁵ R. Macaulay and J. Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Carswell, 2001(looseleaf)), at 9.7(b)

¹⁶ [1979] 1 S.C.R. 311. See D. Mullan et al, *Administrative Law: Cases, Text and Materials*, 5th ed. (Toronto: Emond Montgomery, 2005), pp. 1247-8.

continues to expand,¹⁷ and tribunal jurisdiction over the *Charter of Rights* has also been approached more generously.¹⁸

Historically, the kinds of tribunals where standing has been an issue were either regulatory tribunals (for example, an energy board or competition tribunal) or tribunals whose decisions touched many people indirectly (for example, a municipal planning board) or labour tribunals (where the rights of some employees may have an impact on a much wider group of employees). In regulatory cases, boards typically work out representative compromises, whereby a ratepayers association or citizens group are granted standing to represent the interests of those indirectly affected by board decisions (these groups will sometimes be referred to as interveners as well). This practice may raise accountability questions as the tribunal rarely inquires into the representative character of public interest groups.

In the labour board setting, standing issues often involve third party employees who are affected by another employee's grievance – for example, where an incumbent employee potentially would be displaced following a successful grievance. Should the incumbent employee be given the opportunity to participate in the grievance to protect her rights? The answer would appear to be “no, except in limited circumstances.”¹⁹ As one labour arbitrator observed, “If the rights of individual employees who are directly or indirectly affected by the outcome of arbitration proceedings were granted standing in all cases where their individual rights were affected, the numbers of potentially affected employees would be quite large, arbitration hearings would become lengthy and more expensive, and employees would come to feel some obligation to be separately represented.”²⁰

As these examples illustrate, the tension between fairness and efficiency is an enduring theme in settings of access to administrative justice. Fairness bounds efficiency concerns in the context of standing and may have the effect of expanding the scope of standing. For example, by extending the scope of those in a tribunal process entitled to fairness, the courts have altered the scope of access. To give one example, in *Taylor v. Canada*, Evans J.A., writing for the Federal Court of Appeal, recognized for the first time that complainants are entitled to a degree of fairness in the disciplinary process affecting judges through the Canadian Judicial Council.²¹

(b) Hearings

The second aspect of the perspective on physical access to administrative justice is how parties will interact with the tribunal. Will the tribunal conduct its process entirely in

¹⁷ See, for example, *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 819.

¹⁸ See *Martin v. Nova Scotia (Workers' Compensation Board)* [2003] 2 S.C.R. 504; *Paul v. British Columbia (Forest Appeals Commission)* [2003] 2 S.C.R. 585. See also the discussion of the *Charter* and administrative law by Evan Fox Decent in this volume.

¹⁹ See *C.U.P.W. v. Canada Post Corp. (Hall Grievance)* (2006), 149 L.A.C. (4th) 306.

²⁰ *Re Royal Victoria Hospital and O.N.A. (O'Dwyer)* (1993), 30 C.L.A.S. 355 (Starkman).

²¹ 2003 FCA 55 at paras. 81 and 82.

writing or will there be an opportunity for a hearing of some kind? The types of proceeding of a tribunal will normally be set out in its empowering statute.²²

While government may not be under a legal obligation to create tribunals, once it has chosen to do so, it may well be under a legal obligation to provide adequate funding to ensure fairness, the rule of law and access to justice before these tribunals. For example, in *Khan v. University of Ottawa*,²³ the Ontario Court of Appeal held that an oral hearing was required in the context of a University proceeding which would determine whether a student would fail a course. The Court found that where a decision affecting significant interests of an individual turns on credibility, fairness requires that individual to have an opportunity to put forward her case in person before the decision-maker. What if the body in question is not a University, however, but a province wide licensing body located in the capital city and the person affected lives in a remote rural community? What if an oral hearing is simply not practicable in the context of a high-volume tribunal? As discussed elsewhere in this volume, the standard of procedural fairness required in a particular case will vary but the standards recognized by administrative law justifying a lesser degree of fairness do not expressly include questions of resources.²⁴

The Ontario Landlord and Tenant Board, among other province-wide bodies, has instituted videoconferencing as a substitute to in-person hearings. On the one hand, this measure provides much greater access to hearings without the long travel time and dislocation previously associated with attending hearings in person. On the other hand, many report disadvantages of a hearing by video, some of which may go to the fairness of the proceeding.²⁵ For this reason, Rule 5.2(2) of the *Statutory Powers Procedure Act (SPPA)*, states that a tribunal *shall not* hold an electronic hearing if a party satisfies the tribunal that holding an electronic rather than an oral hearing is likely to cause the party significant prejudice.²⁶

In addition to the location of hearings, tribunals also face other questions of how to provide access to the public. Is it important that a tribunal have a physical presence at all or will a “virtual” tribunal which is accessible through the internet be sufficient? Is a centralized tribunal with all of its functions in one location preferable to a decentralized tribunal?

These issues arise not as an abstract question of fairness but also as a concrete trade-off involving resources. Videoconferencing, for example, is far less expensive than maintaining an office in remote centres or obtaining facilities for in-person hearings. Of

²² For further discussion on the requirement of hearings in administrative law, see Grant Huscroft’s contribution to this volume.

²³ *Khan v University of Ottawa* (1997), 34 O.R. (3d) 535 (C.A.).

²⁴ See the discussion of *Baker* in Grant Huscroft’s chapter in this volume: in *Baker*, the Supreme Court held that the content of procedural fairness will vary depending on the nature of the decision being made, nature of the statutory scheme, importance of the decision to the people affected, legitimate expectations, and the agency’s choice of procedures.

²⁵ For discussion, see L.Sossin and Z. Yetnikoff, “I Can See Clearly Now: Videoconference Hearings and the Legal Limit on how Tribunals Allocate Resources” (unpublished paper, 2006).

²⁶ R.S.O. 1990, c.S-22.

course, a hearing by teleconference would be even less expensive. The question is when efficiency or cost-cutting measures begin to erode the fairness of a decision-making process.

If access turns, as it must, on resources, then the question will be what, if any, legal considerations constrain the government from reducing the resources available to tribunals. Further, where the legislation, government policies, or funding practices create barriers to access, is it the role of the tribunal to raise this issue? If so, what would be the appropriate venue in which to do so? In its annual report to the legislature? In a tribunal's decisions? In a confidential or public dialogue with government? These questions are explored further below.

2) Access to Administrative Justice: Information and Knowledge

Some would argue that accessing a tribunal itself is far less difficult than accessing the legal expertise necessary to succeed at a tribunal. The way in which a tribunal communicates the information and knowledge necessary to access its services or remedies varies and will rarely be set out in an empowering statute. In this, as in so many areas affecting access to administrative justice, it is the policies of the tribunal itself not the government that will be determinative.

(a) Guidelines

Many tribunals develop guidelines to ensure consistency and to structure discretion.²⁷ Transparency with respect to the standards of decision-making represents an emerging aspect of access to administrative justice. For this reason, it is important that guidelines are developed which set out these standards, and where this occurs, it is equally important that these guidelines are made publicly available. One interesting question is whether it can be said to be a requirement of fairness that a tribunal with significant discretion structure that discretion in some fashion. To date, the farthest a court has been willing to go is to state that where guidelines are in place, it may breach fairness for the decision-making body to ignore those guidelines without justification.²⁸

Because tribunals are bound only by statutory provisions, it is not open to a tribunal to develop binding guidelines of their own initiative.²⁹ This issue has arisen in the context of the Immigration and Refugee Board (IRB).

²⁷ See F. Houle and L. Sossin, "Tribunals and Guidelines: Exploring the Relationships between Fairness and Legitimacy in Administrative Decision-Making" (2006) 46 *Canadian Public Administration* 282 at 294-300. See also the discussion in Andrew Green's chapter in this volume.

²⁸ *Bezaire v. Windsor Roman Catholic Separate School Board* (1992) 9 O.R. (3d) 737 (Div. Ct).

²⁹ See *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* 2000 SCC 69 at para. 85. Because they are not considered binding as law, guidelines are not subject to *Charter* scrutiny. For discussion, see L. Sossin, "Discretion Unbound: Reconciling the *Charter* and Soft Law" (2003) 45 *Canadian Public Administration* 465.

The IRB issued Guideline no 7 in accordance with the legislative authority conferred to the Chairperson of the IRB by section 159 of the *Immigration and Refugee Protection Act*.³⁰ Guideline no 7 - Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division - circumscribes inquiry powers of IRB Members so that they can limit the scope of the inquiry, and as such, be in position to control the conduct of the hearing in order to ensure efficient and speedy determinations of claims. Guideline 7 - “changes the order of questioning by having the Refugee Protection Division (RPD) leading the inquiry in the hearing room. The purpose of this change is to allow the RPD to make the best use of its expertise as a specialist tribunal by focusing on the issues which it has identified as determinative.”³¹

In *Thamotharem v. Canada (Minister of Citizenship and Immigration)*³², Guideline 7 was challenged as a breach of procedural fairness and on the grounds that it fettered the discretion of Board members to decide the order of questioning appropriate to a particular claim. It was raised in the context of a refugee application involving a Tamil student claiming persecution if returned to Sri Lanka. The Federal Court held that Guideline 7 does not violate the Board’s duty of fairness but is an unlawful fetter on the exercise of discretion because Board members often operate as if they are bound by it. The denial of Mr. Thamotharem’s refugee status was quashed on this basis. The Federal Court of Appeal affirmed the Court’s finding with regards to Guideline 7 and the duty of fairness but reversed the aspect of the decision dealing with administrative discretion. It dismissed Thamotharem’s application for judicial review on the basis that Guideline 7 expressly directs members to consider the facts of the particular case before them in order to determine whether there are circumstances warranting a deviation from the standard order of questioning. Also, it was not evident that Board members generally disregarded this aspect of Guideline 7 and unthinkingly adhered to the standard order of questioning. Thus, while transparency calls for tribunals to develop and publicize guidelines on which parties before a tribunal may rely, the principles of administrative law limit the effectiveness of that reliance by requiring that a tribunal not treat its own guidelines as binding.

While guidelines may not be binding, tribunals often do have the authority to issue rules of practice. In Ontario, the *SPPA* provides that, “a tribunal may make rules governing the practice and procedure before it” and also stipulates that where a tribunal does so, it must make those rules available to the public.³³ By these rules, tribunals exercise significant discretion with respect to access, limited only by the requirement that rules of practice be consistent with a tribunal’s enabling statute and where applicable, general procedural

³⁰ S.C. 2001, c. 27, s. 159. (1) The Chairperson is, by virtue of holding that office, a member of each Division of the board and is the chief executive officer of the Board. In that capacity, the Chairperson :
(h) may issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides ...

³¹ Immigration and Refugee Board, *Guideline 7: Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division*, paras 19-23 online:
<http://www.irb-cisr.gc.ca/en/references/policy/guidelines/preparation_e.htm#2>.

³² *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 F.C.A. 198; see also: *Benitez et al v. The Minister of Citizenship and Immigration*, 2007 F.C.A. 199.

³³ Section 25.1. S.O. 1994, c. 27, s. 56 (38).

statutes such as the *SPPA*. Rules of practice will, as a practical matter, determine whether the tribunal is easy or difficult to access. These rules set out the applicable time limits for filing material, the extent of material and disclosure provided, and whether hearings will be in writing, in person or by electronic means.

(b) Simplification

Another important aspect of access to information is simplification. Being provided with forms that are unduly complex or with guidelines that are inscrutable is equivalent to closing the doors to the tribunal. According to the Council of Canadian Administrative Tribunal's report, *Literacy and Access to Administrative Justice*, the following approach should be adopted by tribunals to address the question of access:

Administrative tribunals, like other courts, have to follow the standards set in case law. We can

- make sure, as much as is possible, that our clients understand all the proceedings;
- examine how we deal with low literacy clients and how this can affect fair administration of justice;
- follow the lead of many organizations and use “plain language” in all our communications, written, visual, and spoken.³⁴

Most tribunals are committed to simple and user-friendly forms. Some are going further, investigating services which provide assistance to individuals on how to complete forms and understand the basic process requirements of the tribunal.³⁵

(c) Language

Just as “plain language” may facilitate access, so may the capacity of tribunals to provide services and adjudication in the language spoken by those seeking out the tribunal.

Since *R. v. Tran*,³⁶ the Court has adopted a contextual approach to section 14 of the Charter, which provides, "14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter." The Court noted that the *Charter* right is closely linked to the common law right to a fair hearing – the right to be heard, in other

³⁴ Council of Canadian Administrative Tribunals, *Literacy and Access to Administrative Justice: The Promotion of Plain Language* (2005) <http://www.ccat-ctac.org/en/publications/> at p.12

³⁵ Often, this role will fall to the registrar or other front-line staff of tribunals, but in 2006, Pro Bono Students Canada established an “Administrative Justice” initiative under which law students are recruited to work with tribunals on providing such services.

³⁶ [1994] 2 S.C.R. 951.

words, implies a right to understand the case to be met, which in some circumstances will not be possible unless interpretation and translation services are available.

As Lamer C.J. held, writing for the Court,

Importantly, the underlying principle behind all of the interests protected by the right to interpreter assistance under s. 14 is that of linguistic understanding. The centrality of this principle is evident not only from the general jurisprudence dealing with interpreters, but also more directly from the language of s. 14 itself, which refers to "not understanding or speak[ing] the language in which the proceedings are conducted". The level of understanding protected by s. 14 will, therefore, necessarily be high. Indeed, it has been suggested that a party must have the same basic opportunity to understand and be understood as if he or she were conversant in the language of the court.³⁷

Even in the criminal context, however, it is clear the right to an interpreter is not absolute. To establish a violation of s. 14, the claimant of the right must prove on a balance of probabilities not only that he or she was in need of assistance, but also that the interpretation received fell below the basic, guaranteed standard and did so in the course of the case being advanced. Unless the Crown is able to show on a balance of probabilities that there was a valid and effective waiver of the right which accounts for the lack of or lapse in interpretation, a violation of the right to interpreter assistance guaranteed by s. 14 of the *Charter* will have been made out. In terms of the guaranteed standard, it is not one of "perfection" but rather one of continuity, precision, impartiality, competency and contemporaneousness.

The Court makes clear that not every error of translation or interpretation in the context of an accused will constitute a violation of the *Charter*. Further, the Court holds that the error must be one which goes to the "vital interests" of the accused (and so even a serious problem with translation on a minor point (e.g. a scheduling motion) will not constitute a violation.

It is clear that the standards developed in *Tran* would have to be modified to the contexts of administrative proceedings and that a spectrum of interpretation/translation rights might be more appropriate to these contexts. In *Tran*, Court specifically noted that "I leave open for future consideration the possibility that different rules may have to be developed and applied to other situations which properly arise under s. 14 of the *Charter* -- for instance, where the proceedings in question are civil or administrative in nature."³⁸

³⁷ Ibid. at 977-78.

³⁸ Ibid. at 961.

The right to an interpreter (and, by extension, to translation of relevant material) was considered in *Filgueira v. Garfield Container Transport Inc.*³⁹ In that case, the Canadian Human Rights Tribunal considered its own obligation to provide an interpreter to a complainant alleging discrimination in the workplace. The Tribunal noted that the complainant had a bilingual agent assisting with his case. While this mitigated the complainant's need, and while it was acknowledged that the ruling would have an impact on scarce resources, the Tribunal nonetheless ordered that fairness required that the complainant be provided with an interpreter (for at least part of the hearing).

A judicial review application of the Tribunal's decision in *Filgueira* was dismissed.⁴⁰ In upholding the aspect of *Filgueira* dealing with the right to an interpreter, Hughes J. concluded:

Thus, both the complainant and Respondent/employer, while parties before the Tribunal, are players in a larger endeavour, that of seeking to the removal of discrimination. It is within the discretion of the Tribunal to determine whether such an objective can be fairly achieved in the absence of providing, in whole or during part of the process, translation services into a language other than an official language, at taxpayer's expense, to one or more of the parties.⁴¹

Filgueira is an example of the principles in *Tran* being applied flexibly to the realm of administrative adjudication. While the case law answers the question, in part, as to the legal requirements of interpretation and translation services, it raises a host of others, such as whether tribunals or legal aid or the government or some other service providers should be responsible for interpreter and translation services, and into which languages for which tribunals? Should a government sponsored or administered roster of approved interpreters and translators be established? Some tribunals have undertaken initiatives to translate brochures into languages used by user groups,⁴² but linguistic access remains a significant hurdle for almost all tribunals.

(d) Prior Decisions

One of the most controversial aspects of access is how parties may learn about previous decisions of the tribunal. While privacy concerns make it difficult for some administrative bodies to publish their decisions,⁴³ in most cases making available the tribunal's past decisions is seen as a key aspect of its public interest function. In this

³⁹ August 17, 2005, 2005 [*3] CHRT 32, File No. T952/7204

⁴⁰ 2006 F.C. 785.

⁴¹ *Ibid.* at para. 38.

⁴² The Ontario Landlord and Tenant Tribunal, for example, translates its brochures into Arabic, Chinese, Farsi, Korean, Punjabi, Spanish, Urdu, Tamil, Russian and Vietnamese. See http://www.ltb.gov.on.ca/en/Key_Information/157371.html

⁴³ The Canadian Human Rights Commission, for example, cites privacy concerns as the reason it does not publish its past decisions – see http://www.chrc-ccdp.ca/media_room/caselaw_info_jurisprudence-en.asp (accessed April, 2007).

sense, it is analogous to the rule that, absent circumstances justifying confidentiality, all tribunal proceedings should be open to the public, and documents used in those proceedings should be available to the public.⁴⁴ The practice with respect to publishing decisions is uneven. Some tribunals publish all of their decisions in an easily searchable form.⁴⁵ Still others publish anonymized versions of only those previous decisions determined to be of general significance.⁴⁶ There are at least some tribunals who charge a fee to access earlier decisions, which appears to impose a financial burden to the process of learning the standards applied by a tribunal.

Unlike a court, tribunals are not bound by their earlier decisions. Many tribunals in practice, however, aim for consistency and will treat previous decisions as strongly influential over similar disputes. For this reason, making available prior decisions could plausibly be seen as an element of fairness and as part of the requirement that parties before the tribunal should know the “case to meet.”

For all of these reasons, access to administrative justice includes access to sufficient legal and institutional knowledge.

(3) Access to resources needed to navigate the tribunal system

Access to administrative justice is not just a matter of obtaining the necessary information, of course, but as noted above, access is also a matter of resources. This attention to financial barriers is particularly important in the context of vulnerable parties. There are several ways in which an absence of resources may create barriers to access. Below, I address three potential barriers: legal representation, fees and costs, and the budgeting and staffing of tribunals.

(a) Legal Representation

The first and most significant impact of resources is the availability of adequate legal representation. In the criminal justice sphere, a right to state-funded legal representation has been long recognized. In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*,⁴⁷ the Supreme Court of Canada affirmed that the constitutional right to legal assistance extends beyond settings where the jeopardy of an individual is concerned. In that case, the New Brunswick Minister of Health and Community Services was seeking an extension of custody of a mother’s three children for a six month period. The mother was indigent and receiving social assistance. She applied for legal aid but was turned down because at the time custody applications were not covered under the legal aid guidelines in New Brunswick. The Court recognized a constitutional obligation

⁴⁴ See, for example, sections 41 and 42 of the British Columbia’s *Administrative Tribunals Act* S.B.C. 2004, c.45. See also the discussion of this legislation in Christie Ford’s chapter in this volume.

⁴⁵ See, for example, the Alberta Labour Relations Board at <http://www.alrb.gov.ab.ca/decisions.html> or the Ontario Information and Privacy Commission at <http://www.ipc.on.ca/index.asp?navid=62> which allows for the public to search prior decisions both by subject and by name.

⁴⁶ See, for example, Ontario’s Social Benefits Tribunal. http://www.sbt.gov.on.ca/userfiles/HTML/nts_1_7_1.html (accessed April, 2007)

⁴⁷ [1999] 3 S.C.R. 46.

on the New Brunswick government to provide state-funded counsel in the particular circumstances of that case.

While the principle in *G.(J.)* has potential application in the context of administrative tribunals, the reach of constitutionally mandated legal aid may be modest. That said, many provincial legal aid statutes fund legal representation before administrative tribunals. For example, in Ontario, those committed to psychiatric facilities who appear before the Ontario Review Board to argue for release are covered by legal aid certificates, while specialty clinics provide limited representation for eligible claimants before the Social Benefits Tribunal, the Landlord and Tenant Tribunal and other administrative bodies.

Access to justice, however, does not always depend on access to lawyers. The availability of paralegal assistance, the development of self-help support networks and resources, all may play a role in the administrative justice sphere.

(b) Fees and Costs

The second way in which resources may affect access is through user fees or other costs associated with a tribunal's process.

(i) Fees

Tribunals may be funded in a variety of ways. Regulatory tribunals are sometimes self-funded, whereby the tribunal levies an assessment on regulated individuals or organizations and funds its adjudicative operations on the basis of these levies. Consider the example of energy boards. The National Energy Board received 90% of its funding from industry levies with the remaining 10% coming from the Federal Government. In Alberta, the Government pays for close to 50% of the Alberta Energy and Utilities Board's operations while industry levies pay the rest. In British Columbia and Ontario, energy boards are entirely self-funded.⁴⁸

While most adjudicative tribunals are free to the parties,⁴⁹ the practice of charging fees is attracting increasing attention. The British Columbia *Administrative Tribunals Act* provides the Government with the power to make regulations setting out the fees associated with filing applications before tribunals.⁵⁰ These fees can range from the

⁴⁸ See Ontario Energy Board, *Survey of Regulatory Cost Measures* (September 2006) www.oeb.gov.on.ca/documents/abouttheoeb/corpinfo_reports/rcm_surveyreport-elenchus_120906.pdf (accessed April 2007).

⁴⁹ "Filing a Complaint" The Canadian Human Rights Commission online: <http://www.chrc-ccdp.ca/complaints/filing_complaint-en.asp>. "Frequently Asked Questions" The Social Benefits Tribunal online: <http://www.sbt.gov.on.ca/userfiles/HTML/nts_1_63_1.html#187>.

"Worker Forms" The Ontario Workplace Safety and Insurance Board online: <<http://www.wsib.on.ca/wsib/wsibsite.nsf/public/FormsWorkers>>.

"Forms and Rules: Form 1 – Application" The Ontario Pay Equity Hearings Tribunal online: <http://www.labour.gov.on.ca/pec/peht/peht_forms.html>.

⁵⁰ *Supra* at s.60(c).

\$25.00 per complaint filing fee charged by the Ontario Assessment Review Board to the \$50,000.00 per merger notification filing fee charged by the federal Competition Bureau.

Fees of any size have the potential to pose a barrier to access to administrative justice. This is even more relevant in the field of administrative justice since low-income individuals are more likely to have interactions with administrative decision-makers than courts. In *Polewsky v. Home Hardware Stores Ltd.*,⁵¹ the Ontario Divisional Court recognized that the constitutional principle of access to justice required that small claims court fees be waived in the context of an individual who otherwise would not be able to bring a case to court. Similarly in *Pearson v. R.*,⁵² the Federal Court held that the provision of the *Federal Court Act* which, in special circumstances, allows the Court to disregard its Rules,⁵³ should be interpreted so as to allow the court to exempt impecunious parties from having to pay filing fees. In so doing, Muldoon J. observed,

The rule of law is a feature of the law, of at least the common-law parts of Canada, and has been such since long before the adoption of the Charter, as demonstrated in part by Prof. Dicey's learned writings. So, indeed, is that precept of the rule of law - the equality of civil rights among all who claim the benefit of the sovereign's peace, in truth all the inhabitants, whether citizens or not. That which is by law reserved for poor folk - taking Court proceedings "in forma pauperis" - is a civil right and therefore available to the plaintiff herein, on even the bare evidence which he has provided in order to qualify for taking his court proceedings "in forma pauperis".⁵⁴

While administrative tribunals do not necessarily give rise to these same common law civil rights, the Court's approach of interpreting its statutory rules so as to provide discretion to ensure that fees do not bar access would likely be applied in an analogous fashion to the rules or enabling statute of a tribunal.⁵⁵ Consider, for example, the Landlord and Tenant Board which charges filing fees but does not offer fee waivers.⁵⁶

The unwritten constitutional principle of "access to justice" was described by Dickson C.J. in *British Columbia Government Employees' Union v. British Columbia (Attorney General)* (a case concerning the constitutional validity of an injunction issued by the Court to clear the courthouse steps of picketers during a public service strike) in the following terms:

⁵¹ (2003) 109 C.R.R. (2d) 189 (Ont. Div. Ct.).

⁵² [2000] 195 F.T.R. 31.

⁵³ *Federal Court Act*, s.55.

⁵⁴ *Ibid.* at para. 14. The principle in *Pearson* recently received positive treatment in both *Spatling v. Canada (Solicitor General)* [2003] F.C.J. No. 620, and *Pieters v. Canada (Attorney General)* 2004 F.C. 1418.

⁵⁵ In *McKenzie v. B.C. (Minister of Public Safety) et al.*, 2006 BCSC 1372, for example, the rule of law concept developed in the context of civil courts was applied to the setting of a reappointment to an administrative tribunal. (note: this decision is under appeal).

⁵⁶ "Landlord and Tenant Fees" Landlord and Tenant Board online:
<http://www.ltb.gov.on.ca/en/Key_Information/STEL02_111530.html>.

Let us turn then to s. 52(1) of the Constitution Act, 1982 which states that the Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Earlier sections of the *Charter* assure, in clear and specific terms, certain fundamental freedoms, democratic rights, mobility rights, legal rights and equality rights of utmost importance to each and every Canadian. ... Of what value are the rights and freedoms guaranteed by the *Charter* if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them? How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the *Charter* if court access is hindered, impeded or denied? The *Charter* protections would become merely illusory, the entire *Charter* undermined.

There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.⁵⁷

Access to justice is no less imperative in tribunals than courts. Unlike judicial independence, which is an unwritten constitutional principle applying uniquely to courts,⁵⁸ access to justice likely has broader application to all adjudicative proceeding in which rights and interests are at stake, and especially to those with jurisdiction over the *Charter*.

In *Christie v. British Columbia* it was argued that a tax on legal services, like pickets, prevents people from accessing the courts and tribunals and thus violates the right to access justice. The trial judge held that access to justice is a fundamental constitutional right and that taxation on a fundamental right which denies service to low income persons unjustifiably violates s.7 of the *Charter*. The Court of Appeal affirmed this decision and, in fact, went further, holding that because the right to access justice is held by all, the tax should not be levied on *any* legal services which determine rights and obligations, whether before courts or tribunals, and should be struck down for *all* citizens, not just the less affluent.⁵⁹

The provincial attorney general successfully appealed this decision to the Supreme Court which held that not every limit on access is unconstitutional. The Constitution does not mandate a *general* right to legal representation as an aspect of, or precondition to, the rule of law. Rather, the right to counsel is limited to instances where life, liberty and security of the person are affected as is demonstrated by sections 7 and 10(b) of the *Charter*.⁶⁰ The decisions of the lower courts were reversed.

⁵⁷ *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 at 229-30.

⁵⁸ See *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] S.C.R. 781, at para. 24.

⁵⁹ (2005), 262 D.L.R. (4th) 51, 2005 BCCA 631 (B.C. C.A.).

⁶⁰ Section 10(b) of the *Charter* provides that everyone has the right to retain and instruct counsel, and to be informed of that right "on arrest or detention".

(ii) Costs

In addition to the question of fees, there has also been growing concern over the issue of costs in the context of tribunal adjudication and the effect of costs on access to administrative justice. Where the tribunal is deciding a dispute between two or more parties, should the winning parties be able to claim costs against the losing parties as in civil courts? Should the tribunal itself ever be in a position to recover costs? What should be the consequences where a party is unable to pay costs?

The British Columbia *Administrative Tribunals Act* expressly provides for tribunals to develop their own costs regimes:

Power to award costs

47 (1) Subject to the regulations, the tribunal may make orders for payment as follows:

- (a) requiring a party to pay part of the costs of another party or an intervener in connection with the application;
- (b) requiring an intervener to pay part of the costs of a party or another intervener in connection with the application;
- (c) if the tribunal considers the conduct of a party has been improper, vexatious, frivolous or abusive, requiring the party to pay part of the actual costs and expenses of the tribunal in connection with the application.

(2) An order under subsection (1), after filing in the court registry, has the same effect as an order of the court for the recovery of a debt in the amount stated in the order against the person named in it, and all proceedings may be taken on it as if it were an order of the court.⁶¹

One of the first decisions of a tribunal considering a costs regime developed pursuant to this section was *BC Vegetable Greenhouse I, L.P. v. BC Vegetable Marketing Commission*.⁶² This case concerned an application to the British Columbia Farm Industry Review Board (FIRB) by the BC Vegetable Marketing Commission (the Commission) and BC Hot House Foods Inc. (BC Hot House) for an order that BC Vegetable Greenhouse I L.P. (BC Vegetable) pay their costs incurred during BC Vegetable's appeal of a Commission Order that required BC Vegetable to remit to the Commission \$376,642 in outstanding levies. Some of BC Vegetable's grounds of appeal were unsuccessful or abandoned during the proceeding and the tribunal generally found the conduct of the company to have rendered the proceeding more costly than it should have been. The FIRB Panel ordered BC Vegetables to pay the costs of the other parties (but not the FIRB's, although that option would have been open to the Board as well). This decision suggests that where costs are available, unless otherwise circumscribed by a tribunal's enabling legislation, the applicable principles will be similar to those developed in the

⁶¹ Supra. See also s.17.1 of the *SPPA*.

⁶² [Farm Industry Review Board, May 20, 2005.](#)

civil courts, with the exception of the potential for liability on the part of losing parties to pay costs directly to the tribunal. What remains undeveloped is whether the availability of costs will discourage parties to bring disputes to tribunals or dilute the notion of the public interest jurisdiction underlying all administrative tribunal mandates.

(c) Budget and Staffing

The third area where resources play a role is with respect to the budget and staff allocation of the tribunal. This is a controversial area for administrative law as budgetary issues are usually seen under the rubric of public administration rather than within the sphere of administrative law. Could a court ever compel the government against its will to fund or organize a tribunal differently? The notion seems paradoxical. After all, tribunals are established as a matter of government policy through empowering legislation. There is nothing preventing a government from changing the mandate of a tribunal or repealing it altogether. How, then, could it be unlawful for the government to decide its level of funding or staffing?

While it is true that tribunals are creatures of public policy, once established, and once the rights and interests of people depend on the fairness and reasonableness of that body's decision-making, then the duty of fairness clearly imposes constraints on government, as discussed above in the context of the requirement to hold an oral hearing in *Khan*. Perhaps the best known example of this dynamic is *Singh v. Canada*,⁶³ in which the duty of fairness was held to require that the federal government provide oral hearings for refugee claimants. This decision resulted in significant expenditures for government and the reorganization of the entire refugee determination process. In *2747-3174 Quebec Inc. v. Quebec (Regie des permis d'alcool)*,⁶⁴ the Court contemplated ordering the Government of Quebec to reorganize a liquor board on independence grounds. In *Suresh v. Canada*,⁶⁵ dealing with security certificates, fairness obligations were said to constrain the ability of the government to shield disclosure of national security documents. All of these constraints implicitly may impose resource obligations on Government. Courts have yet to consider the corollary issue of whether fairness could be compromised by a tribunal which is provided inadequate funding to fulfill its statutory mandate and/or to provide fair proceedings.

Some years ago, during research on how administrative independence is experienced by decision-makers in the field of humanitarian and compassionate exemptions under the *Immigration and Refugee Protection Act*, I was surprised to learn that from the perspective of decision-makers, their independence was compromised by the requirement that a certain number of cases be “cleared” each week. This clearance rate was a product of the volume of applications and the limited number of staff assigned to these units within Citizenship and Immigration Canada. The result, these decision-makers asserted,

⁶³ [1985] 1 S.C.R. 177.

⁶⁴ [1996] 3 S.C.R. 919.

⁶⁵ 2002 SCC 1.

was to limit their ability to conduct interviews, to research a file, and to consider and deliberate on the evidence provided.⁶⁶

This focus on the lived experience of decision-makers also raises the broader issue of how decision-makers are selected (Whether on a merit principle, by political appointment or some hybrid of the two). Is access to a tribunal compromised where decision-makers are viewed as extensions of the government of the day? Is access enhanced where a tribunal is representative, in the sense that the demographic make-up of members and staff reflects the community and/or user groups of the tribunal?

The line between public administration and administrative law is clearly blurring. It is no longer possible (or desirable) to exclude significant government discretion over how administrative bodies are designed, funded and governed from the purview of administrative law principles. Where these dynamics can be tied to the fairness of a decision-making process or the reasonableness of a decision, they cease to be matters of policy preference alone.

Conclusions

Administrative tribunals are established for a variety of purposes but most would include the following rationale:

- ❖ To resolve disputes or reach decisions on the basis of specialized expertise;
- ❖ To resolve disputes or reach decisions in a more informal and expeditious fashion, thereby reducing costs to the parties; and
- ❖ To resolve disputes in a fashion both at arm's length from the government and advancing the policy mandates set out in the applicable legislation.

Accessibility is consistent with all of these purposes. Accessibility may challenge another key value, however, and that is the scarce resources of government. Accessibility, whether in the form of more and better facilities, more and better information for parties, or more and better representation services, all require resources, and given the high volume of some tribunals, the resource implications may be quite substantial.

In addition to resources, access may also depend on how a tribunal accommodates the unequal power and resources between parties. For example, consider a social benefits tribunal, where often unrepresented welfare recipients face Ministry representatives. How can a decision-maker remain impartial on the one hand while insuring a sufficiently level field on the other? This is a challenge familiar to courts as well, particularly in areas such as family law where power imbalances and self-represented litigants are common. An aspect of this balancing exercise that is unique to administrative tribunals is the added feature that many tribunals are established precisely so as to empower vulnerable

⁶⁶ For a discussion of this research and its findings, see L. Sossin, "From Neutrality to Compassion: The Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion" (2005) 55 *University of Toronto Law Journal* 427.

individuals. In the case of social benefits tribunals, for example, the whole purpose of these tribunals would be undermined if those whose benefits are wrongfully taken away cannot, in practice, access the tribunal.

Access also will involve the balance between fairness and efficiency. It might be optimal for a high-volume tribunal such as a landlord and tenant tribunal to have facilities in every major population centre. It will be more efficient, of course, to maintain fewer facilities but invest in new technologies such as videoconferencing which allow for far greater numbers to have access to dispute resolution. At what point does the pursuit of efficiency erode the fairness of the proceeding? This is precisely the question which administrative law will increasingly have to address.

As important as access is to the parties in administrative justice, it is largely uncharted territory for administrative law. The duty of fairness, for example, typically has not included a concern for the simplicity of forms, the transparency of guidelines or the adequacy of a tribunal's database of prior decisions? The logic of fairness, however is that it must be viewed from the standpoint of those affected by decision-making, and from this perspective, accessibility and fairness are inextricably linked.

Finally, the analysis thus far has assumed access relates to process. Access to justice, however, includes not just being able to understand, navigate and participate in a tribunal's decision-making, but also presupposes that the tribunal will deliver administrative justice of high quality. In this sense, access to administrative justice extends not just to standing, guidelines, fees and representation, but also extends to whether decisions are well-reasoned and delivered in a timely fashion. Access may also extend to whether decision-makers are appointed under a competitive merit-based process.

The purpose of this chapter has been to introduce issues of access to administrative justice and to show how integrated such questions are with the broader principles of administrative law on the one hand, and the everyday practice of diverse tribunals on the other hand. Ultimately, this analysis leads to a challenge for administrative law, to do justice to questions of access both as part of traditional fairness determinations and as an emerging, independent aspect of the legal framework within which tribunals are established and operate. The many implications of this new focus on access to administrative justice remain to be elaborated.