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# Reflections on the U.K. Tribunal Reform: A Canadian Perspective

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## Reflections on the UK Tribunal Reform from a Canadian Perspective

Lorne Sossin\*

I have been following the United Kingdom reforms with interest, and in particular, the journey Lord Justice Carnwath has been pursuing with the Tribunal community in the United Kingdom (UK). The establishment of a unified Tribunals system arose out of a desire to bring tribunals more expressly under the umbrella of the justice system in order to better serve parties coming before those tribunals. The rationales for the UK reform were set out in a 2001 review conducted by Sir Andrew Leggett — “Tribunals for Users — One system One Service”.<sup>1</sup>

The resulting legislation, *The Tribunals, Courts and Enforcement (TCE) Act 2007*, created a “Tribunals Service” and a Senior President of Tribunals (presently Lord Justice Carnwath). The legislation also put in place a flexible tribunals structure, which permitted tribunals outside the Ministry of Justice to transfer into the new system, as well as allow new jurisdictions to be added. According to the Tribunals Service, the primary objective in making these changes is to improve the Tribunal Services provided to “customers” in the following ways: “making clear the complete independence of the judiciary, and their decisions making, from government; speeding up the delivery of justice; making processes easier for the public to understand; and bringing together the expertise from each Tribunal.”<sup>2</sup>

I would like to offer a Canadian perspective on the UK tribunal reform, and to do so in light of new legislation in Ontario, *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*.<sup>3</sup> Until this legislation, and analogous legislative initiatives in Alberta in 2008 and in B.C. in 2004, Canadian administrative tribunals existed largely in isolation from one another. Each was created pursuant to a legislative mandate, housed within a different ministry, and subject to disparate approaches to staffing, budgeting and administration. Some have Chairs who were also CEOs while others had separate Chairs and CEO. Some have full-time members; others part-time members, and some both. The subject matter of these tribunals could not be more disparate — as LeBel J. famously remarked in *Blencoe v.*

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<sup>1</sup> (August 16, 2001), available online: Review of Tribunals <<http://www.tribunals-review.org.uk/>>.

<sup>2</sup> Online: Tribunals Service <<http://www.tribunals.gov.uk/tribunals/about/about.htm>>.

<sup>3</sup> S.O. 2009, c. 33, Sch. 5. I served on an advisory committee during the development of the legislation. Also, while I am a Vice-Chair of HPARB/HSARB, my views are not their views. I am grateful for discussions with several people regarding this new legislation, including Raj Anand, Jamie Baxter, Ron Ellis, Doug Ewart, Michael Gottheil, and Laverne Jacobs. Responsibility for all the perspectives in this comment remains, of course, my own.

*British Columbia (Human Rights Commission):*<sup>4</sup>

[N]ot 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. Thus, inevitably, a court's assessment of a particular delay in a particular case before a particular administrative body has to depend on a number of contextual analytic factors.<sup>5</sup>

Yet, from the standpoint of the parties coming before these varied tribunals for adjudication, the issues are remarkably similar — the desire for fair, accessible, independent and high quality justice. Finding the balance between the necessary and desirable diversity of tribunals on the one hand, and the necessary and desirable commonality between all tribunals on the other, has animated most debates within the administrative justice community over at least the past two decades.

In light of this tension, the goal of many for a long time has been to view administrative justice as a “system” with systemic needs, in addition to simply an aggregation of various separate tribunals.<sup>6</sup> Canada's administrative tribunals, for the moment, are a far cry from an administrative justice system. They are first and foremost divided by jurisdiction. Canada features federal tribunals, provincial and territorial tribunals, as well as municipal and aboriginal tribunals. Within each jurisdiction, tribunals are further fragmented by statutory mandate and supervisory ministry, by policy context and stakeholders, by inquisitorial and adversarial models, and by subject area expertise.

While fragmentation remains the norm, a shift in thinking about administrative tribunals has been occurring in Canada, with more substantial changes, I believe, on the horizon. In B.C., for example, the 2004 *Administrative Tribunals Act* advanced a more coherent approach to statutory standards of review across the whole spectrum of provincial adjudicative tribunals.

In Ontario, the Liberal Government, first elected in 2003, set about rationalizing compensation and creating remunerative categories across the sector; and established uniform appointment procedures, such as a first appointment of two years, followed by a possible renewal for a further three years and a final renewal for a five-year term. The Ontario Government similarly made a commitment to advertise all openings and for merit-based selection.

The new Ontario Act, among other changes, entrenches the commitment both to merit-based appointments and to adjudicative independence. Beyond this, the new Act sets out obligations on all tribunals to develop and disseminate specified accountability documents, including service standards, conflict of interest and ethi-

<sup>4</sup> (2000), 2000 SCC 44, 2000 CarswellBC 1860, 2000 CarswellBC 1861, [2000] 2 S.C.R. 307 (S.C.C.).

<sup>5</sup> *Ibid.* at para. 158.

<sup>6</sup> See L. Sossin, “The Ambivalence of Administrative Justice in Canada: Does Canada Need a Fourth Branch?” in *Lamer: The Sacred Fire*, D. Jutras and A. Dodek, eds. (2009) 46 Sup Ct L Rev 51–75.

cal conduct rules and a memorandum of understanding between the tribunal and ministry setting out the roles and responsibilities of each in the administration of the tribunal.

While arguably not its intent, by articulating a new series of shared obligations, the Act, in my view, contributes in a significant way to making the administrative justice *system* a reality. For example, once a shared template for codes of conduct is mandated, a shared administrative model for investigating complaints becomes possible, and I would suggest, necessary. Thus, a natural next step following this Act in Ontario may well be an “administrative council” for peer adjudication of complaints into the ethical conduct of adjudicators and regulators.

The shared template for tribunals also highlights the need for shared education and training across the administrative justice sector. Given the mix of part-time and full-time members on the one hand, and the mix of legally trained and non-legally trained on the other, providing some organizing principles for all adjudicators to call their own is a key step both in enhancing the quality of decision-making and in the development of an administrative justice system. For now, the patchwork of organizations with a mandate to provide education tailored to adjudicators, like the Society of Ontario Adjudicators and Regulators (SOAR),<sup>7</sup> struggle without government funding or the capacity to meet the diverse needs of the sector. The lack of capacity for educating adjudicators stands in stark contrast to the leadership Canada has shown in judicial education through the development of the National Judicial Institute (NJI).

The Ontario legislation not only suggests the need for shared training and education, but also expressly contemplates tribunals clustered to provide other shared benefits and efficiencies. The Act creates the legislative authority for the development of what are referred to as “clusters”. Clusters bring together two or more tribunals into a shared administrative and governance structure. Clusters differ from amalgamations and mergers of tribunals (with which Ontario also has some experience), in that clusters seek to gain benefits and efficiencies of collaboration (through co-location and shared payroll, for example) without losing the diversity and distinctiveness of individual tribunals.

Ontario’s first cluster — the Environmental and Land Tribunals of Ontario (ELTO), which includes the Ontario Municipal Board, the Assessment Review Board, the Environmental Review Tribunal and Conservation Authority — is headed by an Executive Chair (a new statutory position), with the incumbent Chairs of each tribunal becoming Associate Chairs. In August of 2010, a second cluster was announced, consisting of the Human Rights Tribunal of Ontario, the Child and Family Services Review Board, the Custody Review Board, the Social Benefits Tribunal, Social Assistance Review Board, Special Education Tribunals (English and French), and the Landlord and Tenant Board.

Tribunal clusters are not defined in the Act and the concept within administrative law is a flexible one. The New Zealand Law Commission undertook a study of clustering tribunals and attempted to develop the following functional definition for

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<sup>7</sup> In November of 2010, SOAR and Osgoode Hall Law School announced a partnership with the goal of collaborating to expand the reach of adjudicative education throughout the tribunal and regulatory sector.

clustering:<sup>8</sup>

We should also emphasize that there is no abstract definition of the concept of a cluster. The idea of a cluster does not compel any particular level of integration or sharing of services . . . Rather, the cluster model can be designed in a nuanced way, reflecting the level of connectedness that is desired for each different cluster. We stress too that the extent of connection need not be the same for each cluster within the reform. There may, for example, be one cluster where the tribunals are closely connected in terms of common membership and procedures. This cluster may even merge some of the individual tribunals' jurisdictions. On the other hand, another cluster could be a far looser grouping, with individual tribunals maintaining their own identities, sharing fewer members and having greater procedural variance among themselves.

The very idea of a cluster is grounded in the separate legal identities of the individual tribunals that make up the group. Contrasted with a growing international trend toward tribunal amalgamation at the national and sub-national levels,<sup>9</sup> we can say that clusters may be designed to produce some of the same procedural outcomes as a unified tribunal service of the kind pursued in the UK, but that they are not necessarily motivated by a desire to work each element into an increasingly homogenous whole. A key consequence of this approach is that at least part of a tribunal cluster's purpose is to carry over the best practices and the substantive knowledge and expertise of its constituent tribunals as the basis for coherent change across the entire cluster.<sup>10</sup>

While a cluster usually is based on shared expertise, a unified tribunal service of the kind pioneered by the UK combines tribunals that share little in the way of common expertise. The U.K. *Tribunals, Courts and Enforcement Act 2007* established a generic First-tier tribunal with jurisdiction over a wide range of subject areas previously dealt with under separate tribunals with separate legislative authority. An Upper Tribunal was also established under this Act to deal with appeals from the First-tier tribunal. The First-tier Tribunal is currently divided into six chambers:

- General Regulatory Chamber;
- Social Entitlement Chamber;
- Health, Education and Social Care Chamber;
- War Pensions and Armed Forces Compensation Chamber;
- Tax Chamber; and
- The Immigration and Asylum Chamber.

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<sup>8</sup> Law Commission of New Zealand, *Tribunal Reform* (Wellington: 2008) at 54-55. In its most recent report of October 2008, the Law Commission explores several models for reform and makes some initial recommendations as to its preferred option of a unified tribunal service.

<sup>9</sup> Rachel Bacon, "Amalgamating Tribunals: A Recipe for Optimal Reform" (Ph.D. Thesis, Faculty of Law, University of Sydney, April 2004) at 51.

<sup>10</sup> See Robin Creyke, *Tribunals in the Common Law World* (Sydney: Federation Press, 2008) at 198.

What remains a puzzle, and a key one for this discussion, is whether the Ontario approach is a step along the way to a UK-style Tribunal Service, or whether the UK Tribunal Service “chambers” will result, ultimately, in subject area clustering of a kind closer to the Ontario model.

Some clues may be derived from the 1989 UK report on “Enforcing Planning Control”, in which Robert Carnwath argued for combining the fragmented aspects of “environmental protection” in a single review body, and observed the value of integrating these into the same system that reviews planning decisions.<sup>11</sup> It is particularly interesting to note that Carnwath focused on the need for better enforcement of environmental laws as they applied in cases primarily concerned with land use planning. Emphasized much less, if at all, was the development of coherent and comprehensive jurisprudence cross-fertilized by perspectives from land and environment areas.<sup>12</sup>

It is worth noting that while the precise nature and scope of tribunal clusters in Ontario remains a work in progress, clusters suggest a clear (and, I believe, inexorable) progression toward integration and away from isolation. As clusters cut across ministries, it will seem only natural that tribunals should be defined according to their connection with administrative justice, and not their connection to a particular ministry or minister. As in the UK, the logic of a single ministerial umbrella extending across the tribunal sector as a whole may be inescapable. The UK Tribunals Service may or may not be the destination of reform in that jurisdiction, but the Ontario clusters are almost certainly just a stop on a longer journey for Canadian administrative justice.

In short, this Act ultimately may be more notable for what it makes possible than for what it achieves.

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<sup>11</sup> Robert Carnwath, *Enforcing Planning Control* (London: H.M.S.O., 1989).

<sup>12</sup> *Ibid.*, quoted in Sir Henry Woolfe, “Are the Judiciary Environmentally Myopic?” (1992) 4 J Envtl L 1 at 12.