Tribunals for Access to Justice in Canada

Abstract: Tribunals have great potential to improve access to justice in Canada, and the goal of this article is to better understand this potential. It begins by defining "tribunals" and "access to justice," the key concepts of this article. Because tribunals and trial courts are functional alternatives for the resolution of many legal disputes, the article first reviews the merits of trial-level courts in this regard. It then turns to tribunals, reviewing some objective evidence of tribunal excellence in creating access to justice.

Four key attributes of tribunals make them advantageous alternatives to trial-level courts for the accessible and just resolution of many types of legal dispute. First, tribunals are specialized instead of having general jurisdiction. Second, tribunals apply teamwork to dispute-resolution, instead of assigning all responsibility to individual adjudicators. Third, healthy forms of accountability are easier to establish in tribunals than they are in courts. This includes accountability of individual members to the tribunal and accountability of the tribunal to the legislature that created it. Finally, tribunals can be designed for maximal performance in creating access to justice, by contrast to courts which, for good reasons, resist design or reform efforts coming from outside themselves.

The final Part of the article argues that tribunals can advance access to justice not only by taking on dispute-resolution work that courts would otherwise do, but also by offering authoritative legal vindication of rights that would otherwise be abandoned, or resolved in a completely privatized way. The tribunal promise of accessible adjudication can also be expected to improve the quality of settlements, in terms of upholding parties' substantive legal rights.

1. Introduction

Every year, hundreds of thousands of people have their legal rights determined at Canada's tribunals. Tribunals are administrative decision-makers that resolve legal disputes, within specialized spheres of jurisdiction assigned to them by law.[1] The highest-volume tribunals are the provincial landlord and tenant boards, the federal immigration and refugee appeal tribunals, and entities at both levels of government hearing disputes about pension, insurance, and welfare benefits. Hundreds of lower-volume tribunals also exist, addressing disputes over everything from alcohol licenses to zoos.

The disputes that come before Canadian tribunals are often very important.[2] The appeal divisions of the Immigration & Refugee Board, for example, must try to ensure that all those (and only those) who are legally entitled to stay in Canada are allowed to do so. The rental housing tribunals must apply the law to decide who will lose, and who will keep, their

[1] For an explanation and defence of this definition, see section 1.1, below.

[2] Lorne Sossin & Mark Friedman, ''Charter Values and Administrative Justice" (2014) 67 The Supreme Court L Rev: Osgoode's Annual Constitutional Cases Conference at 392.

homes.[3] The benefits tribunals must seek to get money from governments and insurers to all those, and only those, who are legally entitled to receive it.

Some Canadian tribunals have encountered serious difficulties in carrying out their work. Several of Ontario's high-volume tribunals struggled badly after 2018, after a newly-elected government de-appointed their members *en masse*.[4] Across the country, there are concerns about tribunals' capacity to impartially deliver justice to those who challenge governments or government-favoured parties.[5]

Nevertheless, tribunals have enormous potential to improve access to justice in Canada. The best of them consistently bring about speedy, affordable, and substantively just resolutions. They ensure that parties -- including self-represented parties – are truly heard by officials who are truly impartial. If strong tribunals were to take on and excel in new spheres of dispute-resolution jurisdiction, then access to justice in this country would be faster, more certain, and more affordable. Courts' caseloads might also be partially transferred to tribunals, letting them deliver more timely justice for the cases that remain.

The goal of this article is to identify the inherent potential advantages of tribunals, in terms of creating access to justice for Canadians. Part 1 defines "tribunals" and "access to justice," the key concepts of this article. It also identifies merits of trial-level courts for the accessible and just resolution some legal disputes. This sets up a functional comparison between courts and tribunals in terms of creating access to justice.

Part 2 reviews some objective evidence of tribunal excellence in creating access to justice. It then sets out four attributes of tribunals that make them advantageous alternatives to trial-level courts for the accessible and just resolution of many types of legal dispute. First, tribunals are *specialized* instead of having general jurisdiction. Second, tribunals are better positioned to take a collegial team approach to resolving disputes, instead of assigning all responsibility to individual adjudicators. Third, healthy forms of *accountability* are easier to establish in tribunals than they are in courts. This includes accountability of individual members to the tribunal and accountability of the tribunal to the legislature that created it. Finally, tribunals can be *designed* for maximal performance in creating access to justice, by contrast to courts which, for good reasons, resist design or reform efforts coming from outside themselves.

Part 3 seeks to go beyond the comparison to courts that has structured much of the scholarly discourse on tribunals. Tribunals can advance access to justice not only by taking on dispute-resolution work that courts would otherwise do, but also by offering authoritative legal vindication of rights that would otherwise be abandoned, or resolved in a privatized and

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[3] A tenant loses their home if they are evicted by a residential tenancy board. A small landlord can lose their home to a mortgage lender if a residential tenancy board refuses to evict a non-paying tenant.

[4] Tribunal Watch Ontario, "Justice Denied: The Access to Justice Crisis at Tribunals Ontario", (14 December 2022), online: *Tribunal Watch Ontario* <https://tribunalwatch.ca/wp-content/uploads/2022/12/Dec-14-2022-Statement-PDF.pdf>; Noel Semple, "The Inaccessibility of Justice in Ontario's Adjudicative Tribunals: Symptoms and Diagnosis" (2024) Forthcoming, Toronto Metropolitan University Law Review, online: <https://papers.ssrn.com/abstract=4613080>.

[5] E.g. *CBABC Position Paper on the Civil Resolution Tribunal Amendment Act, 2018 (Bill 22) Prepared by: Canadian Bar Association, BC Branch May 8, 2018*, by CBABC.

invisible way that abandons the goals of public justice. The tribunal promise of accessible adjudication can also be expected to improve the quality of settlements, in terms of upholding parties' substantive legal rights.

1.1. What are tribunals?

The word "tribunal" will be defined, for present purposes, as any administrative decision-maker that is mandated by law to resolve a specific class of disputes by applying the law to them, *except for* entities recognized in Canadian law to be courts.[6] Some tribunals hear appeals of state decisions; others hear enforcement charges brought by state law-enforcement bodies; still others hear private disputes in which the state is not a party. Most tribunals are created by federal or provincial statutes, although it is also possible for them to be authorized by Crown prerogative.[7]

Tribunals are part of the Canadian justice system.[8] They are also all "administrative decision-makers" (ADMs), to use the Supreme Court of Canada's term from *Vavilov*.[9] However not all ADMs are tribunals. Some ADMs do not resolve any disputes by applying law to them; instead they regulate, advise government, manage public assets, or do other work.

In Ontario, there is an *Adjudicative Tribunals Accountability, Governance, and Appointments Act*.[10] A regulation to this statute identifies 25 public sector entities that fit the definition of "tribunal" offered above.[11] In Quebec, administrative entities exercising "adjudicative function" are subject to special legal requirements;[12] these are effectively tribunals. In other provinces and at the federal level, some administrative bodies describe themselves as "quasi-judicial" and most of these are tribunals. A tribunal typically has (i) one or

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[6] Ron Ellis, "An Administrative Justice Fix: a Model Act" (2022) 35:1 Canadian Journal of Administrative Law & Practice 53–67 , s 2; Lorne Sossin, "Access to Administrative Justice and Other Worries" (2013) Administrative Law in Context, Second Edition Toronto, ON: Emond Montgomery Publications, 2013, online: <https://digitalcommons.osgoode.yorku.ca/scholarly_works/502> n 4., s.2; at FN4. It is recognized that current usage of the word "tribunal" is somewhat looser, including for example "regulatory tribunals" that make law prospectively instead of resolving disputes retrospectively. See e.g. Harry Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17:1 Osgoode Hall Law Journal 1–45, online: <https://digitalcommons.osgoode.yorku.ca/ohlj/vol17/iss1/1> at 3.. This article departs intentionally from practice, because it proposes that entities that resolve disputes under the law (true tribunals) should not, in general, also regulate or do other government work.

[7] For example, bodies created to resolve disputes about compensation claims for survivors of residential schools. See Laverne Jacobs, *Reconciling Tribunal Independence and Expertise - Empirical Observations* (University of Toronto, Faculty of Law: University of Toronto, Faculty of Law, 2008) n 2.

[8] *Paul v British Columbia (Forest Appeals Commission)*, [2003] 2 SCR 585, online: <https://canlii.ca/t/50dq> at para 23.

[9] *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019] 4 SCR 653, online: <https://canlii.ca/t/j46kb> at paras 30, 198.

[10] *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, SO 2009, c 33, Sch 5. ("ATAGAA").

[11] "O. Reg. 126/10: Adjudicative Tribunals and Clusters. Under Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009, S.O. 2009, c. 33, Sched. 5", (24 July 2014), online: *Ontario.ca* <https://www.ontario.ca/laws/regulation/100126>. The ATAGAA Regulation's list is not exhaustive. There are other ADMs in Ontario that function as tribunals even though they are not listed in this Regulation, including professional discipline and workplace tribunals.

[12] *Act respecting administrative justice*, CQLR c J-3 c II.

more *chairs* who provide leadership, (ii) appointed *members* with primary responsibility for dispute-resolution in individual cases, and (iii) permanent civil service *staff* who support the work of the tribunal in various ways.

Tribunals adjudicate: they hear evidence, find facts, ascertain the law, and then make decisions that determine the rights and obligations of parties.[13] For this reason, Ontario's Legislature, along with some scholars, dubs them "adjudicative tribunals."[14] However this term problematically glosses over the fact that many tribunals also pursue *consensual* resolution of disputes.[15] For example, the British Columbia Civil Resolution Tribunal applies information-provision, negotiation, and mediation phases to each case before adjudication becomes a possibility.[16] Encouraging settlements in line with the parties' legal rights is part of tribunals' essential work of resolving disputes according to the law. For this reason, the simple phrase "tribunal," without adjectives, is used here to refer to this class of administrative decision-maker.

1.2. What is Access to Justice?

This paper argues that the essential function of Canadian tribunals is to create access to justice. This phrase has been defined in different ways, For the purposes of this article, access to justice ("A2J") exists to the extent that people are able to assert and enjoy their legal rights. It is a person-centered concept, in which justice institutions (such as courts and tribunals) are understood to be means to an end.[17] A2J is what *should* be accorded to those whose legal rights are at risk, or unfulfilled, or disputed. The accessibility of justice is a measure of the distance between (i) what the substantive law promises, and (ii) the lives of the people to whom those promises are made.

"Access" and "justice" can be helpfully understood as two distinct although mutually supporting goals.[18] *Access* is a measure of the costs confronting those who assert, or could assert, legal rights. These include monetary costs (e.g. lawyer fees and filing fees), temporal costs (the amount of time it takes to get to a just resolution), and psychological costs (the stress

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[13] "Charkaoui v. Canada (Citizenship and Immigration) - SCC Cases", online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2345/index.do> at para 48.

[14] ATAGAA, above note 10.

[15] *Administrative Tribunals Using ADR*, by Trevor C W Farrow & Ada Ho, Zotero (Canadian Forum on Civil Justice, 2007); Paul Daly, "Administrative Tribunals in Canada: Constitutional Subordinates or Equal Partners?" in *Administrative Tribunals in the Common Law World* (Oxford: Hart, 2024) , s I.B.; Miriam Lagacé, *Les services de conciliation des tribunaux administratifs du Québec : entre une justice participative et une gestion axée sur les résultats* (Maîtrise en Prévention et règlement des différends, l'Université de Sherbrooke, Québec, 2021) [unpublished].

[16] "The CRT Process | Learn How It Works » BC Civil Resolution Tribunal", online: *BC Civil Resolution Tribunal* <https://civilresolutionbc.ca/crt-process/>.; Shannon Salter & Darin Thompson, "Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunal" (2016) 3 McGill Journal of Dispute Resolution 113, online: <https://ssrn.com/abstract=2955796>.

[17] Andrew Pilliar, "Filling the Normative Hole at the Centre of Access to Justice: Toward a Person-Centred Conception" (2023) 55:3 University of British Collumbia Law Review 149, online: <https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1258&context=ubclawreview>.

[18] Noel Semple, "Better Access to Better Justice: The Potential of Procedural Reform" (2022) 100:2 The Canadian Bar Review, online: <https://cbr.cba.org/index.php/cbr/article/view/4772>.

imposed by legal process). *Access* exists, for a set of legal disputes, to the extent that these three types of cost are low and proportionate to the subject matter of those disputes.[19]

Access is a legitimate interest of all parties and potential parties in legal disputes. For those who make legal claims (e.g. plaintiffs and applicants) or *could* make claims, access is a measure of how much time and money and stress they must expend in order to realize the substantive law's promises to them. For those against whom legal claims are made (e.g. defendants and respondents), access is a measure of how much time and money and stress they must spend to resist claims that go beyond what the law requires.

It is *justice* to which the system should give people access. Outcomes should be *substantively just*, in the sense that they correctly applying the law to the true facts of the case.[20] They should also be *procedurally just* in the sense of being rendered by decision-makers who are unbiased, reasonably perceived as unbiased, and who truly hear the parties before deciding.[21] The justice goal of legal procedure has a third aspect -- *public justice* -- which involves the interests of non-parties.[22] Public justice is served when legal institutions provide information about the law to non-parties, when they deter illegal behaviour by non-parties, and when they help the substantive law develop for the benefit of the public at large.

Canada's formal legal system struggles to provide access to justice, for many types of dispute. The best known problems pertain to the *access* side of the framework. The World Justice Project, which compares the legal systems of 140 world jurisdictions, ranked Canada 68th with regard to the "access and affordability of the civil justice system."[23] Legal fees for litigation are high.[24] Temporal costs (delay) constitute an endemic problem on the civil side, with many trials occurring four to five years after pleadings are served.[25] The psychological cost (stress) associated with asserting legal rights is also elevated, due to the system's complexity

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[19] Noel Semple, ""The Cost of Seeking Civil Justice in Canada" (2016) 93:3 Canadian Bar Review 639.

[20] *Ibid,* at 139 to 142.

[21] Procedural justice usually also requires the giving of reasons for decision: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, online: <https://canlii.ca/t/1fqlk>.

[22] Trevor C W Farrow, *Civil justice, privatization, and democracy* (Toronto, Canada: University of Toronto Press, 2014).

[23] World Justice Project, "Rule of Law Index: Canada: Civil Justice", online: <https://worldjusticeproject.org/rule-of-law-index>.

[24] *Canadian Lawyer Magazine's* Legal Fees Survey from 2021 (the most recent year available) reports the average legal fee for one side for a case culminating in a 5 day trial was over CAD$38,000. (Canadian Lawyer Magazine, "2021 Legal Fees Survey: Results", online: <https://www.canadianlawyermag.com/news/features/2021-legal-fees-survey-results/362970>. In 2020, the average hourly rate for a lawyer with between 6 and 10 years of experience was $580. (Canadian Lawyer Magazine, "Fees rising before downturn (May 11, 2020)", online: <https://cdn-res.keymedia.com/cms/files/ca/120/0299_637245655342367595.pdf>.). Plaintiffs represented on a contingency basis, at least in Ontario, can expect to pay a fee equal to between 25% and 35% of the amount recovered. (Law Society of Upper Canada Advertising and Fee Arrangements Issues Working Group [LSUC Working Group], *Fifth Report* (Toronto: Law Society of Upper Canada, 2017)

[25] Advocates Society (Canada), "Delay no Longer (June, 2023)", online: <https://www.advocates.ca/TAS/Advocacy/Civil_Justice_Delay/TAS/Advocacy_Pages/Advocacy_Pages/Civil_Justice_Delay.aspx?hkey=65c65ef7-569b-49cb-a18c-3239fe00db4c>. According to the results of the 2023 World Justice Project Survey, Canada ranked 58th out of 142 in terms of whether civil justice is free from unreasonable delay. Note 23, above.

and untimeliness. This is especially true for Canada's legions of self-represented litigants, most of whom want and need professional help in resolving their problems but cannot afford it.[26]

1.3. Court Justice

Creating access to justice is the work of both tribunals and courts. And yet, as Chris Bredt and Mannu Chowdhury argue in a recent paper, "administrative justice" and "court justice" are distinctly different routes to the destination they share.[27] Courts and judges have distinct advantages, especially for certain types of dispute. Judicial appointments offer salaries in Canada's top 5%, along with high levels of prestige and autonomy.[28] This attracts many of Canada's most brilliant legal minds to the Bench, which in turn positions courts well to create substantive and public justice in complex disputes involving multiple contesting legal principles and the need for judge-made law-reform.

Canada's judiciary has institutional protections for its independence from the elected branches of government that are very strong by international standards. For freedom of the courts from improper government appearance, our country gets very high marks from the World Justice Project.[29] For high-profile cases in which elected governments have significant vested interests – such as serious criminal charges or constitutional disputes – the judiciary's independence from the elected branches is instrumental in creating substantive and procedural justice.

Canada's judges wear impressive robes, they sit on elevated daises, and they invoke the arcane majesty of the law. When the constitution requires unpopular changes to public policy (such as the liberalization of abortion, or the redefinition of marriage to include same-sex couples), the gravitas of the judiciary can help make such decisions more palatable to the population. National unity is also arguably favoured by the fact that "Judges of the Superior, District, and County Courts," who have constitutionally-protected jurisdiction over the most serious legal disputes, are appointed by the Governor-General on the recommendation of the federal Cabinet.[30]

2. Tribunals and Courts

2.1. The Access to Justice Advantage

Yet, for some other types of legal dispute, tribunals outperform courts in creating access to justice.[31] They tend to be cheaper and quicker, as well as easier and less stressful, especially

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[26] Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants: Final Report", online: <https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>.

[27] Christopher D Bredt & Mannu Chowdhury, "Peer Review and Adjudicative Independence: Finding the Right Balance in Administrative Justice" (2021) 34:1 Canadian Journal of Administrative Law & Practice 55–85, online: <https://www.proquest.com/docview/2492714640/abstract/230DDEF2232148DBPQ/1>.

[28] Arthurs, *supra* note 6 at 36.

[29] The scores are 88% for "Civil Justice Is Free Of Improper Government Influence" and 94% for "Criminal System Is Free Of Improper Government Influence."

[30] *The Constitution Act, 1867*, 30 & 31 Vict, c 3. Section 96

[31] Abella J.A. in *Rasanen v. Rosemount Instruments Ltd* (1994), 17 O.R. (3d) 267 (C.A.) at pp. 279-80. : "Designed to be less cumbersome, less expensive, less formal and less delayed, these impartial decision-making bodies were to

for self-represented litigants. Consider for example the Social Security Tribunal, a federal body that resolves disputes over entitlement to benefits under three statutes.[32] The SST imposes low financial costs on claimants: no legal fees for the 75% of its applicants who are self-represented,[33] and no filing fees at the tribunal itself.[34] It is quick, delivering decisions on average three months after appeals are filed. The SST minimizes stress and psychological burdens, as evinced by the fact that 95% of appellants report satisfaction with the process.[35] The SST provides reasons for decision and even dedicates staff people as "Navigators" to assist unrepresented appellants.[36] and lets parties choose between in-person and online hearings.

The SST is considered exemplary by many in Canada's tribunal community. Its A2J excellence may reflect, in part, the relatively straightforward nature of the cases in its docket, compared to those on the dockets of civil courts. Some other tribunals are less effective in creating access to justice, but the SST is by no means the only successful one. Similar objective signs of success are found at British Columbia's Civil Resolution Tribunal.[37] In Ontario, tribunals such as the LTB,[38] the HRTO,[39] and the Workplace Safety and Insurance Appeals Tribunal (WSIAT),[40] seem to have been working reasonably well in the first years of the 21st century. The success of Canadian tribunals in creating access to justice reflects certain inherent advantages that they possess, relative to courts, as venues for the resolution of some types of legal dispute.There are four features of tribunal justice, distinguishing it from court justice, that support tribunals' strong A2J performance and give them the potential to further excel.

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resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly"

[32] *Employment Insurance Act*, SC 1996, c 23; Employment and Social Development Canada, "Canada Pension Plan", (21 December 2017), online: <https://www.canada.ca/en/employment-social-development/programs/pension-plan.html> Last Modified: 2023-05-15; *Old Age Security Act*, RSC, 1985, c O-9.

[33] *Enhancing accessibility in written communications: A review of forms and letters for the Social Security Tribunal*, by Julie Macfarlane (Social Security Tribunal of Canada, 2021) Last Modified: 2022-05-10.

[34] Social Security Tribunal of Canada, "Employment Insurance Appeal Division: How to appeal", (22 June 2021), online: <https://sst-tss.gc.ca/en/your-appeal/employment-insurance-appeal-division-appeal> Last Modified: 2024-01-16.

[35] Social Security Tribunal of Canada, "Results for Canadians", (28 May 2021), online: <https://www.sst-tss.gc.ca/en/our-work-our-people/results-canadians> Last Modified: 2023-08-21.

[36] Social Security Tribunal of Canada, "Navigators", (18 June 2021), online: <https://sst-tss.gc.ca/en/your-appeal/navigators> Last Modified: 2023-01-31; Laverne Jacobs & Sule Tomkinson, "Examining the Social Security Tribunal's Navigator Service: Access to Administrative Justice for Marginalized Communities" (2022) Law Publications, online: <https://scholar.uwindsor.ca/lawpub/133>.

[37] Katie Sykes et al, "Civil Revolution: User Experiences with British Columbia's Online Court" (2020) 37:1 Windsor Yearbook of Access to Justice 161–188, online: <https://wyaj.uwindsor.ca/index.php/wyaj/article/view/7192>.

[38] For example, regarding historical Landlord & Tenant Board case processing times, see "SJTO | 2010 - 2011 Annual Report", online: <https://tribunalsontario.ca/documents/sjto/2010-11%20Annual%20Report.html#ltb-5> at 31.

[39] Andrew Pinto & Ministry of the Attorney General, "Report Of The Ontario Human Rights Review 2012", online: <https://wayback.archive-it.org/16312/20210402060253/http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/>.

[40] Ron Ellis, *Unjust by design Canada's administrative justice system*, Law and society series (Vancouver: UBC Press, 2013) at 9.

2.2. Tribunal Justice Feature #1: Specialization instead of Generalism

First, most courts have jurisdiction over a wide variety of legal disputes. Even courts focused on a particular type of legal dispute, such as family or tax courts, often rely on generalist judges who practice in other areas before and after their stint on the that bench. Each tribunal, on the other hand, is specialized.[41] Most hear only disputes arising from a single statute, a few others hear disputes under a small number of statutes that give rise to similar disputes.

This favours access to justice for several reasons. First, it makes it much easier to have people with substantive expertise hearing the cases. A labour relations tribunal can hire people who are already familiar with workplace disputes and the applicable law. Expertise makes them more likely to reach decisions that are substantively legal correct. They can reach those decisions relatively quickly, with less need to be educated by the parties or their lawyers, if they already understand the law and the background facts. Their decisions also tend to be more predictable to potential parties, which in turn helps people avoid disputes.[42]

Second, specialization allows a tribunal's process to be fine-tuned.[43] A Parole Board, for example, can conduct hearings in correctional facilities, and can include special hearing procedures appropriate for victims of crime. If all or almost all of a certain tribunal's cases will have lawyers representing all parties– for example at securities or competition tribunals– then traditional adversarial procedure and the rules of evidence can be deployed with the expectation of good results. Conversely, if all or most of a certain tribunal's disputes will include self-represented litigants then members can be trained in more active or inquisitorial approaches to hearings, that account for parties' lack of legal representation.[44]

Third, specialization allows tribunal members to acquire, over time, practical expertise dealing with a certain kind of dispute. A generalist judge confronted with a residential tenancy case (for example) might master the law and apply it in a substantively and procedurally correct way. However, if this judge only sees one case of this type per year, then regardless of their brilliance they will struggle to understand the unstated nuances of landlord-tenant relationships. They also won't know how long it might reasonably take to retain a roofing company to fix a tenant's leak in a certain town, information which is crucial in determining whether the delay in getting a tenant's roof fixed is reasonable or not.[45] Conversely, a residential tenancy tribunal member who spends years doing this work in a single community

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[41] A partial exception is BC's Civil Resolution Tribunal, which now has general jurisdiction over matters worth less than $5,000.

[42] Canadian Bar Association British Columbia Branch, August 2013 submissions, quoted in *CBABC Position Paper on the Civil Resolution Tribunal Amendment Act, 2018 (Bill 22) Prepared by: Canadian Bar Association, BC Branch May 8, 2018*, by CBABC.

[43] *Ibid.*

[44] Michelle A Alton, "Rethinking Fairness in Tribunal Adjudication to Best Promote Access to Justice" (2019) 32:3 Canadian journal of administrative law & practice 151–177, online: <https://search.proquest.com/docview/2285035081?pq-origsite=primo>; Semple, "Better Access to Better Justice", *supra* note 17.

[45] See France Houle, "Constructing the Fourth Branch of Government for Administrative Tribunals" (2007) 37 The Supreme Court Law Review 117–137 at 39. regarding the limitations of judicial knowledge when it comes to tribunal law questions.

can build up this knowledge over time, and use it to produce better access to better justice in their cases.

Multi-disciplinarity

The fact that tribunals are specialized allows them to have multidisciplinary members. In court, all judges are lawyers. But many tribunals, in addition to lawyers, have members from other professional backgrounds. Competition tribunals include economists, and residential tenancy tribunals include people who have been o worked with landlords or tenants. The Consent and Capacity Board of Ontario, which hears disputes about whether individuals have the capacity to make medical decisions for themselves, includes physician members, lawyer members, and "public members" who hail from a diversity of professional and personal backgrounds.[46]

Multi-disciplinarity lets relevant fields of human knowledge be brought to bear in the service of speedy, accurate justice.[47] It allows a tribunal to better understand the disputes that come before it, and craft remedies that will be more functional for everyone affected by them. Multi-disciplinarity is difficult to reconcile with generalist jurisdiction because the breadth of law that must be understood and applied probably requires legal training. Conversely, tribunal specialization unlocks multi-disciplinarity. When only one statute or a handful of statutes are being applied, non-lawyer members can realistically learn the law that they need to know.

2.3. Feature #2: Collegiality and Teamwork instead of Individualism

A second inherent A2J advantage of tribunals is their capacity to deploy teams, as opposed to only assigning cases to individual members to resolve single-handedly.[48] Again, a contrast to courts and judges helps explain this point. A trial judge is established in Canadian law as a solitary and heroic figure, able to personally decide any case without "fear or favour."[49] The constitution protects not only the independence of the judiciary from other parts of the government, but also the independence of each judge from other judges.[50] When judges hear matters at first instance (as opposed to through appeal or judicial review), they invariably do so alone and not in panels. Chief judges are not permitted to exercise influence over the decisions made by individual judges in their districts.

The position of a tribunal member is less solitary than that of a judge. Many tribunals assign panels of members to hear matters -- not only in an appellate or reconsideration

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[46] Consent and Capacity Board, "Member Performance Standards," OnlineL http://www.ccboard.on.ca/scripts/english/accountability/memberperformancestandards.asp. According to this document, each category of members is tasked with making distinct contributions to the Board's work.

[47] Lorne Sossin, "Administrative Law & Administrative Justice in an Interconnected World" (2014) 27:1 Canadian Journal of Administrative Law & Practice 53–67, online: <https://www.proquest.com/docview/1506787609/citation/79DC7FAC3F604C1FPQ/1> at 62.

[48] Explaining tribunals' "culture of institutionalized decision-making," see S Ronald Ellis, "Misconceiving Tribunal Members: Memorandum To Québec" (2005) 18:2 Canadian Journal of Administrative Law & Practice 189–215, online: <https://www.proquest.com/docview/220292012/citation/491D9549E020493EPQ/1>.

[49] Canadian Judicial Council, "Ethical Principles for Judges (2021)", online: <https://cjc-ccm.ca/sites/default/files/documents/2021/CJC_20-301_Ethical-Principles_Bilingual_Final.pdf> at para 3.

[50] *Ibid* at para 1.A.a.: "Judges are, and must reasonably be perceived to be, independent, both individually and institutionally."

hearings but also at first instance. Tripartism is common in labour tribunals, with panels of three including representatives of labour and management.[51] The Law Society Tribunal of Ontario hears most matters with a panel of three, including one non-lawyer.[52]

Less heroic expectations mean that tribunal positions are more accessible than judicial appointments are, to a broader range of people. Law degrees, which are financially inaccessible for many if not most Canadians, are not prerequisites for contributing to tribunal justice. For those who are already lawyers, the many years of legal practice and sterling credentials required to apply successfully for a judgeship are not necessary. This allows tribunal justice to draw on a more diverse set of decision-makers.

Tribunal members are also more affordable to the public treasury than judges are. Many tribunals could hire three or more full-time members with the $338,000 salaries that s. 96 trial court judges earn in Canada.[53] Even if some tribunal salaries are currently too low, there is no need to pay them like judges. Getting more "hands on deck" is a straightforward way to tackle pervasive backlogs in the Canadian justice system. The available funds go further if more of the new hands on deck need not be garbed in expensive judicial robes.

Internal Deliberations

Even when a single member is assigned to hear a dispute, Canadian law permits others in the tribunal to help carry the load. Tribunals are acknowledged to have a measure of institutional responsibility for the substance of the jurisprudence they produce.[54] The word "tribunal," as defined above, includes only *entities* distinct from government itself. Arrangements where dispute-resolvers are directly employed by a Ministry, or work on a freelance basis,[55] do not constitute tribunals; they tend to lack the advantages of collegiality teamwork.

Internal deliberations or peer review prior to release of a tribunal decision, involving members who did not themselves participate in hearing it, are permitted under Canadian law.[56] These discussions (which involve only the legal issues, not the findings of fact made by the hearing panel) can improve the quality of decisions.[57] One week, a lawyer member of a tribunal

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[51] See for example the Ontario Labour Relations Board, per *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A, s. 110(2).

[52] "Hearings Before The Hearing And Appeal Divisions," (O. Reg. 167/07), under the *Law Society Act*, R.S.O. 1990, c. L.8, s. 1.

[53] *Judges Act* (R.S.C., 1985, c. J-1), ss. 10 to 32.

[54] Ron Ellis, "The Justicizing of Quasi-Judicial Tribunals, Part2" (2007) Canadian Journal of Administrative Law & Practice, online: <https://www.ccat-ctac.org/wp-content/uploads/2020/03/16.TheJusticizingQuasi-JudicialTribunalsPart2.pdf> at 72.

[55] For example, British Columbia's residential tenancy arbitrators.

[56] *Iwa v Consolidated-Bathurst Packaging Ltd*, [1990] 1 SCR 282, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/579/index.do>; *Tremblay v Quebec (Commission des affaires sociales)*, [1992] 1 SCR 952, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/869/index.do>; *Ellis-Don Ltd v Ontario (Labour Relations Board)*, 2001 SCC 4, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1839/index.do>.,

[57] "The revisions made through peer review, ranging from addressing a jargon-heavy analysis to an incorrect application of legal principles, generate quality reasons, which can help ensure that litigants feel they were heard and their grievances were thoroughly considered." (Bredt & Chowdhury, "Peer Review and Adjudicative Independence", *supra* note 26 at 70.)

might read a draft decision from a doctor member and help improve its legal reasoning. Next week, the doctor member could return the favour by helping the lawyer member understand the medical evidence in a different case.[58] Many tribunals employ legal counsel who can assist members and review draft decisions.

Internal deliberations are, according to the Supreme Court of Canada, a "critically important means of achieving consistency" in tribunal jurisprudence.[59] Inconsistent decisions – in which effectively identical facts lead to contradictory decisions-- are seriously problematic for access to justice. Inconsistency reduces the acceptability of decisions to unsuccessful litigants, because the outcome hinged on the "luck of the draw" in terms of what decision-makers were assigned to the case. Inconsistency also undermines public justice by reducing the predictability of law.

Inconsistency can be substantially reduced by internal deliberations, led by a tribunal Chair after reviewing contradictory draft decisions. Of course, courts have their own solution for inconsistent decisions – looking to appellate judgments to resolve them. However, this solution depends on parties having the time and money and inclination to engage in appellate advocacy. For many if not most legal disputes that arise in Canada, appellate advocacy is disproportionately expensive and time-consuming and parties simply will not engage in it. For disputes of this nature, tribunals' internal deliberations are a more practical way to ensure consistent law.

Internal deliberations and peer review do create risks. They arguably affect procedural justice, if the individual who heard all of the parties' submissions is not wholly responsible for the decision (even if they are wholly responsible for the findings of fact). Implicit in the maxim *audi alteram partem* (hear both sides) is the idea that the one who does the hearing of both sides should also be the one who actually decides. Moreover, if a tribunal member's draft decisions are subject to review by a Chair who has power over the member's career, that might create a reasonable apprehension of bias in that member.[60] Courts and commentators have developed a body of law meant to maximize the benefits of internal consultations while minimizing its drawbacks.[61] The fact remains that tribunals' teamwork culture creates more latitude for internal deliberations than does judicial justice, and for certain types of case this is an access to justice advantage.

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[58] *Ibid* at 69.

[59] IWA v. Consolidated Bathurst, above note 56. See also *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, *supra* note 55. Connecting the concern for consistency with tribunals' institutional responsibility for their work, see Ellis, "Misconceiving Tribunal Members", *supra* note 47 at 200.

[60] *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, *supra* note 55 at para 27. Bredt & Chowdhury, "Peer Review and Adjudicative Independence", *supra* note 26.

[61] See e.g. *Shuttleworth v Ontario (Safety, Licensing Appeals and Standards Tribunals)*, 2019 ONCA 518, online: <https://canlii.ca/t/j140m>.,Bredt & Chowdhury, "Peer Review and Adjudicative Independence", *supra* note 26.; Daly, *supra* note 14 Art III(C); Frank A V Falzon, "The Integrated Administrative Tribunal" (2006) 19:3 Canadian Journal of Administrative Law & Practice 239–274, online: <https://www.proquest.com/docview/220288652/citation/793B824B1A946F4PQ/1> at 268–272.; .

2.4. Feature #3: Accountability rather than Autonomy

Accountability – of members to the tribunals in which they work and of tribunals to legislatures or their delegates– is a third feature which gives tribunals a functional advantage over courts in creating A2J for some types of case. The only formal written set of expectations for judges is the Canadian Judicial Council's *Ethical Principles for Judges*, which declares itself to be "advisory in nature" and "not intended to be a code of conduct that sets minimum standards."[62] Judges are only held to account or disciplined in the clearest cases of misconduct. This is not a criticism of the *status quo*, which is arguably required by the constitutional independence of the judiciary.[63] However it is a point of contrast between tribunals and courts, which in certain contexts creates functional advantages for the former.

In tribunals, the leadership can supervise individual members, and seek to improve their performance.[64] In many tribunals, Chairs have a measure of supervisory authority, such as the right to veto the reappointment of members they consider inappropriate.[65] Ontario's Law Society Tribunal, for example, makes it clear that members "work under the leadership of the Chair," and must abide by an established list of competencies and duties.[66]

In a recent paper prepared for the Society of Ontario Adjudicators and Regulators, Julie Lassonde reviewed internal performance evaluation practices in 22 tribunals.[67] Over ¾ of these had formal systems for evaluating and improving member performance in terms of factors including knowledge, hearing management, and decision-writing.[68] The research concluded that "when done respectfully and fairly, adjudicators like receiving feedback on their work." Such evaluation of decision-makers, if fair and constructive and if carefully designed to avoid reasonable apprehension of bias, has the potential to improve both access and justice. They allow for reappointment decisions to be made in a meritocratic, apolitical way. Relatively uncontroversial in tribunals, it offers another potential advantage of tribunals relative to courts.

Tribunals can also be constructively accountable to the legislatures that created them. However, this must be done very carefully, *without* impeding or appearing to impede tribunals' capacity to impartially decide cases even if the government is interested in the outcome. The *Fewer Backlogs and Less Partisan Tribunals Act*, 2024, a Private Member's Bill introduced to the

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[62] Canadian Judicial Council, *supra* note 48 at para 4.

[63] Richard F Devlin & Adam Dodek, *Regulating judges: beyond independence and accountability* (Cheltenham, England ; Edward Elgar Publishing, 2016); Kate Glover Berger, "The Structural and Administrative Demands of Unwritten Constitutional Principles" (2021) 65:2 mlj 305–340, online: <http://id.erudit.org/iderudit/1075518ar>.

[64] Ellis, "Misconceiving Tribunal Members", *supra* note 47; Ellis, *supra* note 53 Art 2.

[65] *ATAGAA*, *supra* note 9, s 14(4); Ellis, "Misconceiving Tribunal Members", *supra* note 47 at 206.

[66] Law Society Tribunal (Ontario), "Member Position Description", (2019), online: <https://lawsocietytribunal.ca/wp-content/uploads/2020/12/Member-Position-Description-EN.pdf>.

[67] Julie Lassonde, "Tribunal Adjudicators Performance Evaluation Preliminary Research (Society of Ontario Adjudicators and Regulators (SOAR))", (2023), online: <https://soar.on.ca/sites/default/files/article/SOAR%20Report%20on%20Research%20of%20Tribunal%20Adjudicator%20Performance%20Evaluation%20June%202023.pdf>.

[68] *Ibid*., pages 5 to 6.

Ontario Legislature in March 2024 by MPP Ted Hsu, proposes one way to do so.[69] The Bill would establish an Administrative Tribunal Justice Council, led by nonpartisan stakeholders and reporting directly to the Legislature. The Council's duties would include monitoring tribunal function, identifying problems, and proposing improvements.[70] Healthy tribunal accountability can be supported by gathering data on party satisfaction with procedure, on performance relative to timeline benchmarks, and on adoption of best practices. The Social Security Tribunal and some others already do this.[71] By contrast, Canadian courts cannot be held accountable to legislatures for constitutional reasons. Trial courts gather and disclose very little data on case processing, let alone on litigant satisfaction,[72] and cannot be compelled to do so.

2.5. Feature #4: Designability instead of Constitutional Independence

The fourth key feature of tribunals, distinguishing them from courts, is *designability*. A tribunal's structure, human resources, use of technology, and procedures can be intentionally designed so as to maximize its A2J performance for the specific cases that it hears. Evidence-based choices can be made about questions such as

- the extent to which proceedings should be adversarial or inquisitorial
- when and how settlement should be encouraged, and
- how liberal the tribunal should be regarding parties' adjournment requests and procedural irregularities.

Recent scholarship has shown how the principles of human-centered design can be applied to justice systems,[73] and in Canada it is tribunals rather than courts that have taken the lead in actually doing this.[74] The creation of British Columbia's Civil Resolution Tribunal, a primarily online forum which is now mandated to resolve several different types of civil dispute, has been identified as exemplifying this process.[75]

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[69] "Fewer Backlogs and Less Partisan Tribunals Act, 2024", online: *Legislative Assembly of Ontario* <https://www.ola.org/en/legislative-business/bills/parliament-43/session-1/bill-179>. This Bill draws on the *Model Administrative Justice Act*: Ellis, "An Administrative Justice Fix", *supra* note 5.

[70] FBLPTA, *ibid.*, s. 7(1), (2), and (3).

[71] Social Security Tribunal, "Results for Canadians," *supra* note 35.

[72] Advocates Society (Canada), *supra* note 24.

[73] Margaret Hagan, "Legal Design", (26 January 2015), online: *Law By Design* <https://lawbydesign.co/legal-design/>; Victor Quintanilla, "Human-Centered Civil Justice Design" (2017) 121 Penn State Law Review 745 (2017), online: <https://www.repository.law.indiana.edu/facpub/2588>.; Lorne Sossin, "Designing Administrative Justice" (2017) 34:1 Windsor Yearbook of Access to Justice 87–111, online: <https://wyaj.uwindsor.ca/index.php/wyaj/article/view/5007>.

[74] That being said, A2J-oriented design remains challenging for many tribunals. Many of them are traditional and court-like. As Paul Aterman points out, the legal system – of which tribunals are a part – has its roots in "values, tradition and precedent." This creates a reluctance to rely on "data, measurement and evaluation" which are essential for design. See Emily Farrimond & Paul Aterman, "Five Steps to User-centred Tribunal Design" (2023) 36:1 Canadian Journal of Administrative Law & Practice 5–18, online: <https://www.proquest.com/docview/2787283629/abstract/3C19DA854A3842B4PQ/2>.

[75] Shannon Salter & Darin Thompson, "Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunal" 3; Sykes et al, "Civil Revolution", *supra* note 36.

A tribunal's procedure can be prototyped by those with deep knowledge of the disputes and disputants that come before it. Procedural innovations can be pilot-tested with a selection of cases, with data collected on all aspects of "access" and "justice" performance. After roll-out, data-collection can continue, and drive continuous improvements in everything from the rules of procedure to the layout of the website to the tribunal's approach to scheduling hearings. These design processes should be user-centered and "bottom-up,"[76] driven by data about parties and the specific human vulnerabilities that arise in different dispute contexts.[77]

Access to justice requires not only treating parties justly, but also showing them that they have been treated justly. Especially for Canada's self-represented litigants -- who now outnumber represented litigants in many dispute contexts – this requires concerted efforts to understand human needs and understand the way public justice systems fit into their lives. Like a new vehicle design drawn up for safety and fuel-efficiency by engineers equipped with knowledge about road conditions and driver behaviour, a tribunal can be built to deliver justice and access, by people who understand the context in which it will work.

Justice system design often requires tradeoffs. For example, making procedure more tolerant of discovery, motions, and amendments of pleadings generally improves its performance in terms of procedural and substantive *justice*.[78] Parties receiver a fuller hearing, and when a case is adjudicated the result is less likely to be erroneous. However procedural liberality tends to reduce *access*, because it increases the temporal and financial costs of pursuing or defending a claim. Because tribunals and their procedural rules are designable, they can be calibrated to make these tradeoffs in a rational and evidence-based fashion, maximizing the tribunal's overall performance.[79]

Each tribunal is a creature either of Parliament or of a provincial or territorial legislature. Thus, it can be taken "back to the drawing board" – radically reformed or even replaced when necessary. Suzanne Chiodo calls attention to the role of *policy entrepreneurs* – individuals persistently pushing for public policy change -- in reforming justice procedure.[80] A policy entrepreneur within the executive branch of government, or a small like-minded group, can deliver significant A2J progress by creating or reforming one or more tribunals. This sort of process in British Columbia culminated in the creation of the Civil Resolution Tribunal.[81] The fact that tribunals lack judicial-style independence relative to government may be

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[76] Farrimond & Aterman, *supra* note 73 at 8; Sossin, *supra* note 72. Paul Aterman, "How do I use data and evaluation to improve access to justice?"

[77] Pilliar, *supra* note 16 at 141; Patricia Hughes, "Advancing Access to Justice through Generic Solutions: The Risk of Perpetuating Exclusion" (2013) 31:1 Windsor Yearbook of Access to Justice 1–22, online: <https://wyaj.uwindsor.ca/index.php/wyaj/article/view/4308>. However, there are also arguments for using identical or similar procedures for multiple tribunals, such as the fact that this allows professional advocates to help clients before different tribunals without having to learn multiple procedures.

[78] Regarding access and justice as distinct normative goals, see section 1.2 above.

[79] Semple, 'Better Access to Better Justice', page 159.

[80] Suzanne Chiodo, "Ontario Civil Justice Reform in the Wake of COVID-19: Inspired or Institutionalized?" (2021) 57:3 Osgoode Hall Law Journal 801–833, online: <https://digitalcommons.osgoode.yorku.ca/ohlj/vol57/iss3/9>.: "Policy entrepreneurs are able to steer change at all levels of public policy, playing the role of politician, bureaucrat, academic, spin-doctor, and mediator between interest groups."

[81] Salter & Thompson, *supra* note 15; Sykes et al, "Civil Revolution", *supra* note 36.

advantageous, so long as appropriate measures are in place to guarantee their impartiality in making decisions involving the government or affecting its interests.[82]

The Difficulty of Designing Court Procedures

Designing or redesigning a court or its procedures is more difficult. Canada's constitution gives courts a high degree of independence from government. The "section 96" courts were not created by, and cannot be abolished by, a provincial legislature or by Parliament. Control over them is shared by the Department of Justice (which makes judicial appointments), provincial justice ministries, and judicial leaders.[83] Redesigning them to create better access to better justice would require a level of consensus among the multiple cooks in this kitchen that has historically proven unrealistic, no matter how appealing the recipe and how hungry the people are for reform.

Although legislatures can pass statutes affecting the structure and operations of courts,[84] legislative control is sharply limited. For example, judicial salaries are set by independent commissions in order to protect their independence from government.[85] By contrast, salaries at a tribunal can be set in order to maximize the tribunal's performance with a given budget. In so doing, the need to attract excellent members can be balanced against the need to hire *more* members, in order to resolve cases more quickly and justly.

Likewise, while provincial legislatures do have the constitutional power to amend civil procedure, this power is not all that it seems. Rules committees dominated by judges and litigators make most of the decisions. What's more, many aspects of procedure are in the hands of local judges. They can and do create "Practice Directions" and special forms that apply in only one region of the province, and even some that apply in only one courthouse. One striking example of localism in procedure is the fact that whether an Ontario civil action will be subjected to mandatory mediation depends on which part of the province the case is filed in.[86]

Court procedural rules *allow* judges to do things like case management, active judging, and settlement-conferencing. However the rules cannot (or at least do not) *require* judges to do any of these things.[87] Nor can the performance of individual judges in releasing sound decisions promptly be tracked or rewarded. Arguably, resistance to government designs is a feature and not a bug for Canada's courts, given the need for them, in some cases, to have complete independence from government.

2.6. Two Paths to Justice

The core work of judges is doing justice in the cases that come before them, and Canadian judges generally excel in this work. But human-centered justice design requires not

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[82] Noel Semple, "Tribunals in Canada: A Coming of Age (March 25, 2024).", online: <https://ssrn.com/abstract=4772022> , s 3.3.

[83] Noel Semple, "The Accountability Gap and The Struggles of our Civil Justice System", (22 April 2021), online: *Slaw* <https://www.slaw.ca/2021/04/22/the-accountability-gap-and-the-struggles-of-our-civil-justice-system/>.

[84] E.g. Ontario's *Courts of Justice Act,* R.S.O. 1990, c. C. 43 and *Federal Courts Act*, RSC 1985, c F-7.

[85] Ref re *Remuneration of Judges of the Prov. Court of P.E.I.; Reference re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3.

[86] *Rules of Civil Procedure,* RRO 1990, Reg 194, R. 24.1.

[87] Leitch, 'Coming off the Bench: Self-Represented Litigants, Judges and the Adversarial Process'.

focus on the immediate case at hand, but focus on the next 1,000 cases that will arise, including those that will settle and those at risk of being abandoned without any sort of justice being done, if there is no proportionate and accessible path to justice.[88] This design work demands evidence-based public policy, supported by the resources of government. However non-judges cannot tell Canadian judges how to do their jobs, which sharply limits the designability of the judiciary and creates an advantage for tribunals.

The argument here is *not* that tribunal justice is better than court justice, but rather that these are two distinct paths to accessible justice. By their very nature, tribunals can do things that courts cannot, just as courts can do things that are impossible for tribunals. For certain types of legal disputes, tribunals' specialization, teamwork, accountability, and designability give them a compelling A2J advantage. Courts have repeatedly acknowledged this fact,[89] and legislators have been acting on it at least since the dawn of the 20th century.

Looking forward, classes of dispute in which tribunals' advantages (specialization, institutionalism, and designability) outweigh the courts' advantages (generalism, individualism, and constitutional independence), should be considered by policy-makers for allocation to tribunal jurisdiction where the constitution allows.[90] Doing so would reduce caseload burden on the courts, and help judges create better access to better justice in the cases which will and must remain within their jurisdictions. Arguments along these lines have recently been made for family disputes,[91] and for disputes regarding capacity and guardianship.[92]

3. Beyond the Court Comparison: Tribunals as Alternatives to Abandonment and Privatization

Comparing tribunals to courts does not fully explain their potential to improve access to civil justice in Canada. For many substantive legal rights on the books in this country, a well-designed and well-functioning tribunal is the *only* type of institution that can uphold the rule of law. Moreover, good tribunals do justice in public, and thus are an important check on the problems created by privatization of civil justice.

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[88] *Hryniak v Mauldin*, [2014] 1 SCR 87, online: <https://canlii.ca/t/g2s18>.

[89] See e.g. the comments of Abella J. (as she then was) in *Rasanen, supra* note 31, and Beverley McLachlin, "Administrative Tribunals and the Courts: An Evolutionary Relationship", (22 August 2013), online: <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx#fnb2> Last Modified: 2017-02-28.

[90] Jurisprudence interpreting section 96 of the *Constitution Act* does forestall some legislative delegations of jurisdiction away from superior courts, unless the constitution is amended. *Reference re Code of Civil Procedure (Que)*, 2021 Canada (Federal) ›, online: <https://canlii.ca/t/jgnxz>; *British Columbia (Attorney General) v Trial Lawyers Association of British Columbia*, 2022 Court of Appeal for British Columbia, online: <https://canlii.ca/t/jshpx> [*TLABC2022*].

[91] Patricia Robinson, *The Potential for a Family Law Tribunal* (PhD Dissertations, Osgoode Hall Law School of York University, 2021) [unpublished].

[92] Law Commission of Canada (LCO), Legal Capacity, Decision-Making and Guardianship, Final Report (March 2017), online:<http://www.lco-cdo.org/en/our-current-projects/legal-capacity-decision-making-and-guardianship/final-report/>.

3.1. Tribunals and the *Hryniak* Problem

In *Hryniak v. Mauldin,* 2014 SCC 7*,* a unanimous Supreme Court of Canada recognized that "ensuring access to justice is the greatest challenge to the rule of law in Canada today."[93] Most Canadians simply can't afford to sue or defend themselves in court, and even those who can often find that the costs of asserting their rights are not justified by what's at stake in the dispute.[94] As the *Costs of Justice* project demonstrated, the majority of Canadians with legal needs do not invoke any formal procedure to assert their rights.[95] Rights that depend on civil litigation are therefore in danger of becoming meaningless. *Hryniak* sought to revive access to adjudication in civil matters with a "culture shift" to simplify pretrial procedures in civil court matters, and expand the use of summary judgment. Unfortunately, ten years later, there is little sign of a significant culture shift or of improving access to justice in Canada's civil courts.[96]

Tribunals offer another path toward the reinstatement of access to civil justice called for by the *Hryniak* court. They allow rights to be upheld that would be abandoned if court litigation were the only option. Shannon Salter and Darin Thompson analogize legal procedure to a nightclub bouncer that keeps many self-represented litigants out of the justice "club," because they can't understand how to comply with its requirements, and can't afford counsel to help them.[97] Because tribunal procedure can be designed for the people who need to use it,[98] it can be a more lenient and friendly bouncer, who leaves fewer people out on the street suffering injustice. Tribunal design can draw not only on data about parties, but also on data about those who *should* be applicants, in order to create a process that they will actually use instead of "lumping it."

New tribunals, or new heads of jurisdiction for existing tribunals, might breathe life into substantive rights that are currently unrealizable. Corporations or state bodies often make decisions that must in theory conform to law, but for which there is no legal avenue by which an affected party can realistically argue that their rights have been infringed. One example

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[93] *Hryniak v. Mauldin*, *supra* note 87 at para 1.
[94] *Ibid,* para 25.
[95] Trevor C W Farrow et al, "Everyday Legal Problems and the Cost of Justice in Canada: Overview Report (Canadian Forum on Civil Justice)", (2016), online: <https://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>.
[96] Barbara Billingsley, "Hryniak v. Mauldin Comes to Alberta: Summary Judgment, Culture Shift, and the Future of Civil Trials" (2017) Alberta Law Review, online: <https://albertalawreview.com/index.php/ALR/article/view/789>; R McKay White, "Seven Years of Accessible Justice: A Critical Assessment of Hryniak v. Mauldin's Culture Shift" (2022) 59:3 Alberta Law Review 611, online: <https://www.canlii.org/en/commentary/doc/2022CanLIIDocs1108#!fragment/zoupio-_Tocpdf_bk_4/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zhoBMAzZgI1TMALAEoANMmylCEAIqJCuAJ7QA5KrERCYXAnmKV6zdt0gAynlIAhFQCUAogBl7ANQCCAOQDC9saTB80KTsIiJAA>; Gerard J Kennedy, "The 2010 Amendments and Hryniak v Mauldin: The Perspective of the Lawyers Who Have Lived Them" (2020) 37:1 Windsor Yearbook of Access to Justice 21–67, online: <https://wyaj.uwindsor.ca/index.php/wyaj/article/view/6561>. Regarding access to justice problems in Canada generally, see notes 23 to 26 above, and accompanying text.
[97] Salter & Thompson, *supra* note 74 at 126.
[98] Section 2.5, above.

recently in the news is police forces providing adverse background record checks that gravely damage individuals' careers.[99] Tribunals might make legal rights realizable in such contexts.

3.2. Out of the Shadows

Importantly, tribunals pursue *public* rather than *privatized* justice. Tribunal hearings are generally open,[100] they provide publicly accessible reasons for decision, and their decisions can be appealed and/or judicially reviewed. Trevor Farrow and others have identified the dangers to individual litigants and to broader public interests posed by unquestioning reliance on purely private dispute resolution options such as arbitration and private-sector mediation.[101]

Because tribunal decisions are subject to appeal and judicial review, they are the origin of many landmark decisions from Canadian appellate courts.[102] An accessible and high-functioning tribunal is like a nerve ending that can detect pain in society for which the law ought to provide a remedy. In addition to applying its own remedies to the case at hand, a tribunal decision can convey the bigger message up to the organs of government able to do create systemic change through legal reform.[103]

Tribunals are not only potential alternatives to courts, they are also alternatives to other more secretive and informal state mechanisms. British Columbia, unlike other provinces, allocates residential tenancy disputes not to an independent tribunal, but rather to freelance mediator/arbitrators employed by the Ministry, who do not produce reasons for decision.[104] Alternatives such as ombuds offices,[105] and public-sector prosecution,[106] have their own advantages may well be ideal in some contexts. However a prosecution agency or ombudsman can decline to proceed with a person's complaint, and such decisions are made in private with few if any procedural justice requirements. Nor do ombuds or prosecutor decisions about whether to proceed with a complaint create any reasons for decision or public records.

3.3. Fair Settlement Terms and Access to Adjudication

To the extent that substantive justice is achieved in any context, it is usually achieved through settlement rather than adjudication, and settlements are almost invariably private. Some settlements uphold the parties' legal rights, unfortunately other settlements are simply

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[99] The Toronto Star Editorial Board, "When a police background check derails a career, it's time people knew the reasons why." *Toronto Star,* Mar 11, 2024. Online: https://www.thestar.com/opinion/editorials/when-a-police-background-check-derails-a-career-its-time-people-knew-the-reasons-why/article_60155b24-dd88-11ee-bf42-a74a0580daba.html

[100] *Southam Inc. v. Canada Minister of Employment and Immigration*, [1987] 3 F.C. 329 (T.D.), at p. 336; *Canadian Broadcasting Corporation v. Canada (Parole Board)*, 2023 FCA 166.

[101] Farrow, *supra* note 21.

[102] E.g. *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR [cited to], [1999] SCJ No 463 [*Meiorin*].

[103] For this nervous system metaphor for litigation, see David Luban, "Settlements and the erosion of the public realm" (1995) 83 Georgetown Law Journal 2619 at 2638.

[104] Kerry Gold, "The veiled world of B.C. rental arbitration", *The Globe and Mail* (13 March 2019), online: <https://www.theglobeandmail.com/real-estate/vancouver/article-the-veiled-world-of-bc-rental-arbitration/>.

[105] https://www.ombudsmanforum.ca/ombudsman_offices.php

[106] For example, in Ontario disputes under the *Consumer Protection Act* and the *Employment Standards Act* are assigned to prosecutors from the Ministry of Public and Business Service Delivery and the Ministry of Labour, respectively.

an abandonment of legal rights in the face of superior power. Many tribunals encourage consensual resolution of cases before adjudicating them if necessary. However, tribunals that mediate can and should encourage the parties to settle on terms that are consistent with the substantive legal entitlements of the parties.[107]

Accessible adjudication, which tribunals are well-positioned to offer, significantly improves the likelihood that settlements will deliver substantive justice to the parties.[108] Parties make fair settlement offers in part because they fear the outcome of adjudication should the case *not* settle. If a party believes their adversary incapable of holding out for adjudication – which requires 5 years and $50,000 in Ontario civil court matters -- that party loses a major incentive to negotiate. Moreover, if adjudication is so rare that there are no recent decisions explaining the law, parties will be unable to understand and negotiate for their own rights even if they intend and can afford to.[109] Reported decisions create a "shadow of the law" that lets people understand how the law applies to their own situations, which in turn lets them avoid or settle disputes on fair terms.[110] High-functioning tribunals create an accessible path to adjudication, and they release decisions that explain and develop the law, and thus they help improve the fidelity of settlement terms to the substantive legal rights of the parties.

4. Conclusion

Looking to tribunals to deliver better access to better justice is not a new idea. Legislators have been doing so at least since the 1903 creation of Canada's first tribunal, the Board of Railway Commissioners.[111] However the case for tribunal justice has been undertheorized, and this article has sought to remedy that. There are four inherent characteristics of tribunals that make them functionally superior to courts for the resolution of certain types of legal dispute: specialization, teamwork, accountability, and designability. However tribunals don't only provide alternatives to courts. They provide alternatives to abandonment of legal rights, to privatized dispute-resolution, and to power-based rather than justice-based settlement deals. Although tribunals' potential to deliver better access to better justice is only inconsistently fulfilled in Canada today, that potential has never been more clear.

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[107] Regarding the substantive justice orientation of judicial mediation, see Wayne D Brazil, "A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values" (1990) 1990:1 U Chicago Leg Forum 303 at 330; Archie Zariski, "Judicial Dispute Resolution in Canada: Towards Accessible Dispute Resolution" (2018) 35 Windsor Yearbook of Access to Justice 433–462, online: <https://wyaj.uwindsor.ca/index.php/wyaj/article/view/5789> at 444–5.

[108] *Hryniak v. Mauldin*, *supra* note 87 at para 24.

[109] *Ibid,* at para 1: "Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted."

[110] RH Mnookin & L Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale LJ 950 at 966–73.

[111] *The Railway Act* (1903 S. of C., 3 Edw. VII, c. 58), s. 23.