

# Hearing Back

Piecing Together Timeliness in  
Saskatchewan's Administrative Tribunals



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December 2007

The Honourable Don Toth  
Speaker of the Legislative Assembly  
Province of Saskatchewan  
Legislative Building  
Regina, Saskatchewan

Dear Mr. Speaker:

It is my honour and privilege to submit, pursuant to Section 30(2) of *The Ombudsman and Children's Advocate Act*, a special report titled *Hearing Back: Piecing Together Timeliness in Saskatchewan's Administrative Tribunals*.

Respectfully submitted,

A handwritten signature in black ink that reads "Kevin Fenwick". The signature is written in a cursive, flowing style.

Kevin Fenwick  
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## Executive Summary

Administrative tribunals were initially created to provide an affordable, effective and timely alternative to government bureaucracy and the courts. Since the mid-1900s, they have become an integral part of Canadian government. The government of Saskatchewan funds over 300 boards, commissions and agencies, and we have identified 55 as administrative tribunals for the purposes of this report.

In large part, administrative tribunals have lived up to their mandate, but they are not without their problems. One of the primary criticisms the Ombudsman hears about administrative tribunals is the amount of time it takes them to render their decision after the final hearing. In many instances the decisions are about matters that are of substantial significance for the people involved: entitlement to compensation, evictions, whether they will be found guilty of discrimination, or whether they will get their job back, to name a few.

For example, "Mandy" believed her union failed to represent her adequately. She brought the matter before the Labour Relations Board and participated in two hearings, four months apart: one in June 2003 and one in October 2003. Sixteen months later, she still had no decision from the Labour Relations Board and contacted our office. The Board rendered a decision in April 2005, two years after the initial hearing. The nature of Mandy's issue caused her and her family a lot of stress. Added to her stress was the helplessness she felt when she discovered that the Board was not constrained to render a decision within a timeline and did not seem to be accountable to anyone for the time it was taking.

As the Ombudsman began a system-wide review of timeliness of decision-making, it became apparent that the issue was complex. While assessing the timeliness of a particular tribunal's decision-making, one might well ask the simple question, "Why is it taking so long?" Research for the answer, however, was not simple and often pointed to multiple factors.

It is generally accepted that a tribunal system should provide quality decisions in a timely manner. There are, however, many factors that influence the ability of tribunals to render timely decisions. An individual's understanding about how to prepare and what to expect, the timelines that are in place (if any), the processes the tribunal uses, the resources available to the tribunal, and the tribunal's internal and external accountability all come into play and can influence the timeliness of decision making.

Our inquiry focused on these larger issues and the structures in place that support and/or hinder the work of administrative tribunals to render timely decisions. We selected six tribunals that provided a representative cross-section of various roles and functions of the majority of operational tribunals across Saskatchewan. The six were: the Human Rights Tribunal, the Automobile Injury Appeal Commission, the Labour Relations Board, the Highway Traffic Board, the Office of Residential Tenancies, and the Workers' Compensation Board.

We took a best practices approach in our evaluation of the tribunal system and made 27 recommendations based on the best practices we identified.

### Best Practices

This report focuses on timeliness and consequently discusses only those best practices that are connected to the issue and support timely decision making. Drawing on experience and research in the common law jurisdictions of Canada, the United Kingdom, Australia and New Zealand, we identified the following best practices related to timeliness.

## Executive Summary - 2

### **Best Practices Related to Efficient and Consumer-Friendly Processes**

- Consumers have access to information that will help them understand the process.
- Publications and proceedings are in plain language.
- Orientation meetings are made available to consumers.
- Consumers have access to appropriate dispute resolution (ADR).
- Pre-hearing meetings are available.
- Tribunals provide consumers the opportunity to opt for hearings and reviews conducted by telephone, in writing, or electronically.
- Hearings are conducted with an appropriate level of formality (or informality), while following a standard set of basic procedures.
- When the process is formal or complex, consumers should have access to assistance.
- There is an appropriate balance between timeliness and the potential need for appeals, judicial review, or ombudsman review.

### **Best Practices Related to Development of Timelines**

- Timelines for hearings and decision writing are established, are appropriate and are met.

### **Best Practices Related to Board Composition and Function**

- The number of members and the mix of full-time and part-time members are appropriate for the tribunal's caseload and mandate.
- Tribunal members are appointed based on merit.
- Members have security of tenure.
- Member compensation is commensurate with responsibility.
- Tribunal members have access to training.
- Each tribunal has sufficient resources to effectively discharge its mandate.
- Tribunals use an effective case management system.

### **Best Practices Related to the Balance between Accountability and Independence**

- Tribunal members operate within a performance management system.
- Tribunals publicly report on their work.
- Tribunals are able to communicate with government in a way that will enable them to function properly, while maintaining their independence.

### **Best Practices Related to the Coordination of the Tribunals**

- Systems supporting tribunals operate in a coordinated fashion that promotes the efficient and effective use of resources.



## Findings

The Ombudsman's review found that the administrative justice system in Saskatchewan, as in most other jurisdictions, developed ad hoc, and to date has not evolved into a co-ordinated or rationalized system. As a result, the system does not function in compliance with an agreed-upon set of best practices, which leaves individuals facing a variety of boards, commissions and agencies, each operating with its own set of policies and procedures designed to meet its unique mandate. Many of the problems this situation creates – inefficiency, unnecessary complexity, and delay – have been addressed in other jurisdictions by moving to a more co-ordinated system. Even without a significantly more co-ordinated system, however, there is still merit in adopting a best practices approach to administrative tribunal operations.

## Recommendations

The 27 recommendations are steps administrative tribunals in Saskatchewan need to take to align themselves with best practices related to timeliness. There are two levels of recommendations connected to successful implementation:

- There are recommendations that should be implemented promptly and independently by each tribunal within the current administrative justice system. These recommendations are flagged throughout the report as "for implementation now."
- There are recommendations that likely require consultation between government and tribunals. Many of these recommendations would be easier to implement within a co-ordinated administrative tribunal system. These recommendations are flagged throughout the report as "for consultation and implementation."

We identified 55 administrative tribunals across the province and we recognize that there will be varying degrees of compliance with these best practices and recom-

mendations. Some will need to make more changes than others and some will be well on their way to aligning their procedures with recognized best practices. We strongly encourage all tribunals to implement these recommendations, individually and as a system, so the citizens of Saskatchewan will have access to more effective and efficient redress of the wide array of issues these tribunals oversee.

## Final Thoughts

While there may be valid explanations for why some decisions are delayed, these are seldom acceptable to the people who have to wait. People rightfully believe they are entitled to timely decisions and while the definition of "timeliness" can be debated, there comes a point in any case when all can agree the threshold has been exceeded. The challenge many tribunals face today is to finding a balance that weighs the competing interests of responsibly managing limited resources and delivering timely decisions. In this regard, it is our belief that the Ombudsman and the administrative tribunals are working to the same end.

Our sincere thanks to the people who told us about the delays they experienced. We understand that many, if not all of them have now received the decisions they were seeking and we hope that, because of their willingness to raise the issue, those who take matters to administrative tribunals in the future will have better experiences.

During this inquiry we encountered open co-operation and communication from all six tribunals examined. We believe it is our mutual hope that this inquiry and the recommendations made will point the way to improved timeliness of decision making – an outcome that, if achieved, will significantly alter and enhance fairness for tribunal users.

## Administrative Tribunals in Saskatchewan

Administrative tribunals play an important role in our community. Generally, administrative tribunals are concerned with the executive actions of government and “provide a form of redress, mostly in disputes between citizen and State.”<sup>1</sup> Some tribunals serve to resolve disputes between citizens. Tribunals were initially created to provide an affordable, effective and timely alternative to government bureaucracy and the courts. Since the mid-1900s, they have become an integral part of Canadian government. We identified 55 boards, commissions and agencies, which make up the administrative tribunal system in Saskatchewan (see Appendix A).

Administrative tribunals in Saskatchewan review a broad range of government decisions that deal with many different aspects of most citizens’ daily lives, such as labour and employment, human rights, regulation of agriculture and food, utilities, housing, social assistance, insurance and vehicle registration, and more. Some fulfill a regulatory function, such as the Milk Control Board, which manages the production and distribution of milk, or the Financial Services Commission, which protects consumers through the regulation of the Saskatchewan financial market. Others have an adjudicative mandate, such as the Labour Relations Board, which deals with disputes under *The Trade Union Act*, or the Human Rights Tribunal, which deals with complaints under *The Saskatchewan Human Rights Code*. Whether regulatory or adjudicative, many tribunals are making decisions that may deeply affect the lives of private citizens. They are the determiners of fact, and their decisions, just like decisions of a court or decisions of government, can seriously affect people’s lives.

The role of administrative tribunals in Saskatchewan, similar to tribunals in other provincial jurisdictions, is to serve as an extension of the executive branch of government on matters that require independent decision-making, free from political influence, and in some cases as alternatives to the courts. As elsewhere, the intent is to

provide the public with an accessible, independent and competent forum for a review of decisions on matters that affect the public’s interest in the economy, culture, and personal lives of Saskatchewan citizens.

In large part, administrative tribunals have lived up to their promise, but they are not without their problems. In his paper, “Are Administrative Tribunals Effective in Rendering Justice?,” Justice William J. Vancise observed that tribunals “were created to avoid the rigidity of the judicial system, described as:

- too formal and procedurally dominated.
- too costly because it requires the parties to retain legal counsel.
- unable to adapt the current adversarial model to render expeditious dispositions.
- unable to handle a high volume of cases.
- lacking expertise in relations to public policy in matters such as labour relations.”

He notes, however, “many of those criticisms can now be leveled at administrative tribunals.”<sup>2</sup>

## The Issue: The Timeliness of Decisions and the Impact of Delayed Decision-Making

One of the primary criticisms the Ombudsman hears about administrative tribunals is the amount of time it takes tribunals to render a decision after the final hearing. In many instances, the decisions are about matters that are of substantial significance for the people involved; for example, entitlement to compensation, evictions, whether they will be found guilty of discrimination, or whether they will get their job back.

For example, "Mandy" believed her union failed to represent her adequately. She brought the matter before the Labour Relations Board and participated in two hearings, four months apart: one in June 2003 and one in October 2003. Sixteen months later, she still had no decision from the Labour Relations Board and contacted our office. The Board rendered a decision in April 2005, two years after the initial hearing. The nature of Mandy's issue caused her and her family a lot of stress. Added to her stress was the helplessness she felt when she discovered that the Board was not constrained to render a decision within a timeline and did not seem to be accountable to anyone for the time it was taking.

We investigated Mandy's complaint and others, and found that there can be many reasons for delays:

- The case may involve issues that are highly complex.
- The tribunal may lack adequate resources.
- There may be a lack of procedural accountability.
- The parties may be engaging in deliberate delay tactics.
- Procedural requirements may be overly exacting.
- There may be too little flexibility in tribunals' options for addressing issues.
- The level of subject knowledge and skill of tribunal members may vary.
- A tribunal member may become ill or may leave the tribunal.

While there may be valid explanations for why some decisions are delayed, these are seldom acceptable to the people who have to wait. People rightfully believe they are entitled to timely decisions and while the definition of "timeliness" can be debated there comes a point in any case when all can agree the threshold has been exceeded. The challenge is to find a balance that most people can accept that equitably weighs the competing interests of responsibly managing limited resources and delivering timely decisions.

Delays in decision-making affect not only the individual citizen but also may affect those agencies whose decisions are the subject of the review and in many cases can subsequently affect the efficiency of the administrative tribunals themselves.

Agencies whose decisions or actions are subject to review by an administrative tribunal need to know that their decisions will meet the tribunal's standards. If the administrative tribunals are not providing timely reviews, the agencies are then left in the position of having to continue to render decisions not knowing whether previous decisions have been made in error. This could lead to yet more appeals with the consequent expenditure of limited resources. The inefficiencies are clear.

The administrative tribunals themselves have a vested interest in delivering timely decisions. The longer a case waits for a decision, the more difficult it is to remember the context of what was said or written. There is also an increased chance of error in interpreting evidence when some of the context has been lost to memory. Finally, tribunals who continually have difficulty rendering timely decisions may not be considered to be meeting their operational function of providing access to a decision-making process that is quicker, less expensive, and more efficient than the courts.

## The Purpose of the Ombudsman Inquiry

We examined a wide range of issues facing the administrative tribunal system but our principle concern was timeliness. It is important that consumers have access to a tribunal system that provides quality decisions in a timely manner. There are many factors that influence the ability of tribunals to render timely decisions. The consumer's understanding about how to prepare and what to expect, the timelines that are in place (if any), the processes the tribunal uses, the resources available to the tribunal, and the tribunal's internal and external accountability all come into play.

As a result, this inquiry will focus on the larger processes and current structures now in place to support the work of provincial administrative tribunals to render timely decisions. We have taken a best practices approach and our recommendations are based on the best practices we identified.

## The Methodology of the Ombudsman Inquiry into the Administrative Tribunals

We selected six tribunals that provided a representative cross section of various roles and functions. The six were: The Human Rights Tribunal, the Automobile Injury Appeal Commission, the Labour Relations Board, the Highway Traffic Board, the Office of Residential Tenancies, and the Workers' Compensation Board.

We began the inquiry by researching the available national and international literature in relation to the operational standards and best practices of administrative tribunals. Among the literature we reviewed, three principal reports emerged:

*Tribunals for Users - One System, One Service: A Report of the Review of Tribunals by Sir Andrew Leggatt* (referred to in this document as "the Leggatt Report") – Sir Andrew Leggatt was commissioned to undertake a review of the 70 tribunals in England and Wales. The objective of his report, issued in 2001, was to "recommend a system that is independent, coherent, professional, cost-effective and user-friendly."<sup>3</sup>

*Better Decisions: Review of Commonwealth Merits Review Tribunals* (referred to in this document as the "ARC report") – The Administrative Review Council produced this review in 1995. It covers "the objectives of the merits review system; review tribunal processes; tribunal membership; access, information and awareness;... administration and management;... the structure of the administrative tribunal system, and the relationship between its constituent parts."<sup>4</sup>

*On Balance: Guiding Principles for Administrative Justice Reform in British Columbia* (referred to in this document as the "Administrative Justice Project White Paper") – The Administrative Justice Project in B.C. produced this white paper in 2002. In developing the paper, the project team "examined fundamental questions about the nature, quality and timeliness of administrative justice services in British Columbia."<sup>5</sup> Following the literature review, we created, as none existed, a set of best practices

related to timeliness, as found in the international and national literature. We met with the heads and key personnel of the six selected tribunals. We interviewed lawyers who appear before a number of administrative tribunals. We reviewed each of the selected tribunals' legislation, policy and practices and examined their statistical data in relation to the timeliness of decisions. We conducted a cross jurisdictional comparison of similar provincial tribunals in relation to timeliness and workload. We created and then sent each of the six tribunals a standardized questionnaire that covered the operational practices that impacted on the timeliness of decisions. After we had examined the returned questionnaires we provided our findings and conclusions and met once again with the heads of the six tribunals to elicit their responses.

## The Administrative Tribunals Examined

The tribunals we examined have different mandates, different combinations of full and part-time members, and use different levels of formality when conducting hearings. Here is an overview of each.

	<b>Mandate</b>	<b>Consumers</b>	<b>Board / Tribunal Composition</b>
<b>Automobile Injury Appeal Commission</b>	Hear no-fault benefits appeals under the Personal Injury Protection Plan administered by SGI	Anyone	- 1 Full-time Chair - 1 Full-time Member - 13 Part-time Members
<b>Human Rights Tribunal</b>	Adjudicate complaints under The Human Rights Code and review complaints dismissed by the Human Rights Commission	Anyone	- 1 Part-time Chair - 6 Part-time Members
<b>Highway Traffic Board*</b>	Establish and administer legislation for the safe and legal operation of private vehicles, the bus-truck industry and (where legislated) the short-line rail industry	Anyone	- 15 Part-time Board Members; - 30 Part-time Hearing Officers
<b>Labour Relations Board</b>	Adjudicates disputes arising under The Trade Union Act, The Construction Industry Labour Relations Act, 1992, and The Health Labour Relations Reorganization Act	Unionized employers, unions and employees	- 1 Chair - 2 Vice Chairs - 18 Part-time Members
<b>Office of Residential Tenancies</b>	Adjudicate disputes between landlords and tenants under The Residential Tenancies Act	Landlords and anyone who rents a home	- 1 Director - 2 Deputy Directors - 8 Part-time Hearing Officers
<b>Workers' Compensation Board</b>	Stakeholder board adjudicates worker / employer compensation on work injury claims.	Anyone who works or employs workers	- 1 Chair - 1 Worker Board Member - 1 Employer Board Member

\* We examined two of the programs they arbitrate: the Safe Driver Recognition Program, and the Impoundment Program.

Tribunal Staff	Number of Hearings Annually	Formality of Hearings
<ul style="list-style-type: none"> <li>- Manager of Operations</li> <li>- Appeal Coordinator</li> <li>- Hearing Coordinator</li> <li>- Administrative Support</li> </ul>	2005: 152 2006: 128	Formal – Evidence is given under oath by witnesses who are subject to cross-examination; decisions tend to be detailed and formal. Commonly involves lawyers.
<ul style="list-style-type: none"> <li>- None</li> </ul>	2004: 12 Inquiries, 6 Reviews 2005: 12 Inquiries, 55 Reviews (includes pay equity review involving 40 people.)	Formal – Commonly involves lawyers
<ul style="list-style-type: none"> <li>- Manager Traffic Board Secretariat</li> <li>- HTB Administrator</li> <li>- Compliance Review Coordinator</li> <li>- 4 Hearing Coordinators</li> </ul>	2005: 1,500 (Safe Driver Recognition Program) 2005: 600 (Impoundment Program)	Informal – Commonly by phone
<ul style="list-style-type: none"> <li>- Secretary to Chair</li> <li>- Registrar</li> <li>- Senior Industrial Relations Officer</li> <li>- 2 Administrative Assistants</li> </ul>	2005/06: 256 Applications 139 Hearings  2006/07: 201 Applications 113 Hearings	Formal – Evidence is given under oath by witnesses who are subject to cross-examination; decisions tend to be detailed and formal. Commonly involves lawyers.
<ul style="list-style-type: none"> <li>- 5 Administrative Support Staff</li> <li>- 3 Information Officers</li> </ul>	2005/06: 6,600	Informal – Parties rarely represented by counsel.
<ul style="list-style-type: none"> <li>- Executive Administrative Assistant to Board</li> <li>- Director of Board Services</li> <li>- 3 Assistants to Board</li> <li>- 2 Dictatypists</li> </ul>	2005: 155 Oral Hearings 261 Decisions  2006: 81 Oral Hearings 237 Decisions	Informal Inquiry Model – Seldom involves lawyers.

## Best Practices

The administrative justice system in Saskatchewan, as in most other jurisdictions, developed ad hoc, and to date has not evolved into a co-ordinated or rationalized system. As a result, the system does not function in compliance with an agreed-upon set of best practices, which leaves consumers facing a wide array of boards, commissions and agencies, each operating with its own set of policies and procedures designed to meet its unique mandate. Many of the problems this situation creates — inefficiency, unnecessary complexity, and delay — have been addressed in other jurisdictions by moving to a more co-ordinated system. Even without a significantly more co-ordinated system, however, there is still merit in adopting a best practices approach to administrative tribunal operations.

This report focuses on timeliness and consequently discusses only those best practices that are connected to the issue and support timely decision making. Drawing on experience and research in the common law jurisdictions of Canada, the United Kingdom, Australia and New Zealand, we have identified the following best practices related to timeliness.

### Best Practices Related to Efficient and Consumer-Friendly Processes

#### BEST PRACTICE:

Consumers have access to information that will help them understand the process.

In order for consumers to get full benefit of the services of administrative tribunals and in order for tribunals to maximize their efficiency, it is essential that consumers have ready access to information that will acquaint them with tribunal procedures and expectations. Failure to provide sufficient information inevitably leads to confu-

sion, delays and disenchantment with the entire process.

In Saskatchewan, as in many jurisdictions, administrative tribunals adopt procedures that they believe are appropriate to their mandate. The principal advantage to this approach is that the procedures are tailored to best meet the needs of consumers.<sup>6</sup> A major disadvantage, however, is that consumers are faced with a complicated and confusing array of procedures, which risks neutralizing or outweighing the benefits of procedures specific to each tribunal. To address this situation, the Law Reform Commission of Saskatchewan, following in the footsteps of other jurisdictions in Canada and abroad, introduced a Consultation Paper in 2003 titled, "A Model Code of Procedures for Administrative Tribunals," which provides a basic procedural framework for all tribunals.<sup>7</sup> The Leggatt Report concluded that users ought to be given at minimum the following information with respect to tribunal processes and procedures:<sup>8</sup>

- The jurisdiction of the tribunal including what remedies are available, including any alternatives to pursuing an appeal or case before the tribunal (for example, an ADR or Ombudsman complaint), what each party must prove, what evidence is required and how it should be presented;
- Timetables, pre-hearing and hearing procedures and what options are available if one is unsatisfied with the outcome of the hearing;
- Information on the location, how to get there, parking, and what facilities or resources may be available (photocopying, interpreters) and how to access them; and
- The nature of any decision to be made and when it can be expected, whether there is a right to appeal that decision and the procedure for exercising it.

From the point of view of accessibility, consumers who understand what will be expected of them at tribunal hearings are



less likely to need the services of a lawyer, which will make the services of tribunals more accessible and affordable to many.<sup>9</sup>

Accessibility is not only a matter of making the tribunal process understandable for consumers. There are a number of other services that can be provided to increase accessibility for users:<sup>10</sup>

- help lines
- assistance in preparing for a hearing or pre-hearing
- videos of sample hearings
- information in other languages, and in non-written formats, such as audio or video

Other jurisdictions have found, and the literature supports, that increased accessibility in the form of good public information programs and assistance yields fewer applications that have no merit, and fewer delays due to parties not understanding tribunal expectations and procedures.

The Labour Relations Board, Human Rights Tribunal, Workers' Compensation Board, Highway Traffic Board and Automobile Injury Appeal Commission all have public web sites. Information about the Office of Residential Tenancies is on the Ministry of Justice's website. In addition, with the exception of the Human Rights Tribunal and the Highway Traffic Board, the tribunals have informational brochures. All the tribunals except the Human Rights Tribunal have staff who will provide assistance to users in person or by telephone. Some tribunals will accept speaking engagements on request from interested organizations.

The Human Rights Tribunal falls short of being easily accessible largely because it does not have permanent members, office space, or support staff. Furthermore, the Human Rights Tribunal does not have an educational mandate and does not believe that it is appropriate for them to provide guidance to participants.<sup>11</sup> The tribunal refers people looking for information about the tribunal and its processes to the Saskatchewan Human Rights Commission, which is better positioned to respond.

### Recommendation #1:

Each tribunal make information about itself, its procedures, and its expectations available to consumers. This information should be accessible through direct contact with experienced staff members and in a variety of formats, such as written, audio, video, and Internet.

### FOR IMPLEMENTATION NOW

### BEST PRACTICE:

Publications and proceedings are in plain language.

The move to plain language in all forms of communication has been underway for several decades and has been embraced by many but not all tribunals. Access to information in plain language throughout the tribunal process is important for users who are unfamiliar with tribunal proceedings and should help the parties and members proceed through the hearing process more quickly. Plain language in decisions might make a decision more difficult to write, especially for those trained to use technical language, but if consumers are better able to understand decisions they will be more likely to accept them, which might result in fewer appeals.

The Council of Canadian Administrative Tribunals has produced a publication titled *Literacy and Access to Administrative Justice in Canada: A Guide for the Promotion of Plain Language*. The report recommends that all tribunals move to plain language when providing information to users. This applies not only to written information but to any form of information, so the information will be accessible to users with a range of literacy skills.<sup>12</sup>

The ARC Report recognizes that tribunal decisions may be short or long, simple or complex. It states that tribunal decisions might contain more information and go into more depth than other administrative

decisions because tribunal decisions are expected to contribute to the improvement of decision-making generally, may be disseminated broadly, and may be subject to judicial review.<sup>13</sup> Nonetheless, it states that the decision should be accessible to the reader in plain language.

The responses to our questionnaire revealed that some of the tribunals tried to use plain language on their web site or in other published materials. With regard to decision writing, only the Office of Residential Tenancies and the Highway Traffic Board reported that decisions were written in plain language. The other tribunals reported that decisions were more complex and involved both plain and technical language.

### Recommendation #2:

Tribunals provide their public materials and their decisions in plain language.

#### FOR IMPLEMENTATION NOW

### BEST PRACTICE:

Orientation meetings are made available to consumers.

Some consumers may need a face-to-face meeting to help them understand tribunal procedures and expectations. None of the tribunals offered an orientation meeting exclusively for this purpose. We believe accessibility and timeliness would both be improved by the introduction of this type of meeting. The initial goal of the orientation meeting would be to orient the parties, represented or not, so that they understand the process, what is expected of them, what they have to do – both before and at the hearing – and what they need to prove in order to be successful.

Although the tribunals do not offer orientation meetings to acquaint users with tribunal processes, all tribunals except the Human Rights Tribunal stated that users do have access to tribunal staff members who will

answer questions about the process and provide assistance in preparing for the hearing. In some cases, the Automobile Injury Appeal Commission will hold an appeal management meeting that closely resembles an orientation meeting. Individuals with disputes at the Workers' Compensation Board can apply to the Office of the Worker's Advocate for assistance with preparing and presenting their appeal.

Orientation meetings need not be provided in all cases. The goal of these meetings would be to orient users and manage the process in order to reduce the time and complexity of subsequent hearings. They should not be used if the result would simply be to add another step to the process.

### Recommendation #3:

Tribunals offer orientation, in meeting format where appropriate, to acquaint users with the process. Information provided to individuals at orientation should outline all their options including:

- any access to an appeal within the tribunal system.
- any access to an appeal or judicial review in the court system.
- any access to other dispute resolution services available.

#### FOR IMPLEMENTATION NOW

### BEST PRACTICE:

Consumers have access to appropriate dispute resolution (ADR).

The literature normally refers to "Alternative" Dispute Resolution (ADR) but the word "alternative" carries the connotation that the alternate process is somehow less desirable, in the same way that an "alternate" highway route is less desirable. Alternative dispute resolution, more often than not may be the more appropriate mechanism to

resolve disputes. Thus, to avoid any misconceptions associated with the word "alternate" we will be using "Appropriate Dispute Resolution."

Access to dispute resolution processes other than hearings is common in many forums, including the Courts.<sup>14</sup> ADR processes are distinguished from the courts often by not requiring a hearing and by being less formal. In fact, the administrative tribunal system itself, with its original objective of being less costly, less time consuming and less formal than the courts, is an ADR process.

ADR has enjoyed considerable success.<sup>15</sup> Most people associate ADR with mediation, although sometimes it is closer to conciliation or negotiation. The ADR process may be mandatory<sup>16</sup> or voluntary.<sup>17</sup> Parties to the ADR process are encouraged to be candid, so the facilitator is disqualified from being a decision-maker in another proceeding on the same issue. Generally results will not be binding without the consent of all parties.<sup>18</sup>

ADR has the potential to reduce the number of disputes proceeding to a hearing, which frees up tribunal resources that can be used to expedite the hearing and decision-making process. As a result, matters that do proceed to hearings are likely to be more complex, which means the average time it takes to complete a case will be longer – although one would expect the time taken for each case would be shorter than if ADR was not used.

Some of the tribunals in the review offer ADR as an option, although it is not always referred to as ADR. The Labour Relations Board can refer people with labour disputes to the Labour Relations and Mediation Division of the Ministry of Labour. It also holds pre-hearing meetings that mirror a Queen's Bench pre-trial conference. In certain cases it has the authority to order pre-hearing meetings. In nearly all cases, it sends first collective agreement applications to mandatory conciliation with a Board agent presiding. The Workers' Compensation Board has trained many of its staff in ADR to help resolve issues without

the need of a formal appeal. People in dispute with Saskatchewan Government Insurance have the option of going to mediation prior to appealing to the Automobile Injury Appeal Commission. In addition, there is some opportunity to settle matters at the pre-hearing meetings provided by the Human Rights Tribunal. The Dispute Resolution Office, a branch of Saskatchewan Justice, offers facilitation and mediation services that could be accessed voluntarily by parties to tribunal processes.

As a best practice, Appropriate Dispute Resolution can, as the title suggests, offer people a more appropriate way to settle their disputes. It has the added advantage of letting the tribunal direct its resources to cases that are best dealt with through a hearing process. The availability of ADR does not appear to be an issue, but if administrative tribunals are to maximize its effectiveness, they must ensure that consumers are aware that ADR is in many instances a preferable option.

#### **Recommendation #4:**

Tribunals offer Appropriate Dispute Resolution (ADR) as an option to the hearing process.

#### **FOR IMPLEMENTATION NOW**

#### **Recommendation #5:**

Tribunals include within their public information provided to users, information on the available Appropriate Dispute Resolution (ADR) options.

#### **FOR IMPLEMENTATION NOW**

## BEST PRACTICE:

Pre-hearing meetings are available.

Pre-hearing meetings can serve more than one purpose. They can provide information about tribunal processes, they can be case management meetings to ensure the parties are meeting their pre-hearing obligations promptly and fully, and they can be formal pre-hearing conferences with the goal of settlement.<sup>19</sup> Pre-hearing conferences have become the norm in civil law in Saskatchewan, providing an opportunity for parties to attempt to settle, a format for the parties to learn about one another's case and evidence, and, where it is determined that cases will be proceeding to trial, an opportunity for the parties to clarify the issues that will be determined at the hearing, to provide for any disclosure that is still necessary and to clarify expectations for the trial in terms of expert evidence, witnesses and timeframes.

In the administrative tribunal system, pre-hearing case management meetings are generally a meeting involving the parties to a dispute, their representatives, and a decision-maker, who is often the tribunal registrar, or other tribunal staff member. The decision-maker can act as a facilitator for the parties and attempt to help them through open communication to reach a mutually acceptable resolution. The decision-maker can also provide a reality check, by giving the parties an assessment of what the outcome of the hearing may likely be, and by opening communication.

None of the tribunals in this study, except the Human Rights Tribunal, conducted pre-hearing meetings in all cases as a matter of course - whether for the purposes of settlement or case management. The Labour Relations Board indicated<sup>20</sup> that it did conduct pre-hearing meetings in several instances but not all. Its general objective is usually settlement but case management

also forms part of the process. The Board would conduct a pre-hearing meeting:

- if requested by a party and consented to by both parties.
- in certain instances for some duty of fair representation cases.
- when they were required for case management purposes in especially complex cases or cases involving numerous parties.
- in some first contract negotiations situations (more commonly a Board agent is appointed to conciliate).

The Human Rights Tribunal, which holds pre-hearing meetings in all cases, indicated that in appropriate cases it would contact the parties to the dispute early in the process to determine if they wished to have a pre-hearing meeting for the purposes of settlement.<sup>21</sup> If the parties agreed, then a pre-hearing meeting would be provided through the Tribunal. The panel conducting this pre-hearing case management meeting is a different panel than the panel who would hear the case if the matter proceeded to a hearing. The Automobile Injury Appeal Commission told us that they will provide pre-hearing meetings for some cases. Where hearings are scheduled quite quickly after application and hearings are informal, a pre-hearing meeting may not be required.

Pre-hearing meetings can also serve as an opportunity to offer users an ADR process. The Human Rights Tribunal already does this, and the Labour Relations Board does in certain instances. In these cases, the member or staff person hosting the pre-hearing meeting, and acting as a mediator, attempts to help the parties resolve their issues. For tribunals moving in this direction, to ensure that the parties are able to candidly discuss settlement without fear that it will affect their hearing, it is important that tribunals have a policy in place that any member involved in the pre-hearing meeting cannot be the member assigned to hear the matter if it goes to a hearing. The Labour Relations Board already has such a policy. Pre-hearing meetings need not be with a member of the tribunal, but

could be with a staff member or the registrar.

Orientation, ADR and case management functions do not necessarily need to be provided as three separate contacts with the consumer. Two, or even all three of the functions may be combined when appropriate.

**Recommendation #6:**

Tribunals provide pre-hearing meetings when appropriate.

FOR IMPLEMENTATION NOW

**Recommendation #7:**

Tribunals who also use pre-hearing meetings for mediation purposes have a policy that the member who sits on the pre-hearing meeting shall not be the member that hears the case, unless both parties consent.

FOR IMPLEMENTATION NOW

**BEST PRACTICE:**

Tribunals provide consumers the opportunity to opt for hearings and reviews conducted by telephone, in writing, or electronically.

Face-to-face hearings are not always necessary or legally required and in fact could limit accessibility in some cases.<sup>22</sup> A study in the United Kingdom found that face-to-face hearings were less accessible than alternate forms.<sup>23</sup> Alternate forms of hearings also have the potential to speed up the entire process as parties will likely be more able to agree on a hearing schedule. In addition, alternate forms are commonly less formal, which should make it easier for the consumer to use the system. The ARC Report and the *Leggatt Report* both recommend that, provided the parties

consent to a process apart from an oral hearing, other processes should be used so long as they effectively address the issue.<sup>24</sup> The U.K. White Paper issued in response to the Leggatt Report states that it is the duty of their new tribunals service to be novel and innovative in its approach to dispute resolution so that it need not rely on oral hearings in every situation.<sup>25</sup>

Another advantage of alternate forms of hearing is lower cost for the consumer. The cost of travel and parking to attend a hearing can be substantial. Generally, for individuals who live in Regina and Saskatoon, this is not a significant cost. However, some tribunals do not have offices or do not hold hearings outside the major cities, which means individuals who live in rural and northern communities have to travel to the nearest major center for a hearing. In the event that the hearing lasts longer than one day, they may have to incur additional costs for shelter and food while they are staying in the city. To enable injured workers to attend a hearing, the Workers' Compensation Board will pay time loss from work and travel expenses from anywhere in Canada – and sometimes beyond.

All six tribunals provide face-to-face hearings, either as a matter of course, or on request. Many of the tribunals also allow written hearings, with the exception of the Human Rights Tribunal and Automobile Injury Appeal Commission. Written hearings are much more common with some tribunals, like the Workers' Compensation Board than others, like the Labour Relations Board. Many of the Boards allow telephone hearings for most applications. The Labour Relations Board allows telephone hearings on certain interlocutory issues, and will permit witnesses to offer evidence by telephone. The Human Rights Tribunal will allow witnesses to offer evidence on the telephone where necessary. The Automobile Injury Appeal Commission will hold conference calls as an option, sometimes for an entire day.

Although the Workers' Compensation Board and the Highway Traffic Board make extensive use of written and telephone hearings,

on the whole tribunal hearings are still commonly face to face.

None of the tribunals presently offer hearings by way of video conferencing. Some of the tribunals have considered this option and remain open to it. Other tribunals are concerned about leaving disputing parties alone in a room together. Cost is also a concern. We heard that it would be more cost effective to have everyone travel to the same location for a hearing than to set up a video conferencing system. The costs associated with new technology are coming down and will likely be less of a concern in the future.

#### **Recommendation #8:**

Tribunals, when appropriate, offer alternatives to face-to-face hearings, such as written hearings, telephone hearings, and hearings by video conferencing.

#### **FOR IMPLEMENTATION NOW**

#### **BEST PRACTICE:**

Hearings are conducted with an appropriate level of formality (or informality), while following a standard set of basic procedures.

The formality of tribunal procedures needs to be proportionate to the type of hearing, the type of argument that can be presented, and the significance and impact the decision will have on the applicant. For example, some matters need to be decided more quickly than others, owing to the effect a delay will have on the applicant, and may, therefore, require a less formal and speedier process. On the other hand, tribunals can go too far the other way and take on too formal a process, which can cause delays and take away from accessibility.<sup>26</sup>

There is an understandable range of formality among the tribunals we studied. The processes at the Labour Relations Board are fairly formal and court-like. The Automobile

Injury Appeal Commission and the Human Rights Tribunal processes are a mixture of formal and informal, although closer to the formal end. The Highway Traffic Board, the Worker's Compensation Board and the Office of Residential Tenancies all claimed their procedures were informal, although they also stated that they may use more formal processes depending on the nature of the hearing, the parties appearing, or the amounts being claimed.

The range of formalities is necessary if tribunals are to fulfill their mandate effectively. Some tribunals need to deal with cases quickly, especially when they have a high volume of cases, involving relatively small amounts of money, and applicants requiring decisions quickly; other tribunals dealing with more complex issues may need to be more formal and court-like; and still other tribunals need the flexibility of using formal processes for some cases and informal processes for others.

Despite the need for flexibility and the appropriateness of tailoring the level of formality to match the issue, there are certain minimum procedures and protections required by the rules of natural justice. The Law Reform Commission of Saskatchewan has released a Model Code of Procedure, which allows for procedures to be adapted so that they can be as informal or formal as required. The Model Code has been widely distributed to Saskatchewan's tribunals and is available through the Law Reform Commission.

#### **The Model Code**

Several studies have been undertaken in the last few decades into the procedural requirements of administrative tribunals with the objective of establishing a common set of procedural rules for hearings before administrative tribunals. The Saskatchewan Law Reform Commission has stated that "procedural codes address problems that are perceived to lie at the core of deficiencies in administrative adjudication."<sup>27</sup> Developing such a code is outside the scope of this report. Nonetheless, given the importance attached to procedure in the delivery of fair and efficient service, the matter deserves discussion.

In May 2003, the Law Reform Commission of Saskatchewan published a consultation paper: "Model Code of Procedure for Administrative Tribunals." In its consultation paper, the Commission noted the following consequences of an administrative tribunal system that lacked a common set of procedures:<sup>28</sup>

- uncertainty, both within the agencies and outside, as to the extent of procedural rights.
- increased difficulty in accessing administrative justice.
- duplication of effort in the drafting, development and amendment of procedure.
- delay in the implementation of new programs.
- direct and indirect costs resulting from that duplication, as well as from training costs.
- judicial challenges.
- a failure to fully utilize the abilities of individuals who are not formally trained in procedures.

The Law Reform Commission stated that a procedural code would "provide a comprehensive and authoritative source of law for agencies, ensuring that they have the powers they need to effectively conduct hearings and accomplish their statutory mandates." Quoting the Alberta Law Reform Institute, the Commission stated that a procedural code would "increase simplicity, efficiency and visibility in the powers and procedures of administrative agencies."<sup>29</sup>

With regard to implementing its model code, the Commission offered the following:

"A model code of administrative procedure should contribute to fairness and efficiency by providing decision-makers with clear, practical guidance. . . . Very little in the code . . . conflicts with either the principles of administrative law laid down by the courts, or with the enabling legislation under which Saskatchewan tribunals are constituted. It is, rather, an attempt to give practical, concrete form to established rules."<sup>30</sup>

We agree with the Saskatchewan Law Reform Commission about the desirability of implementing a procedural code and we believe the Code the Commission has presented could be implemented as is, although we understand further consultation would be appropriate. We recognize that, while the degree of formality that may be implied by the Code may be too formal for some of the tribunals, the principles behind the Code should apply to all.

#### **Recommendation #9:**

Tribunals adopt the principles of the Saskatchewan Law Reform Commissions' "Model Code of Procedure for Administrative Tribunals."

**FOR IMPLEMENTATION NOW**

#### **Recommendation #10:**

To supplement the "Model Code of Procedure for Administrative Tribunals", each tribunal adopt additional policy and procedural guidelines specific to its own needs and formalize these in writing.

**FOR IMPLEMENTATION NOW**

#### **BEST PRACTICE:**

When the process is formal or complex, consumers should have access to assistance.

Some tribunals conduct hearings that are formal or technical in nature and for which users will require assistance to properly navigate the system.

While an assisted hearing is more accessible to consumers, it may not be timelier. Legal or quasi-legal representation may make the process more formal and legalistic, slowing the process. In addition, when members write decisions for lawyers, they generally take longer to write because more energy

goes into ensuring the facts and evidence have been laid out sufficiently and more legal examination and research is required. Also, unassisted users facing a formal process commonly slow the process, because unfamiliar users may not know what evidence they need to present and how best to present that evidence.<sup>31</sup> This can result in the members having to wade through irrelevant evidence and sometimes to seek further evidence that the user did not present, in order to properly examine the case. On the other hand, access to trained representatives, who might not be lawyers, early in the process can help avoid unnecessary hearings if the parties withdraw a case in advance of the hearing after being advised that they will not be successful.<sup>32</sup> This frees up resources that can be used more effectively for other hearings.

One goal of the *Leggatt Report* was for most users to be self-represented. This may be unachievable. The U.K. Council on Tribunals Paper, "Feedback on the Council's Users Support Workshops," was skeptical that this would be possible without significant changes to the procedures and structures of the tribunals, stating, "even with access to the best information and advice, most people would find it too difficult, and more often too daunting, to put their own case effectively."<sup>33</sup> An inquiry model, however, such as the one used by the Workers' Compensation Board may not be too difficult or too daunting for users.

Assistance can also come from the tribunal hearing panel. As noted in the *Leggatt Report*, given the number of unrepresented parties appearing before tribunals, assistance from tribunal members has increased. This may be necessary, but it places the member hearing a party-to-party case in the awkward position of having to assist one party without prejudicing the interests of the other party. Despite this difficulty, the *Leggatt Report* recommends that "The chairmen will have to take the leading role in identifying those parties who are struggling with tribunal procedures, and in working out what can properly be done to assist them."<sup>34</sup>

### **Affordable Access to Trained Representatives**

Consumers are allowed to have representation or assistance when appearing before tribunals.<sup>35</sup> The expense, however, is almost always borne by the consumer.

This creates an accessibility problem as many consumers cannot afford representation.<sup>36</sup> Nonetheless, the *Leggatt Report* anticipated that such "advice services" would be used with great frequency by the parties and well-resourced by the tribunal system.<sup>37</sup> The report discussed extending Legal Aid to include advice agencies for tribunals.

For all six tribunals we examined, consumers appearing with the assistance of legal counsel were responsible for the cost of counsel. Applicants at the Workers' Compensation Board can use the services of the Worker's Advocate, who will provide free assistance. Complainants in many human rights cases will be represented by the Human Rights Commission and its staff lawyers. However, Human Rights Commission lawyers represent the Commission and its interests. If, therefore, the Commission's interests are not aligned with the consumer's interests, the complainant may need to seek the services of an independent lawyer. Unionized employees bringing an application against their employer to the Labour Relations Board will have access to their union's lawyer who will be there to represent the interests of the union. On the other hand, union members bringing duty of fair representation complaints against the union will not have access to the union counsel, who will be representing the union on the opposite side of the case. In both instances, unions often appear before the Board with staff representatives and not lawyers. The member may still want a lawyer though, as these staff members tend to be very knowledgeable about the process.

The costs of legal counsel can vary significantly depending upon the expertise or experience of the lawyer, the time that it takes to prepare and present at a hearing, the amount of evidence, including expert evidence that has to be collected,



reviewed and presented, and so forth. In Saskatchewan, Legal Aid does not cover services before a tribunal.<sup>38</sup> While some tribunals, such as the Automobile Injury Appeal Commission, will allow an order for costs if the applicant is successful at the hearing, these costs are capped at a low amount and do not come anywhere near to covering the actual expenses of the legal bill. In order to make administrative tribunals more accessible to people, greater assistance, legal or otherwise, will need to be provided to individuals who cannot afford legal counsel.

All of the tribunals will allow the parties to bring any representative with them whom they wish, including non-legally trained representatives. None of the tribunals refer specific representatives to the parties, with the exception of referrals to the Office of the Worker's Advocate by the WCB and general referrals to the Law Society of Saskatchewan lawyer referral service by the Labour Relations Board. Again, with the exception of potential representation by the Office of the Worker's Advocate for Workers' Compensation Board matters, there are no publicly or tribunal funded representation services offered to users.

There are free legal clinics in Prince Albert, Saskatoon and Regina that will provide advice to people who meet the income criteria, and in special cases will appear before a tribunal with the applicant. Community Legal Assistance Services for Saskatoon Inner City, Inc. (CLASSIC), a non-profit and charitable organization in Saskatoon organized by law students, provides free legal services to low income members of the community. The Law Society of Saskatchewan offers a referral service to seniors in Saskatchewan who are receiving the Federal Guaranteed Income Supplement. Eligible seniors are referred to lawyers who act free of charge in certain areas of the law. There are also many lawyers who are willing to work pro bono but as yet there is no referral service in Saskatchewan. Individuals are left on their own to find lawyers willing to work pro bono.

The percentage of consumers who appear with legal representation varies among the tribunals. The Labour Relations Board estimates that something approaching ninety percent of parties before the Board have legal representation. Most complainants and many respondents appearing before the Human Rights Tribunal have legal representation. The Automobile Injury Appeal Commission reported that Saskatchewan Government Insurance always has legal representation, although only about one-third of applicants have legal representation. Legal representation is significantly lower at the Workers' Compensation Board, the Highway Traffic Board and the Office of Residential Tenancies.

### Recommendation #11:

Government, in collaboration with the administrative tribunals, study and consider providing affordable support services to individuals who are preparing for a hearing at an administrative tribunal on complex and significant issues.

### FOR CONSULTATION AND IMPLEMENTATION

### BEST PRACTICE:

There is an appropriate balance between timeliness and the potential need for appeals or judicial review.

Appeals or judicial reviews can affect the timeliness of decisions in two ways. First, appeals or reviews during the hearing process on preliminary matters can significantly delay proceedings while matters are making their way through the court system. This was especially a concern at the Labour Relations Board where a number of preliminary issues need to be decided. In the extreme, issues can make their way all the way to the Supreme Court, and halt the Board's process for years.

Second, decision writers, mindful of the possibility of appeal or review, may write very

thorough, well-reasoned decisions with a view to making their decisions appeal-proof. This commonly results in longer decisions that take longer to write. Of course, well-reasoned decisions are essential, but so is timely decision writing. The longer it takes to render a decision, the higher the risk that it will lose effectiveness and relevance. In some instances, training in decision writing may be beneficial. The matter of member training is discussed further in the section on board composition and function.

### Recommendation #12:

Tribunal members who write decisions receive training in decision writing that will assist them in writing timely decisions at an appropriate level for the subject matter and the user.

### FOR IMPLEMENTATION NOW

#### Appeal Levels

The possibility of an appeal or review impacts some tribunals more than others. On questions of law or jurisdiction, decisions of the Human Rights Tribunal and the Director of Residential Tenancies are subject to a direct right of appeal to the Court of Queen's Bench and decisions of the Automobile Injury Appeal Commission are subject to a direct appeal to the Court of Appeal. There is no right of appeal from decisions of the Labour Relations Board, the Highway Traffic Board and the Workers' Compensation Board, although there is the potential for judicial review.

In some instances, consumers can find themselves faced with several levels of appeal before receiving a "final decision." This risks leading to "appeal exhaustion," as consumers faced with several levels of appeal can quickly tire of the process. The original intent of creating several levels of appeal may have been to ensure the consumer's right to receive a fair and thorough vetting before a final decision is made, but if consumers abandon the process because of cost or the time it is taking, the objective is missed.<sup>39</sup>

In Canada, two initiatives have been implemented to address part of the problem:

- In Québec, legislation provides for the correction of a mistake by the member who wrote the decision,<sup>40</sup> or for a review or revocation of a decision if:
  - a new fact is discovered which, had it been known in time, would have led to a different decision,
  - a party was not present and provided sufficient reasons for the absence, and
  - there is a substantive or procedural defect of a nature likely to invalidate the decision.<sup>41</sup>

Otherwise, with the exception of a few specific appeal opportunities (immovable property and preservation of agricultural land with leave to the Court of Québec)<sup>42</sup> all decisions of the tribunal are final and binding.

- In Alberta, legislation has recently been passed that authorizes a tribunal to change a decision that would otherwise be final on the recommendation of the Ombudsman.<sup>43</sup>

Both initiatives are less complicated than applications to court or to a higher appeal body.

Another approach is to avoid the necessity of an appeal in the first place. The Leggatt Report recommended that all departments have an automatic procedure for review of decisions that are being appealed. The review would ensure the decision is correct in fact and law and there is no other option than an appeal to resolve the matter. This process would also ensure that an appeal is a justifiable use of public funds.<sup>44</sup>

## Best Practices Related to Development of Timelines

### BEST PRACTICE:

Timelines for hearings and decision writing are established, are appropriate and are met.

Reasonable timelines are an integral part of accessibility. Consumers need to know that their issues are being addressed in a timely way. Consumers will soon lose faith in a tribunal with drawn out procedures and no timeframes. This was recognized in Quebec, where Le Tribunal Administratif is required by statute to deliver decisions within three months unless the president grants an extension.<sup>45</sup> In British Columbia, the *Administrative Tribunals Act* requires tribunals to write practice directives stipulating timelines for tribunal procedures including the time to deliver the final decision and reasons following the hearing.<sup>46</sup>

The principle that decisions should be made within a reasonable amount of time always exists and, generally, better decisions are made when all of the evidence and arguments are still fresh in the minds of the decision-makers.<sup>47</sup> *The Trade Union Act* contains statutory timeframes for certain types of proceedings, such as grievance arbitrations, and the Tribunal Administratif du Quebec operates within a legislated timeframe.<sup>48</sup> Other tribunals in Saskatchewan and elsewhere, such as the Canadian Human Rights Tribunal,<sup>49</sup> have timelines based in policy. Implementing reasonable timelines in statute or policy helps to ensure that members render decisions in a timely way. Timelines are more effective if they are accompanied by sanctions for members, who without good reason do not comply.

Timelines can help part-time members who have busy working lives apart from their work on the tribunal. Timelines clearly communicate what is expected of members and enable them to more easily schedule tribunal work within their other work.

In setting timelines, the time for the entire process must be considered, because users focus on that time, not just the time it takes to complete a portion of the process.<sup>50</sup>

### Complexity and Impact

Complex issues with the potential to profoundly affect the interested parties will require more research and a more detailed report to satisfy the need for fairness than less complicated and less substantive issues. This may be the largest variable affecting the timeliness of tribunal decision writing. Different tribunals deal with different matters, often with hugely different levels of complexity. Therefore, while it may be reasonable to expect one tribunal to release a decision within 48 hours of a hearing, it is not reasonable to have the same expectation for other tribunals that deal with different and more complex matters.

By way of example, the Automobile Injury Appeal Commission deals with approximately 150 cases annually, while the Office of Residential Tenancies hears approximately 6,800 cases. On the other hand, the Automobile Injury Appeal Commission's decisions are detailed, formal, and lengthy, dealing with complex legal, medical and mathematical concerns, while the Office of Residential Tenancies' decisions are significantly less formal, written in plainer language and are relatively short.

### Clearly Set Statutory Timelines or Policy-Based Timelines

None of the tribunals in our review were subject to statutory timelines for writing their decisions; however, several of the tribunals have internal policies on timelines for decision-making. Some also have timelines for other steps in the hearing process.

The Human Rights Tribunal has an informal guideline of six months to deliver a decision after receiving an appeal. It has no policies on timelines for steps in the hearing process. In 1996, the Saskatchewan Human Rights Commission in its report "Renewing the Vision", stated, "The tribunal should hear cases no later than three months after referral from the commission, and should have a

statutory obligation to render decisions as quickly as possible."<sup>51</sup>

The Labour Relations Board is subject to a policy timeframe in terms of certification and de-certification applications. Applications are to be scheduled for a hearing within 20 days of the date of application and a decision is to be rendered within 10 days of completion of the hearing. In all other cases decisions are to be rendered within 90 days of the last hearing date. The Labour Relations Board acknowledged that these timeframes are not met in every case owing to problems beyond the control of the Board (e.g. difficulties with the mail system not providing for adequate service and notice, or incorrect spelling of names or incorrect addresses on file, which make service and notification more time consuming, complex issues surrounding the bargaining unit description, and in decertification applications where employer interference is found).

The Automobile Injury Appeal Commission has an internal policy that all decisions are to be completed within two months of the final submission of evidence. This is a recently adopted policy that the Commission has met consistently since August 2006.

The Office of Residential Tenancies has an internal policy that all decisions are to be provided within 40 days of the date of the hearing. Many decisions are provided within two weeks.

The Highway Traffic Board's policy is to provide their decision to staff within one day of the hearing. Generally, parties will receive the decision within one week.

The Workers' Compensation Board has no policy timeframes; however, most decisions are rendered within thirty days from the date of the hearing. The Board is different than the other tribunals in that it will often continue to collect information on its own after the hearing, which can include requiring the worker to undergo medical tests. This can greatly impact on their ability to provide decisions within any timeframe.

On the whole, the tribunals with timelines stated in policy were having less difficulty rendering decisions within reasonable timeframes than those that did not.

In common law, all tribunal decisions are expected to be reached within a reasonable timeframe. Nonetheless, some decisions can exceed this timeframe and take several months or years. Excessive delays create difficulties for all involved: for the parties who have to wait for a determination, there are often psychological and sometimes financial hardships; for the decision writer, who will be less able to remember the evidence given at the hearing and will have to rely more and more heavily on his or her notes; for the tribunal and the responsible ministry, whose reputations suffer; and for the public who become distrustful and cynical about the effectiveness of the tribunal and the tribunal system as a whole when they learn about excessively delayed decisions.

Timelines can be set in policy, or in statute or regulation. In Québec, the Tribunal Administratif du Québec operates within a statutory timeframe and exceptions require an application to the president of the tribunal. British Columbia has opted for policy timelines. There, each tribunal is required to create practice directives in relation to procedural timelines, including the time taken to render a decision. The tribunals must make the timelines publicly available and provide them to any party who appears before a tribunal.

Of course, there will be situations where complications arise and a set timeframe becomes impossible to meet. In these cases, the tribunal should advise all interested parties, representatives and any other interested individuals that it is unable to meet the timeframe and it should provide a new timeframe.

A one-size-fits-all timeframe is not workable given the differences in issues brought before a multitude of tribunals. In Saskatchewan, a system of timeframes set in policy, through practice directives established by each individual tribunal, may be the best means of ensuring that timeframes

for each tribunal are reasonable. Legislated timelines would be more awkward as there would have to be separate timelines for each tribunal in their governing legislation or in a comprehensive set of legislative or regulatory timelines established in an overarching act. Legislated timelines would be easier to impose in a centralized administrative tribunal system such as Quebec's Tribunal Administratif du Quebec.

In addition to timeframes for decision-making, the government and/or the tribunals might want to follow the example of some tribunals and consider setting timeframes for other matters such as making application, responding to an application, providing disclosure, establishing evidence, and setting a pre-hearing meeting.

### Recommendation #13:

Government and tribunals work together to implement policy timelines within which hearings must be held and decisions must be made. The timelines must be readily available to consumers. In the event a timeline is breached, the decision-maker must provide the parties with the reason for the breach and a new timeline for rendering the decision.

### FOR IMPLEMENTATION NOW

## Best Practices Related to Board Composition and Function

### BEST PRACTICE:

The number of members and the mix of full-time and part-time members are appropriate for the tribunal's caseload and mandate.

Tribunals need an adequate number of members working a sufficient number of hours to provide good quality and timely service. Some of the tribunals were concerned about unfilled vacancies.

### Appropriate Number of Members on Tribunal Panels

Typically, the more members there are on a panel, the greater the likelihood of a delay in rendering a decision, because decisions are commonly written by one member and have to be vetted by the other members before they are approved and released. In the event that a member disagrees with the decision and writes a dissenting decision, the delay will be even greater. In especially significant or complex cases, this might be a fair trade between timeliness and thoroughness. Canada's Immigrant and Refugee Board of Canada, in changing its policy in favour of timeliness, moved from two member panels to one member panels, to allow for more decisions to be processed more quickly.

There are potential advantages to multi-member panels, though. An Australian study observed that on occasion a single member dealing with an especially complex case can be subject to "decision paralysis" that can lead to lengthy delays.<sup>52</sup> The Leggatt Report found that there is evidence that many users find multi-member panels easier to address.<sup>53</sup>

### Part-Time and Full-Time Members

Whether to appoint full-time members, part-time members or some combination of full and part-time members will depend on the size and complexity of the caseload.

Clearly, full-time members will gain experience and knowledge more quickly than part-time members. But there are many advantages to using part-time members, including a broader field of expertise among the members, and current and up-to-date experience in specialized areas that part-time members can bring to the tribunal.<sup>54</sup> Having part-time members can also help address a problem that can arise when a tribunal has only full-time members and consequently has too few full-time members for peak periods and too many for low periods. With only full-time members, delays during peak periods are inevitable.

There are, however, disadvantages. Part-time members often have other obligations that interfere with their tribunal obligations and can have difficulty scheduling tribunal hearings, due to conflicts with their schedules for work outside the tribunal. Part-time members may also find it difficult to provide timely decisions because of commitments outside the tribunal. On top of this, some of the tribunals indicated<sup>55</sup> that rates of pay for members are quite low, especially for members who are lawyers, compared to their regular rate of pay. This could lead to members giving a higher priority to their higher paying regular work than to tribunal work, which can lead to delayed decision writing.

Part-time members may also be more vulnerable to undue influence in order to secure future work.<sup>56</sup> To avoid the need for large numbers of part-time members and to ensure that part-time members are contributing to effective and timely decisions, the Australian Administrative Review Council recommended that part-time members have a minimum workload requirement.<sup>57</sup>

Four of the tribunals we examined had both part-time and full-time members. The Human Rights Tribunal and the Highway Traffic Board had no full-time members. The Workers' Compensation Board had no part-time members. The Chair and the Vice Chairs at the Labour Relations Board are full time and the side persons, who represent unionized labour and employers, are all part time. The Chair and the Vice Chairs

are lawyers and write all the decisions. The Director and two Deputy Directors of The Office of Residential Tenancies are full time and the remaining members are part time. The Automobile Injury Appeal Commission has 2 full-time members, who are lawyers, and 14 part-time members, some of whom are lawyers.

We did not hear any concerns from the tribunals about the mix of part-time and full-time members and, everything considered, it did not appear to us that the mix was inappropriate. In general, the tribunals we examined who had part-time members did not indicate any desire to reduce the number of part-time members.

#### **Recommendation #14:**

Government, in consultation with tribunals, ensures the number of members and the mix of full-time and part-time staff are appropriate for the tribunal's case-load and mandate.

#### **FOR CONSULTATION AND IMPLEMENTATION**

#### **BEST PRACTICE:**

Tribunal members are appointed based on merit.

The appointment of qualified tribunal members is critical to the effective functioning of the administrative tribunal system. To this end, all the reviews of administrative justice systems we consulted supported a merit-based selection system for tribunal members. The criteria for a merit based system are a selection panel, a job description and an open competition. In Quebec, where the administrative justice system is governed by *An Act Respecting Administrative Justice*, qualifications of members are set in the Act. One qualification is that members must have at least 10 years experience.<sup>58</sup> Qualifications are not enough, though. The public, if it is to have any faith in the fairness and impartiality of the system, needs to know that appoint-

ments are the result of an open and fair selection process. In addition, to ensure independent decision-making, members need secure tenure and tenure of sufficient length to allow for enhancement and continuity of knowledge.<sup>59</sup>

A merit-based selection process not only ensures that members have the knowledge and skills to effectively discharge their responsibilities, it also serves as a solid base for a performance management system (see page 30).<sup>60</sup>

With regard to timeliness, a merit-based system has the potential to yield members who will quickly be able to render high quality and timely decisions.

The six tribunals we examined had slightly different processes for appointment of members, although all members are appointed by way of order-in-council.

The appointment process for the Director of Residential Tenancies, the Chair of the Workers' Compensation Board and the two Vice Chairs of the Labour Relations Board but not the Chair fit the criteria for a merit-based appointment. Members of some of the other tribunals are appointed based on the recommendation of the Chair and other members. The employer representative for the Workers' Compensation Board is appointed by an Order-in-Council from a list submitted by employer associations, and the worker representative is appointed from a list submitted by labour organizations.

### Recommendation #15:

Government implements a merit-based appointment system for all tribunal members that includes a selection panel, a job description and an open competition.

### FOR CONSULTATION AND IMPLEMENTATION

## BEST PRACTICE:

Members have security of tenure.

An essential part of independent decision-making is security of tenure. Members should not have to worry that unpopular decisions could affect their tenure. A member's focus needs to be on making what he or she believes is the right decision. Security of tenure also requires terms of sufficient length to be meaningful. This would also have the advantage of allowing members to gain experience that would enable them to make well-reasoned decisions in a timely manner. The Leggatt Report recommended 5 to 7 years and the Australian Administrative Review Council recommended 3 to 5 years.<sup>61</sup>

Only three of the Boards examined appoint all members for the same term: the Human Rights Tribunal (5 years), the Highway Traffic Board (2 years) and the Automobile Injury Appeal Commission (3 years). The Chair and Vice-Chairs at the Labour Relations Board are appointed for 5-year terms, while the side persons are appointed for 3-year terms; the Chair of the Workers' Compensation Board is appointed to a 5-year term, while the side persons are appointed to 4 year terms; and the Director of Residential Tenancies is appointed to a 5-year term and the Deputy Directors and hearing officers are appointed to 3-year terms.

When we raised the issue of security of tenure, it was not clear whether member appointments for some of the tribunals were enforceable for the entire term or if, for example, a term could be prematurely ended following a change in government. At one tribunal, the Chair was appointed for a 5 year term, but the Chair's contract included a condition that either party could terminate the contract at any point during the term on two months notice. If term appointments are not enforceable for the term, then it is questionable whether they provide the security of tenure discussed in the case law and academic materials with regard to institutional independence of the administrative tribunals.

### Term Renewal

There is no consensus on the issue of renewable terms. The Leggatt Report does not discuss the advisability of renewable terms.<sup>62</sup> The Australian Review Council notes both advantages and disadvantages. A potential disadvantage is that members will be more lenient in their decision-making toward their end of their term and will be less likely to make decisions that would be unpopular with the government. On the other hand, tribunals with fixed terms lose experienced members and may discourage qualified applicants who are looking for more long term security.<sup>63</sup> In British Columbia, the Administrative Justice Office recommended stopping the practice of making appointments at pleasure and instituting fixed term appointments with provisions for tenure or reappointment.<sup>64</sup>

We believe fixed term appointments offer opportunities to rejuvenate tribunals, to acquire new knowledge and expertise, and to maintain creativity and enthusiasm among the members, and that these advantages outweigh any advantages of appointments with unlimited renewal.

To be effective, both recommendations 16 and 17 require the merit-based appointment process described in recommendation 15.

#### Recommendation #16:

Government strengthen security of tenure for tribunal members and remove provisions in contracts for existing members that allow the member's employment to be terminated prior to the expiry of the term. The only exception to this should be termination for cause.

FOR CONSULTATION AND IMPLEMENTATION

#### Recommendation #17:

Tribunal members have fixed terms with a limited number of renewals.

FOR CONSULTATION AND IMPLEMENTATION

### BEST PRACTICE:

Member compensation is commensurate with responsibility.

If tribunals are to attract and hold highly qualified members, they need to offer rates of pay that are commensurate with the members' responsibility. Most of the tribunals admitted that it is difficult to attract highly qualified full-time and part-time members, especially members with professional qualifications, owing to the relatively low rate of pay they can offer. As noted earlier, the relatively low rate of pay can affect timeliness because part-time members can find themselves having to choose between tribunal work and their sometimes significantly higher paying regular work. This is often the problem for tribunals whose members are lawyers. As is commonly the case both in Saskatchewan and elsewhere, many tribunals, even if some members are not lawyers, use lawyers to write most or all of their decisions - and as a group, lawyers tend to earn considerably more working as lawyers than as tribunal members.

#### Recommendation #18:

Government, in consultation with tribunals, ensure that compensation is commensurate with members' responsibilities.

FOR CONSULTATION AND IMPLEMENTATION



**BEST PRACTICE:**

Tribunal members have access to training.

The importance of initial and ongoing training for members is emphasized in the major studies we consulted. One would expect that well trained members are more likely to produce higher quality and more timely decisions. Unfortunately, training opportunities in Saskatchewan are limited. *The Leggatt Report* recommended that all members receive introductory training in core competencies, including training on interpersonal skills, diversity training, and training on how to assist unrepresented users while maintaining independence. It also recommended special training for the Chairs and Presidents.<sup>65</sup> In Canada, the Administrative Justice Project White Paper recommends that responsibility for training be clarified in an operational agreement or Memorandum of Understanding between tribunals and the responsible Minister.<sup>66</sup>

Responses to interviews and our background questionnaire revealed that the amount of training provided varies widely. The Workers' Compensation Board has a good training program for new members. Board members receive an initial orientation, including training on hearing processes. The Board also uses training offered by the Foundation of Administrative Justice and national and international bodies connected to Workers' Compensation. The Office of Residential Tenancies did not believe training was necessary, because the hearing officers were lawyers and consequently able to write a proper decision and conduct a hearing. The Human Rights Tribunal did not have a training program but told us that if training opportunities arose, they would request funding so the members could attend. The Labour Relations Board provided information at the plenary meetings of the Board, usually on issues like conflicts of interest or weighing evidence, but they did not require training of members. The Automobile Injury Appeal Commission holds an initial two-day training session for all new members. Training is also

a component of their annual two day meetings. The Highway Traffic Board requires all members to receive Board orientation and take training through the Ministry of Justice.

When it came to training, we found no consistency among the tribunals. Some appeared to have adequate training for members, others relied on the existing skills of their lawyers, and yet others indicated that they would like to provide greater training opportunities for members, but the training was unaffordable or inaccessible.

Sufficient and effective training is a defining characteristic of any well run organization or system. Although some training for tribunal members is available in Saskatchewan, in the case of lawyers, we heard that the available training was not at an appropriate level to be a helpful addition to their existing skills. It may serve consumers better and may be more cost effective if there was a co-ordinated approach to training tribunal members in Saskatchewan. While consistency between tribunals generally is not warranted given their diverse mandates, there is still room for more consistency in style and philosophy with a view to making the tribunal system more accessible to consumers. Decision writing, for example, could be written in a style that is closer to plain language, and hearings could be conducted less formally.

**Recommendation #19:**

Government and administrative tribunals work together to provide each tribunal member with initial and ongoing training.

**FOR IMPLEMENTATION NOW**

## BEST PRACTICE:

Each tribunal has sufficient resources to effectively discharge its mandate.

To meet the public's need for high quality, affordable and timely decisions, tribunals need appropriate resources. The most obvious resources are office space and staff, which need to be balanced with caseloads. The Automobile Injury Appeal Commission, which operated with part-time members only and developed an increasingly large backlog, reduced the backlog to acceptable levels within only a few months by appointing two full-time members.

### Information Technology

A less obvious need perhaps and one that is sometimes neglected is up-to-date information technology. Databases containing previous decisions, electronic hearing documents, case management software, training software, word processing, email — all these can provide tools to relatively small tribunals that at one time were only available to large tribunals. It is generally agreed that information technology, properly used, improves efficiencies and thereby saves time.<sup>67</sup>

The advantages of information technology are evident even in jurisdictions like Saskatchewan where nearly all tribunals operate independently of one another. In more centralized systems, where information technology systems can effectively rationalize and co-ordinate the activities of multiple tribunals and produce performance reports that assist in effectively managing caseloads, the advantages are even greater.<sup>68</sup>

### Support Resources

Members cannot reasonably be expected to provide high quality and timely decisions if they also have to attend to scheduling, letter writing, photocopying, phone calls and all the other duties that are commonly assumed by support staff.

The six tribunals, with the exception of the Human Rights Tribunal, all had support staff

that they relied on, often very heavily. The Human Rights Tribunal indicated that its members met the need for support staff by relying on the staff and equipment of their own law firms. This is not an optimal arrangement and could lead to delays as support staff have to fit tribunal work into their regular work.

### Dealing with a Disparity of Resources

There is a surprising disparity in the resources available to the tribunals we examined; despite the fact that operationally they were reasonably similar. The Human Rights Tribunal does not have a permanent location, any full-time staff or any equipment of its own, while the Labour Relations Board has all three, although surprisingly it did not have an electronic case management system.

Shortfalls in resources can always be met with more money, but this is not necessarily the best or even a likely option. Other jurisdictions have met the challenge of maximizing scarce resources by moving to super tribunals, amalgamating similar tribunals, and sharing support staff. Coordination of resources is one of the most significant benefits of rationalizing the administrative tribunal system. Further, some sharing of resources could likely be accomplished without moving to a super-tribunal system, if the tribunal system was co-ordinated more broadly. Some tribunals could share space, as they already deal with similar subject matter and are supported by similar ministries.

### Recommendation #20:

Government ensure that all administrative tribunals have adequate resources to fulfill their mandate and align with best practices.

### FOR CONSULTATION AND IMPLEMENTATION

## BEST PRACTICE:

Tribunals use an effective case management system.

Case management systems have already been adopted by Courts and many tribunals.<sup>69</sup> Case management, when done properly can ensure that the parties are completing the work necessary for a timely hearing, that required disclosure of information is completed prior to the hearing, that clarification is provided on the issues and the evidence needed,<sup>70</sup> and that unfounded cases and cases appropriate for ADR are identified.<sup>71</sup>

The Leggatt Report recommended greater use be made of legally trained registrars, who could make initial determinations about the appropriate way to deal with each case, such as referring the case back for internal review, referring the case to ADR, or referring the case to the Chair to prepare for a hearing. The Registrar could also be given powers to subpoena witnesses and evidence, to order the production and exchange of documents, to issue directions and to refer parties to courts for contempt actions when they abuse tribunal procedures.<sup>72</sup>

Most of the tribunals we examined have an electronic case management system. The Labour Relations Board is awaiting budget approval for acquiring an electronic case management system. The Human Rights Tribunal also does not have an electronic case management system, but it has no permanent location, no full-time or permanent staff and no office equipment.

For smaller tribunals an electronic case management system may be too expensive. In those cases, it may be necessary to share resources with other tribunals. Once again, this could be accomplished more easily in a co-ordinated tribunal system.

## Recommendation #21:

Government and tribunals work together to ensure all tribunals have an electronic case management system.

## FOR CONSULTATION AND IMPLEMENTATION

## Best Practices Related to the Balance Between Accountability and Independence

### BEST PRACTICE:

Tribunal members operate within a performance management system.

A good performance management system for tribunal members ensures a high level of adjudication skills, knowledge, effectiveness, and sensitivity to the needs of consumers, colleagues and the public. Tribunals that do not have a performance management system will find it much more difficult to reach their potential.

Despite the obvious advantages of performance management, there are those who believe the advantages are outweighed by the potential for interference with the principle of independent decision-making. The concern is legitimate but perhaps overstated. As stated in the Leggatt Report, "Assessments are not concerned with the rightness or wrongness of decisions or with any aspect of them (like consistency) which depends on qualitative judgments of the decisions themselves or of other decisions with which they could be compared."<sup>73</sup> Assessments are more appropriately measured against a set of standards and objectives that do not directly affect the principle of independent decision-making, such as, timeliness, case management, conduct at hearings, and general quality of reasoning.

To work effectively, a performance management system must include the following:<sup>74</sup>

- a job description that clearly defines responsibilities.
- initial and ongoing training designed to match needs identified in the performance assessments.

- a set of performance standards and mutually agreed upon objectives against which to measure performance.
- an annual evaluation or review as to whether the objectives and standards were achieved.

Once a performance management system is in place, someone needs to complete the assessments. This would normally fall to the Chair of the tribunal or in larger tribunals to the Vice Chairs. This may require legislation that explicitly authorizes the Chair or a delegate to manage the members.<sup>75</sup>

Performance management for the tribunal Chairs presents different challenges, especially in a jurisdiction like Saskatchewan that does not have a centralized administrative tribunal system. Assessments by the ministry responsible for the tribunal would threaten the perceived or actual independence of the members. In jurisdictions that have moved to a super tribunal or an administrative research council, performance assessments of the tribunal Chairs can be done without raising concerns about interference.

A performance management option that may work well for some tribunals is peer review. In this model, tribunal members assess each other's performance and the performance of the Chair. The Chair would be assessed against the Chair's job description which, in some instances, is quite different from those of the members. One option is to have members attend each other's hearings from time to time with the express purpose of reviewing performance - which would meet the objection that the Chair does not participate in hearings conducted by members and therefore has no way of assessing their performance.

Of the tribunals we reviewed, only the Workers' Compensation Board and the Highway Traffic Board currently conduct performance evaluations of the members. The tribunals who do not use a performance management system explained their position by offering the following comments:

- A performance management model could result in a potential loss of independence.
- Individuals conducting the performance evaluations could potentially rate members on the basis of the content of their decisions.
- Members may write decisions to get the best performance evaluation rather than decisions that they thought were best on the basis of the facts of the case.
- Chairs said that they were not properly trained to conduct performance evaluations.
- Chairs stated that they did not have the time and resources to implement a performance management model.

There is an additional concern that the legislation at present may not give tribunal heads the authority they need to conduct performance evaluations of members, because the Chairs do not have explicit authority over the members and their work.

### Performance Management and Timelines

Timelines will be more effective if there are consequences for failure to comply. Instances where there are no reasonable excuses for failing to meet timelines for rendering decisions could be addressed through a performance management process. The seriousness of a delay or the number of times unreasonable delays occur could affect a member's eligibility for reappointment or in extreme cases establish grounds for dismissal.

None of the tribunals we reviewed imposed direct sanctions for members whose decisions are delayed. For tribunals with policy timeframes in place, the consequence for delayed decisions was usually some coaxing and/or coaching by fellow members or staff. Only two tribunals – the Workers' Compensation Board and the Highway Traffic Board - have performance management systems in place, which offer some potential for corrective action.

One advantage of imposing consequences in-house is that it enables administrative tribunals to prevent and address perform-

ance management issues and to provide supportive and corrective training early on.

At present, the only recourse for consumers and some tribunal Chairs dealing with members' performance management issues is to refer the matter to professional licensing bodies.

### Recommendation #22:

Tribunals implement a system of ongoing performance management, including annual reviews for all members, including tribunal Chairs.

### FOR IMPLEMENTATION NOW

### Recommendation #23:

Tribunals include failure to meet timelines in performance management evaluations.

### FOR IMPLEMENTATION NOW

### Recommendation #24:

Government provide to Tribunal Chairs the authority and responsibility to conduct performance management of tribunal members. The performance assessment portion of this responsibility may be conducted through a peer review process.

### FOR CONSULTATION AND IMPLEMENTATION

## BEST PRACTICE:

Tribunals publicly report on their work.

Public confidence in the administrative tribunal system requires the system to be accountable for its results. This is commonly accomplished through the publication of annual reports showing what the tribunal has accomplished during the year. In Quebec, Le Tribunal Administratif is required by statute to produce annual reports each year that can be tabled in the legislature.<sup>76</sup>

Not every tribunal needs to produce a comprehensive annual report. Annual reports for different tribunals will vary greatly in length and content, given their substantially different caseloads and mandates. With regard to timeliness, *The Leggatt Report* recommends that each tribunal produce an annual report showing information on: the time from initial decision to eventual implementation; the time taken by the tribunal, including average time spent waiting for a hearing; the proportion of target times exceeded, with broad categories of reasons for doing so; and the use of sanctions.<sup>77</sup>

Of the six tribunals examined, only the Labour Relations Board, and the Workers' Compensation Board submit independent annual reports to the government. The Automobile Injury Appeal Commission and Office of Residential Tenancies provide a brief report to the Department of Justice for inclusion in the Department of Justice's annual report. The Human Rights Tribunal told us it did not have sufficient resources to publish an annual report and is not statutorily required to provide an annual report. The Highway Traffic Board does not publish an annual report.

### Recommendation #25:

Tribunals submit an annual report to the Minister responsible, and that report be made public.

### FOR IMPLEMENTATION NOW

## BEST PRACTICE:

Tribunals are able to communicate with government in a way that will enable them to function properly, while maintaining their independence.

Tribunals are not courts and tribunal members do not enjoy the constitutionally protected independence accorded to judges.<sup>78</sup> Tribunals are accountable to their users for their performance as independent, impartial and competent decision makers. They are also accountable to the public, as in most cases funding for the tribunal comes from public tax dollars. Although it would be misleading to say they are accountable to the government ministry that provides funding for the tribunal, the ministry is accountable to the public for the performance of the tribunal. This makes for an awkward relationship between tribunals and ministries. Regrettably, there is a perception by many people that administrative tribunals are not independent of their host government ministries, because tribunals get their funding and support from those same ministries. This can lead to a distrust of the administrative tribunal and its decisions.<sup>79</sup> In order to be effective, tribunals must have the confidence of the public that they are independent and unbiased.<sup>80</sup> Therefore, a clear separation is necessary between government ministries and ministers whose decisions are reviewed by administrative tribunals and the government ministries or ministers who are responsible for appointing and supporting tribunals.<sup>81</sup>

In other words, communication is necessary, but without real or perceived interference. This could be accomplished in several ways including memorandums of understanding, structural independence and clearly defined communications between tribunals and government ministries,<sup>82</sup> and reports to government ministries about recurring problems.<sup>83</sup> The Administrative Justice Project White Paper recommends that ministries and tribunals enter into operational agree-

ments or memorandums of understanding, the elements of which should include:

- Assigning express responsibility for ensuring the tribunal achieves its purposes.
- Defining the role of the tribunal as it relates to government's general functions including policy development, legislative drafting, stakeholder consultations and communications.
- Specifying how the tribunal is to report on its activities and outcomes, whether through annual reports or service plans, either independently or through the host ministry.
- Specifying what role the tribunal is expected to play in the annual budgeting process and in the handling of financial transactions.
- Defining the role of the host ministry in providing administrative supports to the tribunal for matters such as human resource management or information technology.
- Establishing arrangements for the provision of legal services to tribunals.
- Identifying opportunities for providing shared services, either between the host ministry and the tribunal or between tribunals.
- Setting out the role and contributions of the host ministry for training and for the development of the core competencies required by the tribunal.<sup>84</sup>

All the tribunals stated that there was very little communication between their tribunal and the relevant host ministry although all tribunals thought this was appropriate. They associated greater communication with interference to their independence and freedom to make impartial decisions. A few tribunals recognized that there were instances where more communication with the ministry would have been useful, because the Minister or ministry had made public statements about the tribunal that wrongly stated the true nature of the tribunal and its proceedings. They believed their tribunal would be better served if the Minister better understood tribunal policies and procedures.

On the other hand, despite having little communication with their ministry, two tribunals stated this did not pose any concerns in terms of budgeting and resources. If they required additional funds for training, labour, or something else, they would simply contact the Deputy Minister or Assistant Deputy Minister and they were seldom denied the additional funds requested. Another tribunal, however, said it was unlikely to get money apart from its budget during the year, and that a lack of communication with the ministry was the most likely reason. While it is understandable that not all requests for funds can be granted, tribunals need sufficient resources to function effectively and need access to the ministry to request such resources.

Ministers are accountable for the work of the tribunals for which they have responsibility and the tribunals need to be able to make decisions without political interference. At present, in Saskatchewan the system leans heavily toward avoiding actual or apparent interference at the expense of ministerial accountability. This does not have to be the case. British Columbia, for example, uses memorandums of understanding that clearly establish the relationship between ministers and tribunal heads so that neither tribunal independence nor ministerial accountability are compromised. As important as tribunal independence is, overly zealous attempts to protect it result in poor communication between Ministers and tribunals and potentially less than optimal service to consumers. We heard examples of both.

#### **Recommendation #26:**

Government improve communication between ministries and tribunals while continuing to protect and maintain the independence of the tribunals.

**FOR CONSULTATION AND IMPLEMENTATION**

## Best Practices Related to Co-ordination of the Tribunals

### BEST PRACTICE:

Systems supporting tribunals operate in a co-ordinated fashion that promotes the efficient and effective use of resources.

At present, the tribunals in Saskatchewan act independently of one another. There is no sharing of resources and support and responsibility for the tribunals rests with several Ministers. Co-ordination of administrative tribunal systems is a relatively recent development, beginning about 30 years ago and accelerating in the last 10 years. Several models have been adopted with a strong preference shown for none. This is understandable as the circumstances in each jurisdiction are unique.<sup>85</sup>

British Columbia has implemented an overarching Act that governs many aspects of tribunal operations and has set up a research body. Although it has not moved to a super tribunal system, it has abolished some tribunals and amalgamated others. Ontario and Alberta also have overarching legislation governing tribunal operations. Québec, Australia and the United Kingdom have all amalgamated some, most or all of their tribunals into one body. Both the United Kingdom and Australia have also created a research body.

#### Central Body / Super Tribunal

Australia was one of the first jurisdictions to adopt a single tribunal model, which was applied to both the Commonwealth Review Tribunals and several states tribunals. Only a few specialist tribunals exist outside the centralized system. Recently, the United Kingdom adopted this model. A single tribunal model was also recommended by the New Zealand Law Commission.<sup>86</sup> Québec implemented Le Tribunal Administratif du Québec in 1998, which amalgamated five administrative tribunals.<sup>87</sup> It also assumed certain powers that formerly fell under the jurisdiction of the Court of

Québec. Another example of a super tribunal is the Immigration and Refugee Board of Canada, which houses three separate tribunals:<sup>88</sup> The Immigration Division,<sup>89</sup> the Refugee Protection Division,<sup>90</sup> and the Immigration Appeal Division.<sup>91</sup>

The Leggatt Report offered several advantages of the single tribunal model, stating that with this model it is easier to:

- address the lack of familiarity that most unrepresented and even represented users have with the various administrative tribunals,<sup>92</sup>
- meet the need to provide adequate information to users about procedures,<sup>93</sup>
- meet the need to create a clearer and simpler system for the development of the law.<sup>94</sup>

A single tribunal model also offers the potential to hold one unified hearing when there is an issue that is within the jurisdiction of more than one tribunal.<sup>95</sup> By way of example, the Law Reform Commission of Saskatchewan noted that a potential development in the City of Saskatoon might require appeals to both the Meewasin Valley Authority Appeals Board and the Municipal Development Appeals Board.<sup>96</sup> When hearings can be amalgamated in a useful way it reduces the chances of getting inconsistent decisions from different tribunals and it may also save substantial time and cost because the case only needs to be presented once.

Resource sharing in a co-ordinated system can also be an advantage. Co-ordinating access to staff, technology and space has the potential to maximize the utility of these limited resources, while at the same time improving the effectiveness of some tribunals. The Leggatt Report mentions the potential for flexibility in matching resources to demand.<sup>97</sup>

With regard to timeliness, the move to co-ordinated or amalgamated tribunal systems is too new to offer any supportable conclusions. Nonetheless, one would expect that timeliness would be a natural result of a rationalized administrative tribunal system.



### Central Council / Research Body

A central council or research body has been adopted by several jurisdictions, including the United Kingdom,<sup>98</sup> Australia,<sup>99</sup> and British Columbia.<sup>100</sup> In addition, there are also groups like the Society of Ontario Adjudicators and Regulators (SOAR) in Ontario<sup>101</sup> and the Council of Canadian Administrative Tribunals (CCAT).<sup>102</sup> Each of these bodies has a different mandate. Some, like SOAR and the CCAT, provide assistance such as training, papers on relevant subjects, and guidance on specific concerns. Others, such as the Administrative Justice Office in British Columbia and the Administrative Review Council in Australia primarily conduct research for the government in relation to the tribunals system, its problems and ways to improve it.

### Overarching Act

The British Columbia *Administrative Tribunal Act* provides a framework for all tribunal enabling acts. It codifies the laws recognized by the courts and applies powers and authorities selectively to tribunals thereby recognizing the diverse roles and mandates of British Columbia's tribunals.<sup>103</sup> British Columbia's system fosters the exchange of ideas and knowledge through two organizations that exist to serve tribunal members: the Circle of Chairs and the British Columbia Council of Administrative Tribunals.

### Saskatchewan Tribunals

Administrative tribunals in Saskatchewan have developed in an ad hoc manner, and they do not have any overarching body, research body, or legislation binding them together. They are housed within various ministries of government. Some make first-level decisions, while others hear appeals from decisions of government, a crown corporation or another governmental type body. Some deal with private parties on each side; others always have government or a governmental body as a party, and yet others will have government or a governmental body as a party in some cases only. Some are very informal, with parties rarely using legal representation and with informal means of collecting evidence; others are quite court-like and involve sophisticated parties with legal counsel in most instances. Some are permanent

bodies with several full-time staff and members who hold hearings very regularly, and others are entirely part time with no permanent location, staff or resources and hold hearings only when they are required - which may be very rarely. In other words, there is very little that binds the various administrative tribunals in Saskatchewan together except the fact that they are all non-judicial tribunals dealing with issues pursuant to their individual constituting legislation.

Some of the tribunals surveyed supported the idea of having a research body, which might be able to help them pool research resources. Others did not believe a research body would have any positive effect. All six tribunals were quite wary of the prospect of a super-tribunal. They did not believe the advantages would outweigh the negative affect a super tribunal would have on uniqueness of their tribunals, and would ultimately reduce the breadth of expertise among their members.

With respect to its organizational model, the administrative tribunal system in Saskatchewan is lagging behind progressive developments in other jurisdictions in Canada and abroad. It developed in an ad hoc manner and as yet there is no overarching act or central structure that rationalizes or binds together its overall operation. Consequently, it suffers the inevitable inefficiencies coincident with any large, multi-faceted enterprise lacking central leadership. Other jurisdictions have achieved favourable results through various approaches, none of which, owing to their short histories, have proven to be significantly better than the others. One common feature that unites the approaches is the rationalization of the administrative tribunal system under one set of principles. This has been accomplished by a combination of legislation, as in British Columbia, and amalgamation, as in Quebec, the United Kingdom and Australia. Another option, which has been adopted by the United Kingdom, Australia and provincially in Canada by British Columbia and Ontario, is an overarching body responsible for providing guidance and research.

**Recommendation #27:**

The Government of Saskatchewan consider options for coordinating the administrative tribunal system to accomplish the following:

- Facilitate sharing of resources, directing resources to where they are most needed.
- Provide consistency and structure to the system for the benefit of users and members alike.

**FOR CONSULTATION AND IMPLEMENTATION**

## Conclusion

As the Ombudsman began this review, it became apparent that the issue of timeliness of decision-making was a complex matter and asking the question, "Why is it taking so long?" was only the beginning.

It is a generally accepted principle that a properly functioning tribunal system provides high quality decisions in a timely manner. There are, however, many factors that influence the ability of tribunals to render timely decisions: a consumer's understanding about how to prepare and what to expect, the timelines that are in place (if any), the processes the tribunal uses, the resources available to the tribunal, and the tribunal's internal and external accountability.

Our inquiry focused on these larger factors and the structures in place that support or hinder the efforts of administrative tribunals to render timely decisions. We took a best practices approach in our evaluation of the tribunal system and our recommendations were based on the best practices we identified.

We found that the administrative tribunal system in Saskatchewan developed in an ad hoc manner, and to date has not evolved into a co-ordinated or rationalized system. As a result, the system does not function in compliance with an agreed-upon set of best practices, which leaves consumers facing a bewildering variety of boards, commissions and agencies, each

operating with its own set of policies and procedures designed to meet its unique mandate. Many of the problems this situation creates – inefficiency, unnecessary complexity, and delay – have been addressed in other jurisdictions by moving to a more co-ordinated system. Even without a significantly more co-ordinated system, however, there is still merit in adopting a best practices approach to administrative tribunal operations.

While the definition of "timeliness" can be debated, there comes a point in any case when all can agree the threshold has been exceeded. The challenge many tribunals face today is to finding a balance that weighs the competing interests of responsibly managing limited resources and delivering timely decisions. In this regard, it is our belief that the Ombudsman and the administrative tribunals are working to the same end.

During this inquiry we encountered open cooperation and communication from all six tribunals examined. We believe it is our mutual hope that this inquiry and the recommendations made will point the way to improved timeliness of decision making - an outcome that, if achieved, will significantly enhance fairness for tribunal users.

## Summary of Recommendations

### Recommendation #1:

Each tribunal make information about itself, its procedures, and its expectations available to consumers. This information should be accessible through direct contact with experienced staff members and in a variety of formats, such as written, audio, video, and Internet.

FOR IMPLEMENTATION NOW

### Recommendation #2:

Tribunals provide their public materials and their decisions in plain language.

FOR IMPLEMENTATION NOW

### Recommendation #3:

Tribunals offer orientation, in meeting format where appropriate, to acquaint users with the process. Information provided to individuals at orientation should outline all their options including:

- any access to an appeal within the tribunal system.
- any access to an appeal or judicial review in the court system.
- any access to other dispute resolution services available.

FOR IMPLEMENTATION NOW

### Recommendation #4:

Tribunals offer Appropriate Dispute Resolution (ADR) as an option to the hearing process.

FOR IMPLEMENTATION NOW

### Recommendation #5:

Tribunals include within their public information provided to users, information on the available Appropriate Dispute Resolution (ADR) options.

FOR IMPLEMENTATION NOW

### Recommendation #6:

Tribunals provide pre-hearing meetings when appropriate.

FOR IMPLEMENTATION NOW

### Recommendation #7:

Tribunals who also use pre-hearing meetings for mediation purposes have a policy that the member who sits on the pre-hearing meeting shall not be the member that hears the case, unless both parties consent.

FOR IMPLEMENTATION NOW

### Recommendation #8:

Tribunals, when appropriate, offer alternatives to face-to-face hearings, such as written hearings, telephone hearings, and hearings by video conferencing.

FOR IMPLEMENTATION NOW

### Recommendation #9:

Tribunals adopt the principles of the Saskatchewan Law Reform Commissions' "Model Code of Procedure for Administrative Tribunals."

FOR IMPLEMENTATION NOW

**Recommendation #10:**

To supplement the "Model Code of Procedure for Administrative Tribunals," each tribunal adopt additional policy and procedural guidelines specific to its own needs and formalize these in writing.

**FOR IMPLEMENTATION NOW**

**Recommendation #14:**

Government, in consultation with tribunals, ensures the number of members and the mix of full-time and part-time staff are appropriate for the tribunal's case-load and mandate.

**FOR CONSULTATION AND IMPLEMENTATION**

**Recommendation #11:**

Government, in collaboration with the administrative tribunals, study and consider providing affordable support services to individuals who are preparing for a hearing at an administrative tribunal on complex and significant issues.

**FOR CONSULTATION AND IMPLEMENTATION**

**Recommendation #15:**

Government implements a merit-based appointment system for all tribunal members that includes a selection panel, a job description and an open competition.

**FOR CONSULTATION AND IMPLEMENTATION**

**Recommendation #12:**

Tribunal members who write decisions receive training in decision writing that will assist them in writing timely decisions at an appropriate level for the subject matter and the user.

**FOR IMPLEMENTATION NOW**

**Recommendation #16:**

Government strengthen security of tenure for tribunal members and remove provisions in contracts for existing members that allow the member's employment to be terminated prior to the expiry of the term. The only exception to this should be termination for cause.

**FOR CONSULTATION AND IMPLEMENTATION**

**Recommendation #13:**

Government and tribunals work together to implement policy timelines within which hearings must be held and decisions must be made. The timelines must be readily available to consumers. In the event a timeline is breached, the decision-maker must provide the parties with the reason for the breach and a new timeline for rendering the decision.

**FOR IMPLEMENTATION NOW**

**Recommendation #17:**

Tribunal members have fixed terms with a limited number of renewals.

**FOR CONSULTATION AND IMPLEMENTATION**

**Recommendation #18:**

Government, in consultation with tribunals, ensure that compensation is commensurate with members' responsibilities.

**FOR CONSULTATION AND IMPLEMENTATION**

**Recommendation #19:**

Government and administrative tribunals work together to provide each tribunal member with initial and ongoing training.

**FOR IMPLEMENTATION NOW**

**Recommendation #20:**

Government ensure that all administrative tribunals have adequate resources to fulfill their mandate and align with best practices.

**FOR CONSULTATION AND IMPLEMENTATION**

**Recommendation #21:**

Government and tribunals work together to ensure all tribunals have an electronic case management system.

**FOR CONSULTATION AND IMPLEMENTATION**

**Recommendation #22:**

Tribunals implement a system of ongoing performance management, including annual reviews for all members, including tribunal Chairs.

**FOR IMPLEMENTATION NOW**

**Recommendation #23:**

Tribunals include failure to meet timelines in performance management evaluations.

**FOR IMPLEMENTATION NOW**

**Recommendation #24:**

Government provide to Tribunal Chairs the authority and responsibility to conduct performance management of tribunal members. The performance assessment portion of this responsibility may be conducted through a peer review process.

**FOR CONSULTATION AND IMPLEMENTATION**

**Recommendation #25:**

Tribunals submit an annual report to the Minister responsible, and that report be made public.

**FOR IMPLEMENTATION NOW**

**Recommendation #26:**

Government improve communication between ministries and tribunals while continuing to protect and maintain the independence of the tribunals.

**FOR CONSULTATION AND IMPLEMENTATION**

**Recommendation #27:**

The Government of Saskatchewan consider options for coordinating the administrative tribunal system to accomplish the following:

- Facilitate sharing of resources, directing resources to where they are most needed.
- Provide consistency and structure to the system for the benefit of users and members alike.

**FOR CONSULTATION AND IMPLEMENTATION**

## Appendix 1 - List of Administrative Tribunals

Administrative tribunals are often known by other names, such as boards and commissions. Here is a list of the organizations we have identified as administrative tribunals in Saskatchewan.

Agricultural Implements Board	Saskatchewan Crop Insurance - Board of Directors
Agricultural Operations Review Board	Saskatchewan Film and Video Classification Appeal Committee
Agri-Food Act Appeal Committee	Saskatchewan Film Classification Board
Automobile Injury Appeal Commission	Saskatchewan Financial Services Commission
Board of Revision	Saskatchewan Human Rights Commission
Development Appeals Board	Saskatchewan Legal Aid Commission
Educational Relations Board	Saskatchewan Legal Aid Commission Appeal Committee
EMT Licensing Appeal Board	Saskatchewan Municipal Board
Family Services Board	Saskatchewan Real Estate Commission
Farm Land Security Board	Saskatchewan Review Board
Highway Traffic Board	Saskatchewan Securities Commission
Home Based Education Review Board	Saskatchewan Social Services Appeal Board
Human Rights Tribunal	Social Services Regional Appeal Committees
Independent Schools Review Board	- Centre Regional Appeal Committee
Investigation Committee (Student Discipline)	- Northeast Regional Appeal Committee
Investment Board	- Northwest Regional Appeal Committee
Labour Relations Board	- Southeast Regional Appeal Committee
Lands Appeal Board	- Southwest Regional Appeal Committee
Liquor & Gaming Authority	Surface Rights Board of Arbitration
Liquor & Gaming Licensing Commission	Teacher Classification Board
Liquor Board	Victims Compensation Appeal Committee
Meewasin Valley Authority Appeal Board	Wakamow Valley Authority Appeal Board
Milk Control Board	Wascana Centre Appeal Board
Occupational Health & Safety Adjudicators	Water Appeal Board
Oil & Gas Conservation Board	Workers' Compensation Board
Power Engineers' Board	
Provincial Land Appeals Board	
Provincial Mediation Board	
Public & Private Rights Board	
Saskatchewan Apprenticeship & Trade Certification Commission	
Saskatchewan Building and Accessibility Standards Appeal Board	

## Endnotes

Internet URL references are accurate as of December 7, 2007.

- <sup>1</sup> Scottish Committee of the Council of Tribunals (2006) *Framework of Standards for Tribunals* p2.
- <sup>2</sup> W.J., Vancise, "Are Administrative Tribunals Effective in Rendering Justice" from G. A. Smith and H. Dumont (eds) *Justice to Order* (Canadian Institute for the Administration of Justice, 1999) at 45, online: Canadian Institute for the Administration of Justice <http://www.ciaj-icaj.ca/francais/publications/1998/VANCISE98.pdf> p43.
- <sup>3</sup> Leggatt, Sir Andrew, *et. al.*, *Tribunals for Users - One System, One Service: A Report of the Review of Tribunals by Sir Andrew Leggatt*, (2001), online: Review of Tribunals <http://www.tribunals-review.org.uk>.
- <sup>4</sup> Austl., Commonwealth, Administrative Review Council (ARC), *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No. 39) (Canberra: Australian Government Publishing Service, 1995), online: Administrative Review Council [http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications\\_Reports\\_Report\\_Files\\_Report\\_No.39](http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Report_Files_Report_No.39).
- <sup>5</sup> British Columbia, Administrative Justice Office, *On Balance: Guiding Principles for Administrative Justice Reform in British Columbia* by the Administrative Justice Project (July 2002), online: Administrative Justice Office [http://www.gov.bc.ca/ajo/down/white\\_paper.pdf](http://www.gov.bc.ca/ajo/down/white_paper.pdf).
- <sup>6</sup> It was recognized by the Supreme Court of Canada in *Knight v. Indian Head School Division No. 19*, at 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case"
- <sup>7</sup> Law Reform Commission of Saskatchewan, "Consultation Paper: A Model Code of Procedure for Administrative Tribunals, May 2003. <http://sklr.sasktelwebhosting.com/Admin1.htm>.
- <sup>8</sup> *Leggatt Report*, *supra* note 3 at para. 4.12; see also ARC, *Better Decisions*, *supra* note 4 at 92 and 106; In Quebec, legislation requires tribunals to assist users in drafting written materials, *Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 12.
- <sup>9</sup> This issue is discussed in the *Leggatt Report*, *supra* note 2 at para. 4.4.
- <sup>10</sup> *Leggatt Report*, *supra* note 3 at para. 4.13; Council on Tribunals, "Feedback from the Council's Users Support Workshops" (April 2006) at para. 1.3, 5.3, 8.4-8.7, online: Council on Tribunals <http://www.council-on-tribunals.gov.uk/docs/usersfeedback.pdf> (hereinafter "Feedback Paper").
- <sup>11</sup> Interview with Karen Prisciak, Chair of Human Rights Tribunal, August 1, 2007.
- <sup>12</sup> Council of Canadian Administrative Tribunals has produced a publication entitled, *Literacy and Access to Administrative Justice in Canada: A Guide for the Promotion of Plain Language*, online: Council of Canadian Administrative Tribunals <http://www.ccat-ctac.org/en/pdfs/literacy/Literacyandjustice.pdf>.
- <sup>13</sup> ARC, *Better Decisions*, *supra* note 4 at 69.
- <sup>14</sup> In the AJP *White Paper* the authors found the adoption of processes for the early, consensual resolution of disputes has come to be seen as a significant component in enhancing public access to justice and improving the efficiency of administrative tribunals. See AJP *White Paper*, *supra* note 5 at 18.



- <sup>15</sup> Le Tribunal Administratif uses conciliation, with trained conciliators provided by the tribunal: Tribunal Administratif du Québec, *Conciliation: A fast and simple way of settling your dispute* (October 2005), online: Tribunal Administratif du Québec [http://www.taq.gouv.qc.ca/english/pdf/D%E9pliant%20conciliation%20\(octobre%202005\)%20ANG LAIS.pdf](http://www.taq.gouv.qc.ca/english/pdf/D%E9pliant%20conciliation%20(octobre%202005)%20ANG LAIS.pdf).
- <sup>16</sup> As with mandatory mediation programs and pre-trial conferences at the Court of Queen's Bench in Saskatchewan.
- <sup>17</sup> At Le Tribunal Administratif there are a few instances where the process is binding, but for most it is only provided where requested by one party and agreed to by the other, see *Conciliation . . .*, *supra* note 15.
- <sup>18</sup> At Le Tribunal Administratif, if the parties agree to a settlement it is given the force of an order of the tribunal, see *Ibid*. Although, the ARC Report recommends that decisions flowing from ADR should be accepted provided the user has not been pressured or coerced: ARC, *Better Decisions*, *supra* note 3 at 56.
- <sup>19</sup> Pre-hearing meetings can be called for case management or settlement purposes in Le Tribunal Administratif: *An Act respecting administrative justice*, R.S.Q., chapter J-3, s. 126.
- <sup>20</sup> Interview with Jay Seibel, Chair of Labour Relations Board July 26, 2007.
- <sup>21</sup> Response by Karen Prisciak, Chair of Human Rights Tribunal to Background Questionnaire.
- <sup>22</sup> In *Baker v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court, following the decision in *Knight* found that oral face-to-face hearings are not a procedural requirement of fairness in all cases and that different types of procedures are acceptable depending on a number of factors. The Court stated at para. 33:
- "However, it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. The Federal Court has held that procedural fairness does not require an oral hearing in these circumstances: see, for example, *Said, supra*, at p. 30."
- Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.
- <sup>23</sup> *Leggatt Report, supra* note 3 at para. 8.16.
- <sup>24</sup> *Leggatt Report, supra* note 3 at para. 10.15 and ARC, *Better Decisions, supra* note 3 at 54.
- <sup>25</sup> Secretary of State for Constitutional Affairs and Lord Chancellor, *Transforming Public Services: Complaints, Redress and Tribunals* (July 2004), at paras. 6.20-6.25. online: Department for Constitutional Affairs <http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf> (hereinafter "U.K. White Paper").
- <sup>26</sup> ARC, *Better Decisions, supra* note 4 at 29 and 31. This includes unnecessary and potentially intimidating court-like processes such as rising when the tribunal members enter the hearing room, bowing to tribunal members, administering oaths to witnesses as a matter of course, requiring 'expert' witnesses to qualify themselves before giving evidence, having participants stand when addressing tribunal members, making technical objections to the admission of certain evidence, and the use of cross examination.
- <sup>27</sup> Law Reform Commission of Saskatchewan, *supra* note 7, p. 4.
- <sup>28</sup> *Ibid*: p. 3.
- <sup>29</sup> *Ibid*: p. 5.
- <sup>30</sup> *Ibid*: p. 6.
- <sup>31</sup> See for example, Council on Tribunals, "Feedback Paper," *supra* note 10 at para. 4.7.

- <sup>32</sup> *Leggatt Report*, *supra* note 3 at paras. 4.15-4.17.
- <sup>33</sup> Council on Tribunals, "Feedback Paper," *supra* note 10 at para. 4.6.
- <sup>34</sup> *Leggatt Report*, *supra* note 3 at para. 7.18; see also ARC, *Better Decisions*, at 102.
- <sup>35</sup> See for example ARC, *Better Decisions*, at 62.
- <sup>36</sup> This is discussed in the Council on Tribunals, "Feedback Paper," at paras. 4.1-4.4.  
"Recommendation 22: Applicants for review should be intitled to be represented or assisted in any dealings with a review tribunal."
- <sup>37</sup> *Leggatt Report*, *supra* note 3 at paras. 4.17-4.19. "There is a wide continuum of need for advice and support by tribunal users, from straightforward information packs at one end of the scale to step-by-step assistance, including representation at an appeal hearing, at the other."
- <sup>38</sup> The range of services described in sections 9, 10, and 11 of the Legal Aid Regulations, 1995, do not include services related to administrative tribunal hearings.
- <sup>39</sup> This issue is discussed in the Leggatt Report. *Leggatt Report*, at paras. 6.10-6.15, 7.15, 7.18, 7.19.
- <sup>40</sup> *An Act respecting administrative justice*, *supra* note 19, s. 153.
- <sup>41</sup> *An Act respecting administrative justice*, *supra* note 19, s. 154.
- <sup>42</sup> *An Act respecting administrative justice*, *supra* note 19, s. 159.
- <sup>43</sup> Alberta Ombudsman Act, CH0-8, **21.1(1)**:  
On the recommendation of the Ombudsman under section 21(3), a department, agency or professional organization may  
(a) rehear a matter or reconsider a decision or recommendation made by the department or agency or professional organization or an officer, employee or member of it, and  
(b) quash, confirm or vary that decision or recommendation or any part of it.
- <sup>44</sup> *Leggatt Report*, *supra* note 3 at para. 9.6.
- <sup>45</sup> *An Act respecting administrative justice*, *supra* note 19, s. 146. reads as follows:  
146. In any matter of whatever nature, the decision must be given within three months after being taken under advisement, unless, for a valid reason, the president of the Tribunal has granted an extension.  
Where a member seized of a matter fails to give a decision within three months or, as the case may be, within such additional time as has been granted, the president may, of his own initiative or on an application by a party, withdraw the matter from the member.  
Before granting an extension or withdrawing a matter from a member who has failed to give his decision within the required time, the president shall take account of the circumstances and of the interests of the parties.
- <sup>46</sup> *Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 12.
- <sup>47</sup> For this reason the ARC Report recommends decisions be made as quickly as possible following a hearing, including immediate oral decisions with possible written reasons to follow: ARC, *Better Decisions*, *supra* note 4 at 22. The IRB has a similar policy: *Immigration and Refugee Board of Canada: An Overview*, (March 2006), online: Immigration and Refugee Board of Canada [http://www.irb-cisr.gc.ca/en/about/publications/overview/index\\_e.htm](http://www.irb-cisr.gc.ca/en/about/publications/overview/index_e.htm).

- 48 *An Act respecting administrative justice, supra* note 19, s. 146.
- 49 The *Canadian Human Rights Act* allows for the Chair of the Tribunal to make rules in relation to, among other things, timeframes for holding hearings and rendering decisions. *Canadian Human Rights Act*, S.C. 1985, c. H-6, s.48.9, reads as follows:  
48.9  
(1) Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.  
(2) The Chairperson may make rules of procedure governing the practice and procedure before the Tribunal, including, but not limited to, rules governing  
(a) the giving of notices to parties;  
(b) the addition of parties and interested persons to the proceedings;  
(c) the summoning of witnesses;  
(d) the production and service of documents;  
(e) discovery proceedings;  
(f) pre-hearing conferences;  
(g) the introduction of evidence;  
(h) time limits within which hearings must be held and decisions must be made; and  
(i) awards of interest.
- 50 *Leggatt Report, supra* note 3 at para. 8.4.
- 51 "Renewing the Vision: Human Rights in Saskatchewan, Summary of Report," online: Saskatchewan Human Rights Commission <http://www.shrc.gov.sk.ca/codereview/summary/summary2.htm>.
- 52 ARC, *Better Decisions, supra* note 4 at 36.
- 53 *Leggatt Report, supra* note 3 at para. 7.25 citing Frost, C and Howard, A, *Representation and Administrative Tribunals*, London, 1977.
- 54 ARC, *Better Decisions, supra* note 4 at 84.
- 55 Interview with Ann Phillips, Chair of the Automobile Insurance Appeal Commission, July 27, 2007; Interview with Karen Prisciak, Chair of the Human Rights Tribunal, August 1, 2007.
- 56 ARC, *Better Decisions, supra* note 4 at 84.
- 57 ARC, *Better Decisions, supra* note 4 at 77.
- 58 *An Act respecting administrative justice, supra* note 19, s. 41.
- 59 See W.J., Vancise, "Are Administrative Tribunals Effective in Rendering Justice" *supra* note 2; AJP *White Paper, supra* at 14; *Leggatt Report, supra* at para. 7.7; ARC, *Better Decisions, supra* at 75-77.
- 60 SOAR Report, note 141.
- 61 *Leggatt Report, supra* note 3 at 7.7; ACR, p. 82.
- 62 *Leggatt Report supra* note 3 at 7.7.
- 63 ARC, *Better Decisions, supra* note 4 at 82.
- 64 AJP, p. 14.

- <sup>65</sup> *Leggatt Report*, *supra* note 3 at para. 7.32. Diversity training is also recommended in the Council on Tribunals, "Feedback Paper," *supra* note 10 at para. 5.3; *Leggatt Report*, *supra* note 2 at para. 7.32. Similarly, in the U.K. White Paper, presidents of the tribunal are placed in charge of ensuring new members are appropriately trained and encouraged to provide further training as necessary; U.K. White Paper, *supra* note 25 at para. 6.75.
- <sup>66</sup> AJP *White Paper*, *supra* note 5 at 30; the need for increased training was also recommended by the Society of Ontario Adjudicators and Regulators.
- <sup>67</sup> *Leggatt Report*, *supra* note 3 at para. 8.6.
- <sup>68</sup> *Leggatt Report*, *supra* note 3 at para. 10.7 to 10.11.
- <sup>69</sup> If necessary, Le Tribunal Administratif members can convene a case management conference and have the parties agree to or otherwise impose a timetable for all of the steps prior to hearing to be completed: *An Act respecting administrative justice*, *supra* note 19, s. 119.1-119.5.
- <sup>70</sup> *Leggatt Report*, *supra* note 3 at para. 8.15.
- <sup>71</sup> *Leggatt Report*, *supra* note 3 at para. 8.7. See also U.K. White Paper, *supra* note 25 at para. 7.9.
- <sup>72</sup> *Leggatt Report*, *supra* note 3 at para. 8.8.
- <sup>73</sup> *Leggatt Report*, *supra* note 3 at para. 7.43.
- <sup>74</sup> Society of Ontario Adjudicators and Regulators Performance Management Committee, *Towards Maintaining and Improving the Quality of Adjudication: SOAR Recommendations for Performance Management in Ontario's Administrative Justice Tribunals* (June 1995), online: Society of Ontario Adjudicators and Regulators [http://www.soar.on.ca/soar-perf\\_man.htm](http://www.soar.on.ca/soar-perf_man.htm).
- <sup>75</sup> See SOAR Report; *Leggatt Report* at para. 7.39; U.K. White Paper, *supra* note 25 at para. 6.80, citing Judicial Studies Board *Fundamental Principles and Guidance for Appraisals in Tribunals* (October 2003), online: Judicial Studies Board [http://www.jsboard.co.uk/downloads/jsb\\_appraisal\\_web.pdf](http://www.jsboard.co.uk/downloads/jsb_appraisal_web.pdf); ARC, *Better Decisions*, at 85.
- <sup>76</sup> *An Act Respecting Administrative Justice*, *supra* note 19, s. 96.
- <sup>77</sup> *Leggatt Report*, *supra* note 3 at para. 8.5; ARC, *Better Decisions*, at 109; the Canadian Human Rights Tribunal produces an annual report that provides statistics in relation to the timeliness of their process and of their decisions, See for example: *Canadian Human Rights Tribunal Annual Report 2006*, online: Canadian Human Rights Tribunal <http://www.chrt-tcdp.gc.ca/pdf/annual06-e.pdf>.
- <sup>78</sup> See *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781.
- <sup>79</sup> *Leggatt Report*, *supra* note 3 at para. 2.18.
- <sup>80</sup> This is also a requirement of natural justice, see for example: *Baker v. Canada (Minister of Citizenship and Immigration)*, *supra* note 41.
- <sup>81</sup> *Leggatt Report*, *supra* note 3 at para. 2.23.
- <sup>82</sup> *Leggatt Report*, *supra* note 3 at para. 9.14.
- <sup>83</sup> *Leggatt Report*, *supra* note 3 at para. 9.17. Likewise, the ARC noted that tribunals should work cooperatively with agencies to improve overall quality of decision-making: ARC, *Better Decisions*, *supra* note 3 at 22.

- <sup>84</sup> See AJP *White Paper*, *supra* note 5 at 29-30.
- <sup>85</sup> AJP *White Paper*, *supra* note 5 at 31.
- <sup>86</sup> N.Z., Law Commission, *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals* (Report 85) (Wellington: Law Commission, March 2004) at 28, online: New Zealand Law Commission [http://www.lawcom.govt.nz/UploadFiles/Publications/Publication\\_89\\_219\\_R85.pdf](http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_89_219_R85.pdf).
- <sup>87</sup> Tribunal Administratif du Québec, *Its Beginnings*, online: Tribunal Administratif du Québec <http://www.taq.gouv.qc.ca/english/tribunal-specialise/origines.jsp>. The five tribunals were the Commission des affaires sociales [Social Affairs Commission], the Commission d'examen des troubles mentaux [Mental Health Commission], the Bureau de révision en immigration [Immigration Board], the Bureau de révision de l'évaluation foncière [Immovable Property Board], and the Tribunal d'appel en matière de protection du territoire agricole [Protection of Agricultural Land Appeal Tribunal].
- <sup>88</sup> *Immigration and Refugee Board of Canada: An Overview*, *supra* note 47.
- <sup>89</sup> The Immigration Division of the IRB deals with admissibility hearings and detention issues.
- <sup>90</sup> The Refugee Protection Division hears claims for people claiming refugee protection or who are claiming that they are persons in need of protection who are already in Canada.
- <sup>91</sup> The Immigration Appeal Division hears appeals of immigration issues, including the appeals by sponsors of unsuccessful family applications, appeals of removal orders made against permanent residents, refugees, and foreign nationals with resident visas, appeals by permanent residents who have been found by a visa officer outside Canada not to have met their residency obligation, and appeals by the Canada Border Services Agency (CBSA) on behalf of Public Safety and Emergency Preparedness Canada (PSEP) of decisions on admissibility.
- <sup>92</sup> *Leggatt Report*, *supra* note 3 at paras. 3.4-3.8.
- <sup>93</sup> *Leggatt Report*, *supra* note 3 at paras. 3.4-3.8.
- <sup>94</sup> *Leggatt Report*, *supra* note 3 at para. 3.9. To begin with the most significant ten tribunals in the U.K. were amalgamated, with all new tribunals to follow: U.K. White Paper, *supra* note 25 at para. 6.4 and 6.9. The system was placed under the guidance of the Department for Constitutional Affairs: U.K. White Paper, *supra* note 25 at para. 6.14.
- <sup>95</sup> Law Reform Commission of Saskatchewan, *supra* note 7. See also *Leggatt Report*.
- <sup>96</sup> Law Reform Commission of Saskatchewan, *supra* note 7.
- <sup>97</sup> *Leggatt Report*, *supra* note 3 at para. 5.8.
- <sup>98</sup> See *Leggatt Report*, *supra* note 3 at paras. 7.50-7.54, which states that the Council on Tribunals should expand its mandate significantly. However, the U.K. White Paper sees the Council on Tribunals primarily as a lobby group for the tribunal system and for users, with no role in research: U.K. White Paper, *supra* note 25 at para. 11.10.
- <sup>99</sup> The Administrative Review Council, online: <http://www.ag.gov.au/arc>.
- <sup>100</sup> The Administrative Justice Office, online: <http://www.gov.bc.ca/ajo/>.
- <sup>101</sup> Society of Ontario Adjudicators and Regulators, online: <http://www.soar.on.ca/>.
- <sup>102</sup> Council of Canadian Administrative Tribunals, online: <http://www.ccat-ctac.org/en/>.
- <sup>103</sup> Plant, Geoff. Attorney General of British Columbia, BC Council of Administrative Tribunals, Ninth Annual Conference, keynote address, Oct. 25, 2004.

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