

THE POTENTIAL FOR A FAMILY LAW TRIBUNAL

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ABSTRACT

This thesis considers the potential for tribunal adjudication in family law, particularly for custody and access cases. The central argument is that a paradigm shift away from adversarialism may enable experimentation with a holistic tribunal-based family law settlement system, at least for family law cases in which a best-interests-of-the-child determination is required. It is suggested that within a holistic tribunal “settlement system,” multi-disciplinary mediators and adjudicators could share decision-making responsibility, nurture tribunal expertise and develop transparent decision-making guidelines, while adjudication could be relegated to a secondary, inquisitorial component. New empirical research on mediation and adjudication processes in selected tribunals is reported, which I argue is relevant to the potential for an alternative institutional approach to family law dispute resolution. I conclude that there appears to be sufficient potential for a tribunal approach to family law dispute resolution to warrant further research.

This thesis is dedicated to the memory of my parents and to my husband, Jim Robinson, who suggested this topic a decade ago and has been a constant source of insight and encouragement.

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The Potential for a Family Law Tribunal

INTRODUCTION

It is the first day of trial. I've worked with the father for almost a year. He has told his story, and I've re-told it on his behalf, in four formal offers of settlement, written briefs for three court conferences, mediation submissions, and, finally, in the materials now before the court. His struggle for meaningful role in his three-year old son's life has been packaged by me in multiple ways.

The parties were never married; the mother is testifying, and the father finds this unpleasant and at times infuriating. During a break he is assured by his counsel (for whom I am an associate) that the mother's account will be challenged on cross-examination, and he will have a turn to tell his side of the story.

Cross-examination of the mother begins with all the drama for which the father could have hoped. It is archetypal – she is quickly unnerved, becomes hesitant, and slowly unravels. The father's hopes palpably rise; the exposure of the mothers' irrationality will surely lead the judge to sympathize with his claim.

The judge eventually interrupts counsel's cross-examination to say she doesn't approve of its tone – it is inappropriately aggressive. Counsel immediately backs off, now showing excessive politeness to the witness. As soon as the mother leaves the witness stand, the judge says she would like to speak to the parties. From the bench, she delivers a rebuke to them for asking a stranger to make decisions about their child. She tells them how much better it would have been for the child if they had settled. She asks them if they both hope to attend the little boy's wedding; they do. The judge warns that if they proceed along the path they are on it is unlikely they will both be invited. She repeats several times that she is not as qualified as the parents to understand what is best for this child. She suggests the trial be interrupted for a settlement conference or further mediation. She ends the day by expressing hope that we can all be on a settlement track by morning.

We retreat with the father to one of the rooms in the courthouse designed for private consultation, whereupon he erupts over the preceding negotiations, conferences and mediation, all of which involved professional fees, and all of which were met with stonewalling. He is incensed that the judge has insisted upon a return to negotiation and has "weighed in" after hearing the "other side" for an entire day and not having heard "his side." He accuses his counsel of alienating the judge with her cross-examination.

Unlike the judge, I am aware that the mother has refused to settle on any terms which would allow him more than minimal access to the child, and her own lawyer has characterized her, privately, as irrationally stubborn. I am aware that his legal fees and trial retainer have necessitated a substantial second mortgage. I am aware that he has literally and figuratively exhausted all avenues for settlement, has come to court as a last resort and has been chastised for doing so, at least in part because the decision-maker disapproves of the decision-making process with which she has been entrusted.

In the trial described above, the judge's admonition finally undid the mother's intransigence; the parties settled the next day, on terms more favourable to the father than any of the four settlement offers that had earlier been rejected. Privately, in chambers, the judge confided to counsel that she "did not like" the settlement but had signed off because "at least it's consensual." Despite this apparent "win," the father was unnerved. The outcome was the result of a court process in which he had not been heard, and it seemed random, with no apparent connection to what "justice" or the law required.

This thesis builds upon a frequently noted paradigm shift occurring in Anglo-American legal systems, particularly in the area of family law,¹ away from adversarialism and toward a more collaborative, inter-disciplinary and problem-solving paradigm (Hybrid? Post-Adversarial? Therapeutic? Vulnerability?) not yet fully formed.

¹ See: Jana B. Singer, "Dispute Resolution and the Post-Divorce Family: Implications of a Paradigm Shift" (2009) 47 (3) Fam. Ct. Rev. 363; Final Report of the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters, "Meaningful Change for Family Justice: Beyond Wise Words" *infra*, footnote 23.

Social and legal developments which appear to have contributed to, or seem symptomatic of, this paradigm shift include: the large population of self-represented litigants in all dispute-resolution forums,² the very low percentage of cases which proceed to trial in all areas of the law,³ growth in the number of problem-solving family courts in the United States,⁴ and efforts to expand their therapeutic orientation to other areas of the law;⁵ the establishment of Family Relationship Centres and the Less Adversarial Trial system in Australia,⁶ and proposals released in October 2018 by the Australian Law Reform Commission aimed at “redevelopment” of the Australian family justice system;⁷ the current, ongoing “radical reorganization” of family courts in the UK;⁸ the implementation of family law reform initiatives in Ontario, such as the Mandatory Information Program,⁹ Family Law Information Centres,¹⁰ and court-adjunct mediation;¹¹ the pending expansion of Unified Family Courts,¹² substantive law and process reforms contained in British Columbia’s *Family Law Act*¹³ and similar reforms contained in proposed amendments to

² Julie Macfarlane, “The National Self Represented Litigants Project: Identifying and Meeting the Needs of Self Represented Litigants, Final Report” *infra*, footnote 128. See also: Rachel Birnbaum and Nicholas Bala, “Experiences of Ontario Family Litigants with Self-Representation” *infra*, footnote 122.

³ Law Commission of Ontario, “Towards a More Efficient and Responsive Family Law System: Interim Report” online: <http://www.lco-cdo.org/en/family-law-reform-interim-report>

⁴ Barbara A. Babb, “Re-evaluating Where We Stand: A Comprehensive Survey of American Family Justice System,” (2008) 46 (2) Fam. Ct. Rev. 230.

⁵ Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 Yale L. & Pol’y Rev. 125 (2004).

⁶ Jennifer E. McIntosh, Hon. Diana Bryant and Kristen Murray, “Evidence of a Different Nature: The Child Responsive and Less Adversarial Initiatives of the Family Court of Australia” (2008) 46 (1) Fam. Ct. Rev. 125 at page 126.

⁷ Australian Law Reform Commission, “Review of the Family Law System: Discussion Paper” online: <https://www.alrc.gov.au/publications/review-family-law-system-discussion-paper>

⁸ Lisa Parkinson, “The Place of Mediation in the Family Justice System” (2013) 25 Child & Fam. L.Q. 200 at page 200.

⁹ Nicholas Bala, “Reforming Family Dispute Resolution in Ontario: Systemic Changes and Cultural Shifts” in *Middle Income Access to Justice*, Michael J. Trebilcock, Lorne M. Sossin and Anthony J. Duggan (eds.) (University of Toronto Press, 2012) at page 281-282.

¹⁰ Ontario Ministry of the Attorney General, Family Law Information Centres, online: <https://www.attorneygeneral.jus.gov.on.ca/english/family/infoctr.php>

¹¹ *Supra*, footnote 9 at page 289. [Bala, “Reforming Family Dispute Resolution”]

¹² Philip Epstein, *Epstein’s This Week in Family Law* Fam. L. Nws. 2018-13.

¹³ *Family Law Act*, SBC, 2011, c 25.

the *Divorce Act*,¹⁴ academic literature and popular media accounts which have drawn attention to problematic aspects of family court systems,¹⁵ and further literature which has pointed out the potential for tribunal processes in “areas of vulnerability” in family law;¹⁶ the inclusion of “multi-disciplinary approaches” and “legal problem-solving” in law school curricula; the emergence of “vulnerability theory” as a way of interpreting the institutional effects of law and legal systems;¹⁷ and, finally, the December 2017 proposal of the Australian Parliament to test a Parenting Management Hearing Panel, a multi-disciplinary administrative tribunal for “less complex” children’s matters in which parties are self-represented.¹⁸

The central argument of this thesis is that the noted paradigm shift may facilitate experimentation with alternative *institutional* approaches to family law dispute resolution. This thesis explores the potential for a tribunal-based family justice system, at minimum for cases involving children’s best interests. I argue that the longstanding recognition that family litigation is damaging to children and separated families has become incompatible with social norms to the extent that it may legitimately be considered a new and serious social problem that requires an innovative solution. I argue that a novel jurisdiction in family law may be created by a holistic tribunal “settlement system” in which multi-disciplinary mediators and adjudicators function as equals, tribunal expertise is nurtured, and transparent decision-making guidelines are developed. Adjudication in a settlement system could be relegated to a secondary, accessible, and inquisitorial component.

¹⁴ *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.).

¹⁵ See: *infra*, footnote 23. [Family Justice Working Group Report]

¹⁶ Kent Roach and Lorne Sossin, “Access to Justice and Beyond” (2010), 60 *Univ. of Toronto L.J.* 373.

¹⁷ Martha Albertson Fineman, “The Vulnerable Subject, Anchoring Equality in the Human Condition” (2008-2009), 20 *Yale J.L. & Feminism* 1.

¹⁸ *Supra*, footnote 7 at pages 142-143. [Australian Law Reform Commission, Discussion Paper]

Vulnerability theory is a rapidly growing theoretical approach to law, which I apply to family court systems; by way of introduction, vulnerability theory calls for a “responsive state” to place the needs of the “vulnerable subject” at the centre of social policy.¹⁹ It emphasizes substantive rather than formal equality, examines the effects of social institutions on the populations they serve,²⁰ and unmask illusions about autonomy and choice.²¹

The empirical research conducted for this project explores decision-making in four selected Ontario tribunals, which I argue have points of similarity to family law adjudication. Research methods include participant observation, ethnography, and interviews with tribunal members. Through the empirical research and administrative law literature review, many aspects of tribunal culture are explored, including the administrative law principles upon which the subject tribunals are based, the processes they are permitted to employ, how they are actually employed, and views among the members interviewed as to the effects of tribunal processes upon vulnerable populations.

There is an acknowledged imbalance between the scope of this project and the topic with which it engages. I ask the reader to consider this thesis a “thought experiment” in which the potential for a family law tribunal is imagined in the context of the reported functioning of family court systems, select administrative law tribunals, and administrative law principles. Expert input from multiple disciplines (family and administrative law, constitutional and criminal law; social work

¹⁹ *Supra*, footnote 17. [Fineman, Anchoring Equality]

²⁰ *Ibid.* [Fineman, Anchoring Equality]

²¹ *Ibid.* [Fineman, Anchoring Equality]

and psychology) would be required, as well as extensive additional research, to move beyond the thought experiment stage.

I have not explored untapped potential of family court systems, for a number of reasons. First, a full comparative institutional analysis is beyond the scope of this paper. Second, there are many precedents for implementing a new policy agenda through an administrative tribunal process including instances in which tribunal jurisdiction was previously exercised by the Superior Courts (such as the Worker's Compensation Board, Worker's Compensation Appeal Tribunal, Ontario Labour Relations Board, and Financial Services Commission, now re-constituted as part of the Licensing Appeal Board) suggesting that in the context of a new policy agenda, transition to a tribunal can be a natural progression. Finally, a pattern of reform has been identified with respect to the Ontario family law court system that consists of attaching "new reforms and offices to the system, without considering the complexity of the entire structure,"²² which has been portrayed as less than ideal.²³ To the extent that it may, one day, be timely to rebuild the family justice system "from the ground up,"²⁴ there is, in my view, every reason to consider alternative institutional approaches.

²² Noel Semple and Carol Rogerson, "Middle Income Access to Justice: Policy Options with Respect to Family Law," in *Middle Income Access to Justice*, Michael J. Trebilcock, Lorne M. Sossin and Anthony J. Duggan (eds.) (University of Toronto Press, 2012) at page 448.

²³ Final Report of the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters, "Meaningful Change for Family Justice: Beyond Wise Words" (April 2013), at page 1; online: <http://www.cfcj-fcjc.org/sites/default/files/docs/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf>

²⁴ *Supra*, footnote 22 at page 421. [Semple and Rogerson] The authors refer to the prospect of re-building the court system from the "ground up."

In Chapter One, institutional analysis is discussed, the application of vulnerability to family dispute resolution is introduced, and social changes that suggest new norms, and may be propelling the paradigm shift referred to above, are briefly noted.

Chapter Two reviews the operation of existing family dispute resolution systems, as disclosed in academic literature and prior research, with an emphasis upon self-represented litigants, the value of structured decision-making in family law, the importance of truth-finding in the application of the best-interests-of-the-child test, and the effect upon self-represented litigants of formal court processes. Under the heading “But We Do That Already” I discuss a potential objection to this thesis – that family law court systems have been so thoroughly and effectively reformed as to render this paper moot. Much of the research and literature cited is critical of family court systems; I note that it is taken from credible sources and its aggregation is not gratuitous. The intention is to illustrate the importance of overcoming the “implementation gap” referred to in the Family Justice Working Group Report,²⁵ and to identify areas in which alternative institutional approaches appear to warrant further research and consideration. It is not meant to convey a lack of respect for the Ontario family law bench and bar, or to imply that no aspects of existing court systems should inform the exploration of different institutional approaches. As Nigel Stobbs writes, a paradigm shift “is about the evolution of disciplines, not progress by the total rejection of the cumulative disciplinary matrix.”²⁶

Chapter Three is comprised of a vulnerability theory analysis.

²⁵ *Supra*, footnote 23. [Family Justice Working Group Report]

²⁶ Nigel Stobbs, “Nature of Juristic Paradigms: Exploring the Theoretical and Conceptual Relationship Between Adversarialism and Therapeutic Jurisprudence” (2011-2012), 4 Wash. U. Jurisprudence Rev. 97 at page 100.

In Chapter Four, academic literature and prior research as to the features of administrative law and tribunal adjudication are discussed. The essential components of adversarial and inquisitorial models are identified, and I suggest that in custody and access cases which require adjudication, decision-making should be more inquisitorial and less adversarial.

Chapter Five sets out the methodology used in the empirical research component of this project and summarizes briefly the characteristics of the four tribunals in which hearings were observed and interviews conducted. Tribunal members who participated in interviews were asked to recount their experiences and perceptions with respect to tribunal adjudication and settlement processes. The empirical data is reported upon in narrative form in Chapter Six and attached in chart form as Appendix B.

Chapter Seven identifies the assumed policy goals of a hypothetical family law tribunal and discusses the capacity of tribunal processes to achieve them. Relevant reports and commentary with respect to family court systems are briefly considered as well, with the caveat that a full comparative institutional analysis is beyond the scope of this project. The chapter concludes by identifying areas in which further study is recommended.

In Chapter Eight the potential for therapeutic justice and efficiency in tribunal systems is discussed, as is the potency of adversarial ideology and symbolism, and the strength of entrenched interests. Arguments relevant to the constitutional validity of a family law tribunal are proposed, and other potential obstacles are briefly discussed. It is argued that symbolic and

ideological obstacles to tribunal adjudication in family law and are increasingly becoming eclipsed by the paradigm shift noted at the outset of this thesis.

1. FRAMEWORK, THEORY AND SOCIAL POLICY

*Adjudication is a form of social ordering.*²⁷

This chapter discusses institutional analysis, and reviews theoretical perspectives and social movements which, I argue, are relevant to the paradigm shift referred to above.

1.1 Institutional Analysis

The words “court” and “tribunal” are sometimes used interchangeably, and in a casual sense they both refer to adjudicative bodies. Not so here; I use “court” to refer to a traditional legal decision-making forum built upon adversarial principles, with broad plenary or statutory authority to apply the law, and in which certain formalities are routinely observed: judges and court staff are robed (as are lawyers in the Superior Court), lawyers bow to judges, processes are governed by complex and detailed rules,²⁸ and surroundings are at least somewhat stately and distinctly hierarchical. The word “tribunal” is used here to connote an entity that is legislatively created under administrative law principles, with a limited and specific mandate and a narrow statutory power of decision granted for the purpose of implementing an articulated policy agenda, and often (but not always) designed to be relatively informal and “user-friendly,” with the expectation of serving large numbers of self-represented parties.²⁹ While the Ontario Provincial Courts were created by the *Courts of Justice Act*,³⁰ (unlike the Superior Courts of Justice, which have plenary authority) and, *like tribunals*, these courts have the power to

²⁷ Justice Thomas A. Cromwell, “Neither out Far nor in Deep: The Zuber Commission and the Problems of Civil Justice Reform” 37 U.N.B.L.J. 94 (1988).

²⁸ In Ontario: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 under *Courts of Justice Act*, R.S.O. 1990, c. 43.; and in family law: *Family Law Rules*, *Courts of Justice Act*, R.S.O. 1990, c. C.43, O. Reg. 114/99.

²⁹ Raj Anand, “A Checklist for Administrative Law Today” 27 Can. J. Admin. L. & Prac. 235 at page 235.

³⁰ *Courts of Justice Act*, R.S.O. 1990, c. 43.

establish and adapt their processes through practice directions and specialized rules of procedure, and *like tribunals*, they deal with large numbers of self-represented parties and have adapted to better assist them, tribunals exist as part of a distinct legal culture. A false equivalency between courts and tribunals, as the terms are used here, trivializes administrative law principles, norms and structures.

This thesis examines the potential for administrative processes to ameliorate *some problems* in *some aspects* of family litigation; it is not a fulsome comparative institutional analysis, which would typically involve a blend of law and economics and critical legal studies,³¹ and would require a multifaceted examination of the economic and social effects of both court and tribunal processes,³² including new empirical research on family courts and far more extensive empirical research on tribunal functioning than is provided here. Most important, it would canvass the experiences of tribunal users and fully investigate the potential benefits of newly proposed reforms to family court systems, particularly the recently approved and much celebrated expansion of Unified Family Courts in Ontario. Indeed, it seems safe to assume that positive and successful developments in family law practice and dispute resolution exist that have not been discussed in literature reviewed for this project. Within the narrow scope of this project, I believe it is reasonable to focus upon *problems* in family law court systems which appear to remain unsolved, given that credible (in some instances, authoritative) family law research and commentary has been used to identify them, with the caveat that very recent reforms may have mitigated these problems in ways that have not yet generated study and commentary.

³¹ Edward L. Rubin, “The New Legal Process, The Synthesis of Discourse and Microanalysis of Institutions” (1995-1996), 109 Harv. L. Rev. 1393 at page 1403.

³² *Ibid.*, at page 1428. [Rubin]

Despite that a wholesale institutional analysis has not been undertaken, the questions raised in such an analysis: How does law operate in the world? What are the “human ends served by justice systems?”³³ How do different institutions attempt to achieve similar policy goals?³⁴ provide a framework for discussion. The question of how law operates in the world here concerns adjudication in family law court systems and select tribunals. As noted, problems are identified through prior research and literature, and tribunal processes that may help to address these problems are identified similarly, with the addition of the empirical research conducted for this project. The “human ends” of justice systems considered in this project are those that prior research suggests are significant and, to varying degrees, unmet in existing family law dispute resolution systems. They include access to justice in all of its forms, and in particular, access to authoritative dispute resolution that does not disadvantage self-represented litigants and is not damaging to families and children. The question of how different institutions attempt to achieve similar policy goals is addressed through a discussion of the potential for tribunal processes to address needs that remain unmet in family court systems. This analysis does not pretend to be exhaustive, and it is obviously not conclusive of either the potential for tribunal processes in family law or the potential for further reformed court processes. It is an initial foray into complex question.

³³ Hanoch Dagan, “The Realist Conception of Law” (2007), 57 U. Toronto L.J. 607.

³⁴ Gregory Shaffer, “Comparative Institutional Analysis and a New Legal Realism” (2013), Wis. L. Rev. 607 at page 609.

The idea of a family law tribunal is not original to this thesis. A tribunal or “tribunal-like” approach to family law has previously been suggested by academics and judges. Kent Roach and Lorne Sossin have suggested:

[t]he increased resources that would be required to add the middle class to legal aid might better be directed at more fundamental reallocation of resources, including the replacement of a costly court-based system in areas such as family law with a holistic tribunal structure.”³⁵

Alberta Justice Hugh Landerkin has recommended a staged approach to custody and access disputes, described as “closer to an administrative tribunal.”³⁶ An analysis of the potential for administrative systems in family law is contained in the 1999 prize-winning paper of then-undergraduate law student Kathy Carmichael; she envisions a comprehensive, non-adversarial administrative system to process divorce applications and provide a wide range of related services.³⁷ Very recently, the government of Australia announced a four-year pilot project to test an administrative tribunal “designed to provide a multi-disciplinary alternative to court proceedings for less complex children’s matters where parents are not legally represented.”³⁸ Decision-making panels comprised of family lawyers, social workers, child development experts and psychologists will conduct Parenting Management Hearings (PMHs) designed to assist self-represented parents to resolve child-related disputes. The plan is to give PMHs “powers to make

³⁵ *Supra*, footnote 16 at page 375. [Roach and Sossin] The authors also recommend clear law and note that access to justice must be situated in the context of social and economic redistribution.

³⁶ The Honourable Hugh F. Landerkin, “Custody Disputes in the Provincial Court of Alberta: A New Judicial Dispute Resolution Model” (1996-1997), 35 *Alta. L. Rev.* 627.

³⁷ Kathy Carmichael, “New Directions: Divorce and Administrative Law, Department of Justice” (1999), online: http://www.cfcj-fcjc.org/sites/default/files/docs/hosted/17456-new_directions.pdf Carmichael wrote this paper, for which she won a Department of Justice “Dispute Resolution in Law Studies” award, as a University of New Brunswick law student. The paper is still posted on the Department of Justice website (<http://www.justice.gc.ca/eng/pi/dprs-sprd/prog/award-prix/awardr-prixr.html>), and a synopsis with a link to the full text also appears on the Canadian Forum for Civil Justice website, under the heading “Context-specific Dispute Resolution” (<http://www.cfcj-fcjc.org/clearinghouse/context-specific-alternative-dispute-resolution>).

³⁸ See: *supra*, footnote 7 at pages 142-143. [Australian Law Reform Commission, Discussion Paper]

binding determinations on simple family law matters, which would otherwise require consideration by family law courts, and its processes are intended to be fast, informal, non-adversarial and *more inquisitorial*.³⁹

There are, of course, obstacles to a tribunal approach to family law dispute resolution, some of which have constitutional underpinnings and therefore vary among different jurisdictions; further obstacles have been suggested in the form of a need for strong legal powers to deal with domestic violence cases and issue contempt of court orders, and a need for advanced legal reasoning in complex cases.⁴⁰ Obstacles to tribunal jurisdiction are, of course, fundamental concerns that would be resolved by expert analysis in the context of a larger project. Within the limited remit of this paper, potential arguments with respect to the constitutional validity of a family law tribunal and the availability of strong tribunal powers are briefly discussed.

It is not difficult to explain the policy motivation to create deeply reformed family law dispute resolution processes. There is now a preference for settlement in all areas of the law, and existing research on the experiences of litigants, lawyers and judges in Canadian family court systems, reveals persistent criticism, despite decades of reform, which extends beyond custody disputes and implicates all areas of family law. Much of this criticism, set out in some detail below, has emanated from the judiciary, including commentary from Justices of the Supreme Court of

³⁹ Parliament of Australia, Parenting Management Hearings, online: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/Budget_Review201718/ParentingHearings

⁴⁰ Noel Semple and Nicholas Bala, “Reforming the Family Justice System” (2013) Paper prepared under contract with the Association of Family and Conciliation Courts online: <http://afccontario.ca/wp-content/uploads/2015/11/Semple-Bala-Family-Justice-Reform.pdf>

Canada, the British Columbia Court of Appeal, the Ontario Superior Court of Justice and the Ontario Provincial Court, and from highly esteemed Canadian academics.

It has been asserted in the literature that despite societal and institutional preference for settlement of family law disputes, some cases “cannot or should not settle,”⁴¹ and it has become, in my view, increasingly trite to say that adversarial processes are inappropriate for cases involving children.⁴² Accepting both of these propositions, there is an obvious need for accessible, authoritative adjudication that is not based upon adversarial processes for cases that cannot or should not settle. This is not a novel insight; indeed, the 2018 Australian Law Reform Commission Review of the Family Law System Discussion Paper,⁴³ notes that a key concern which emerged in responses to its prior Issues Paper⁴⁴ is that developments in *alternative* dispute resolution *do not help families who need an adjudication process*; it states that they “continue to face a process that is ill-suited for dealing with family relationship issues” and cites very familiar-sounding reports as to the damaging effects of family litigation.⁴⁵

It is noted in comparative institutional analysis scholarship that institutions create patterns of perceiving matters which independently affect outcomes.⁴⁶ This is one of any number of

⁴¹ *Ibid.*, at page 9. [Semple and Bala, Reforming the Family Justice System] The authors note that apart from the characteristics of the parties and the nature of the dispute, reproducing public values, creating precedent through the imposition of outcomes consistent with legal entitlements, clarifying important or novel points of law, resolving constitutional challenges, and facilitating settlement through the shadow of the law are further reasons that some cases should not settle.

⁴² See: *supra*, footnote 7. [Australian Law Reform Commission, Discussion Paper] See also: J.A. Jolowicz, “Adversarial and Inquisitorial Models of Civil Procedure” (2003), 52 *Int'l & Comp. L.Q.* 281 at page 281.

⁴³ *Ibid.* [Australian Law Reform Commission, Discussion Paper]

⁴⁴ *Infra*, footnote 309. [Australian Law Reform Commission, Issues Paper]

⁴⁵ *Ibid.*, at page 138. [Australian Law Reform Commission, Discussion Paper] The Report notes stakeholders reports “that the litigation process tends to entrench or exacerbate existing hostilities between the parties, with adverse implications for the wellbeing of children.”

⁴⁶ *Supra*, footnote 34 at page 617-617. [Shaffer]

“process effects” which may result in an institution producing outcomes which not only fail to reflect legal entitlements, but also undermine the policy rationale of the institution itself. I argue here that the negative process effects of family court systems described by judges and academics beg the question: what is the policy rationale for the resolution of family law disputes through a court system in an era that vastly prefers settlement? The policy rationale for a tribunal, on the other hand, is often easy to identify; it is inherent in its specific mandate. Its processes are designed at the legislation stage or by the tribunal itself to best serve its mandate, suggesting a coherence between policy and function. Moreover, tribunals may be created to “adjust interests,”⁴⁷ that is, not only make decisions about existing rights, but empower a weaker party or population through conscious process design choices, as part of a mandate to achieve policy goals.

It has been said that it is difficult to treat tribunals as a coherent sector of administrative justice, given their broad range of mandates and statutory powers,⁴⁸ and that the scope and complexity of administrative law creates significant methodological challenges for comparative tribunal study.⁴⁹ To at least partially address this concern, I have chosen to study four tribunals with different features and mandates, but sufficient similarities to suggest some harmonized values and to have been “clustered” under an umbrella organization known as “Social Justice Tribunals of Ontario:” the Child and Family Services Review Board, Landlord and Tenant Board, Social Benefits Tribunal, and the Human Rights Tribunal of Ontario.

⁴⁷ H. W. Arthurs, “Three Faces of Justice - Bias in the Tripartite Tribunal” (1963) 28 Sask. Bar Rev. 4 at page 147.

⁴⁸ Lorne Sossin, “Independence, Accountability and Human Rights” online, http://www.justice.gov.yk.ca/pdf/Lorne_Sossin_Article.pdf at page 4.

⁴⁹ Janina Boughey, “Administrative Law: The Next Frontier for Comparative Law” (2013), 62 (1) I.C.L.Q. 55 at page 65.

Some of my experiences of the family court system are set out anecdotally, at the outset of this paper and in the chapter “Courts and Family Law.” Anecdotal recollections are based upon memory, and are not offered as “research,” but rather, as illustrations, in part, of experiences that motivated my interest this project.⁵⁰ Throughout the balance of this paper a few of my observations of tribunal hearings are reported ethnographically. These ethnographic accounts are based upon detailed and thorough contemporaneous notes and are included as research. Both ethnographic research and anecdotal recollections are included as *singular examples* of observed or experienced events and are not meant to betray the complexity of any institution or role, that is, they are not intended to be generalized to the whole.

1.2 Theoretical Supports

*Law can no longer maintain itself as an autonomous discipline.*⁵¹

This paper is not intended to contribute to the larger discussion of the nature of law and does not argue for the merits of one theory over another, which is beyond its scope; instead, it suggests that certain legal theories provides a framework for interpreting the effects of existing legal processes⁵² and help to create a bridge between “what is” and “what ought to be.”

One such theoretical framework is legal realism,⁵³ which began as a challenge to the formalist assumption that law is determinate, outside the social climate, different from, and superior to,

⁵⁰ My experience in family law practice consists of three years as an associate in a litigation firm, from 2007 to 2010; I previously worked as a corporate and commercial lawyer.

⁵¹ *Supra*, footnote 31 at page 1394. [Rubin]

⁵² Margaret Davies, “Legal Theory and Law Reform” (2003) 28 *Alternative L. J.* Vol. 4 at page 168.

⁵³ *Supra*, footnote 33. [Dagan]

politics.⁵⁴ New legal realism emphasizes the importance of empirical research and moves beyond the analysis of appellate opinions to the *analysis of decision-making processes* and the potential distortion of these processes by systemic forces which, in family law, might include settlement pressure, coercive mediation, and bargaining outside the shadow of the law.⁵⁵ A branch of new legal realism, critical legal studies, is focused on the big picture: it locates the indeterminacy of law beyond the interpretations of individual judges, in the larger sphere of fragmented political cultures in which law can serve a rationalizing function for culturally embedded privileges and disadvantages; in effect, to maintain existing power structures with scant consideration for social justice.⁵⁶ A further branch of new legal realism known as new governance theory advocates for a problem-solving, collaborative approach to both the creation and implementation of law.⁵⁷

Legal realism emphasizes the tensions inherent in law and “hints at” institutional features that can alleviate these tensions.⁵⁸ Vulnerability Theory, another new branch of new legal realism,⁵⁹ goes a giant step further; it interrogates the extent to which social institutions (such as legal systems) perpetuate patterns of privilege and disadvantage among the populations they are meant to serve, and emphasizes *state responsibility* to justify or remedy institutional effects that fail to further a substantive equality agenda.⁶⁰ Vulnerability theory calls for a “responsive state,”⁶¹ and, in my view, strongly resonates with family law reform literature which recommends “a more

⁵⁴ Brian Z. Tamanaha, “Understanding Legal Realism” (2008-2009), 87 Tex. L. Rev. 731 at page 731.

⁵⁵ Stewart Macaulay, “Contracts, New Legal Realism and Improving the Navigation of the Yellow Submarine” (2005-2006), 80 Tul. L. Rev. 1161.

⁵⁶ *Supra*, footnote 31 at page 1427. [Rubin]

⁵⁷ Victoria Nourse and Gregory Shaffer, “Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory” (2009) 95 Cornell L. Rev. 61 at page 88.

⁵⁸ *Supra*, footnote 33 at page 613. [Dagan]

⁵⁹ *Supra*, footnote 57 at page 76. [Nourse and Shaffer]

⁶⁰ Martha Albertson Fineman, “The Vulnerable Subject and the Responsive State” 60 Emory L.J. 254.

⁶¹ *Ibid.* [Fineman, Responsive State]

dramatic shift to non-adversarial approaches,” through “drastic change,” “fundamental overhaul” and a “paradigm shift”⁶² in family law dispute resolution.

It is admittedly a sharp turn from vulnerability theory to law and economics, which focusses upon the individual choices of autonomous and presumably empowered (that is, not vulnerable) rational economic actors. This turn is made here for two reasons: 1) it has been noted in law and economics literature that the ability of tribunal systems to target specific policy objectives may make a tribunal model “better suited to specific areas of vulnerability,” including “at least some areas of family law;”⁶³ and 2) despite that law and economics is unconcerned with power imbalances, which it takes as a given, and it is skeptical of the ability of governments to increase “net social welfare,”⁶⁴ a behavioural law and economics analysis is an alternative to vulnerability theory for examining who benefits and who loses (that is, patterns of advantage and disadvantage) through the operation of law and legal systems. Such an analysis is well beyond the scope of this paper but is recommended as a subject of further study.

1.3 Social and Legal Movement

*We experience ourselves, our thoughts and feelings as something separate from the rest. A kind of optical delusion of consciousness.*⁶⁵

An analysis of the capacity of dispute resolution processes to serve human ends by meeting a set of goals must, naturally, identify these goals. Certain goals, such as efficiency, are uncontroversial but may be variously interpreted; is the standard “bare efficiency” (the number

⁶² *Supra*, footnote 23. [Family Justice Working Group Report]

⁶³ *Supra*, footnote 16 at page 15. (Westlaw) [Roach and Sossin]

⁶⁴ Michael J. Trebilcock, “Law and Economics” (1993), 16 *Dalhousie L.J.* 360 at page 376.

⁶⁵ Mathew Ricard, *The Quantum and the Lotus* (Random House Inc., 2001).

of cases processed and how long it takes to process them) or something more nuanced that accounts for user experience and fairness? Absent targeted social science research, it is risking *hubris* to claim an understanding of social consensus sufficient to justify a new social policy agenda. Having acknowledged that, the following is ventured.

Much evidence suggests that the self-represented litigant phenomenon is now a durable socio-legal fact, and, moreover, the population of self-represented litigants is becoming large and diverse enough to suggest, in areas such as family law, that the self-represented are no longer marginalized as against the mainstream, they have become the mainstream. Ample empirical research, including my own, supports the now-mainstream status of self-represented litigants, which, in turn, suggests several things: first, this “group” occupies a significant place in justice systems, and their perceptions of the way they are treated translates into confidence (or the lack of it) in these systems.⁶⁶ Second, designing justice systems to serve the interests of self-represented litigants is not a matter of tailoring justice to the quirks of individuals or outliers; nor is it a “nanny state” solution for the underprivileged. Third, the increasing diversity of self-represented litigants (more to the point: low income is no longer the defining feature of self-represented litigants) makes it difficult to dismiss vulnerability theory’s proposition that the population of self-represented litigants could include almost any one, at almost any time, and social policy goals should address this common risk.

⁶⁶ Ronald Staudt and Paula L Hannaford, “Access to Justice for the Self Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers” (2002), 52 *Syracuse L. Rev.* 1017.

Efforts to improve access to justice often contain a “substantive equality” argument and are driven by “ethical demand.”⁶⁷ An example deeply relevant to this project is the reform of spousal support law in Canada. In a period known as the “trilogy era,” broad-based dissatisfaction developed with meagre, short-term spousal support awards premised upon the “formal equality” of separated spouses. Support orders were based upon un-nuanced and often unrealistic assumptions about the ability of ex-spouses who had been financially dependent in marriage, usually women, to become financially independent after separation.⁶⁸ In *Moge v. Moge*⁶⁹ the Supreme Court of Canada acknowledged academic writing on the “feminization of poverty” and departed from the prior line of precedent.⁷⁰ Carol Rogerson and D.A. Rollie Thompson subsequently created the *Spousal Support Advisory Guidelines* (“SSAG”) pursuant to which the quantum and duration of spousal support are standardized within ranges, calculated by applying factors such as years worked during marriage, children and their ages, length of marriage, and so on. The effect was to incorporate individual circumstances into the analysis of a spouse’s ability to become self-sufficient after separation. The threshold issue of entitlement to support was left to be determined based upon individual circumstances. It is difficult to overstate the significance of the SSAG, which have profoundly improved outcomes for separated women and their children.

⁶⁷ “Ethical demand” refers to demand for innovation in response to the misalignment of a system or law with perceived norms or social values. See: Martha Fineman and Anna Grear, “Introduction, Vulnerability as Heuristic – an Invitation to Future Exploration” in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, Anna Grear, Martha Albertson Fineman (eds.) (Ashgate Publishing, Ltd., Jan. 28, 2014).

⁶⁸ Carol Rogerson, “Spousal Support After *Moge*” (1996), 14 Can. Fam. L. Q. 281; and, Carol Rogerson, “The Canadian Law of Spousal Support” (2004-2005), 38 Fam. L.Q. 69.

⁶⁹ *Moge v. Moge*, [1992] 3 S.C.R. 813.

⁷⁰ *Ibid.* [*Moge*]

Follow-up research indicates the *SSAG*, despite being advisory only, were quickly and widely adopted by Canadian trial courts, and endorsed by appellate courts;⁷¹ they have gained tremendous status and legitimacy. The British Columbia Court of Appeal has gone so far as to suggest the *SSAG* should invariably be applied in the absence of articulated reasons as to why they should not. This presumptive approach has been endorsed by the Ontario Court of Appeal, although it has been criticized in other provinces.⁷²

Whatever social forces might have resisted the *SSAG*, (lingering support for formal equality, men's rights groups preferring the status quo, individualized justice enthusiasts chafing at standardization...) were seemingly overcome. The *SSAG* were propelled by the prior development of a rule-based mindset with respect to financial outcomes in family law, the prior struggles of courts to reconcile spousal support with prevailing notions of formal gender equality,⁷³ and forceful arguments in the literature about the "feminization of poverty."⁷⁴ In retrospect, the *SSAG* seem to be an instance of ethical demand enabling the law to respond to the "vulnerable subject."

As suggested above, it has increasingly been recognized that adversarial processes, sometimes associated with a "winning at all costs" ethic, are unsuitable for family law dispute resolution.⁷⁵

⁷¹ Carol Rogerson and D.A. Rollie Thompson, "Spousal Support Advisory Guidelines Three and a Half (almost) Years Later: Cases, Criticisms and Responses, Revisions" Family Law Source (Westlaw). See also Carol Rogerson and D.A. Rollie Thompson, "The Canadian Experiment with Spousal Support Guidelines" *infra*, footnote 151.

⁷² Julien D. Payne, "Recent Developments in Family Law in the Common Law Provinces" (2011), 38 *Advoc. Q.* 292 at pages 325-326.

⁷³ *Supra*, footnote 68, at page 281. [Rogerson, After *Moge*]

⁷⁴ See: *Moge v. Moge*, [1992] 3 S.C.R. 813.

⁷⁵ See: *supra*, footnote 7. [Australian Law Reform Commission, Discussion Paper] See also: Michael King, Arie Freiberg, Beckie Batagol, Ross Hyams, *Non-Adversarial Justice* (Federation Press, 2014).

Indeed, the stated goals of family court reform initiatives, which almost invariably emphasize the importance of *alternative consensual* dispute resolution processes, illustrate that norms now support non-acrimonious divorce. A celebrity couple's press release announcing their "conscious uncoupling" was derided as pretentious, but nonetheless conveyed an idea with social currency. Vulnerability theory clearly emphasizes human connectedness and interdependence, as do popular spiritual movements and academics in a variety of fields.⁷⁶ For example, in a vulnerability theory analysis of climate change, "existential assets" were defined as systems of belief that include religion and perhaps politics, which may foster "an ethic of human oneness that can serve as a catalyst for an equitable global climate regime in which all communities can be resilient."⁷⁷ It is abstract, yet entertaining, to consider that neuroscience has discovered an interdependence between the right and left hemispheres of the brain – they reportedly have more overlapping functionality than was previously thought, and what is more, it has been convincingly argued that a left brain orientation (described as a sort of disease, or at least dysfunction) has become culturally dominant over the past century, resulting in a lamentable loss of "betweenness" among people.⁷⁸ To venture deeper (literally), quantum mechanics has demonstrated that simply measuring the spin of one particle can instantaneously change the spin of another, far away, *seemingly separate* particle, which some consider an explanation for telepathy (the ultimate connectedness), and which Einstein famously referred to as "spooky action at a distance."⁷⁹

⁷⁶ See: Martha Minow, "Lawyering for Human Dignity" (2002-2003), 11 Am. U. J. Gender Soc. Pol'y & L. 143.

⁷⁷ Atieno Mboya, "Vulnerability and the Climate Change Regime" (2008) 36 UCLA J. Envtl. L & Pol'y 79 at page 93.

⁷⁸ Iain McGilchrist, *The Master and his Emissary, The Divided Brain and the Making of the Western World*, (Yale University Press, 2009) at pages 393-397.

⁷⁹ Walter Isaacson, *Einstein, His Life and Universe*, (Simon & Shuster, 2007) at page 533.

I argue that cultural approbation of a more “enlightened” approach to divorce, the mainstream status of self-represented litigants, a legal realist, evidence-based approach to law and social policy, and the emergence of vulnerability theory as a way of understanding what law is and ought to be, all combine to suggest growing potential to build a family law settlement system designed for self-represented parties; in other words, a legitimate social policy goal upon which a unique family law tribunal could be founded.

1.4 Summary

This chapter has outlined the scope of the institutional analysis undertaken in this thesis and discussed vulnerability theory as a theoretical support for placing the institutional effects of social institutions upon vulnerable populations at the centre of social policy. Changing social norms with respect to family dissolution have been suggested as further support for considering alternative institutional approaches to family law dispute resolution and it has been suggested that a transition from courts to tribunal, at least for custody cases, is neither a novel nor radical idea, and it warrants a number of further forms of analysis.

2. COURTS AND FAMILY LAW

The parties had a highly conflictual marriage. Eventually the wife abruptly left, taking the children to her parents' home in another town, and later informing the husband that the marriage was over. The husband, unemployed, poorly educated and volatile, was from a wealthy family. He hired an excellent lawyer and brought an application for interim custody based upon the wife absconding with the children. The wife, who earned little more than minimum wage, was represented at various times but in the main was self-represented. The husband was awarded interim sole custody.

Years later there had not yet been a trial. Both sides had ordered private assessments that took a very long time to produce; the court was booking well into the future not only for trials, but for the series of mandatory pre-trial conferences; counsel had other commitments; custody was only one issue between the parties and despite repeated orders for disclosure the husband was not forthcoming, creating further delay from which he benefitted.

Throughout this time, the children remained enrolled in school near the father's home, continued their friendships and close relationships with extended family members. The wife had moved in with her parents, who lived over an hour's drive away.

At the Trial Management Conference, the last in a series of conferences in which settlement was explored and encouraged, the conference judge urges the couple to come to terms yet wearily remarks that the history of the case gives him little reason to hope they will.

On the literal verge of trial, in the courthouse, the husband's lawyer presides over a long and intense last-ditch settlement meeting, during which the wife is self-represented, and the parties finally reach an agreement. Settlement seemingly enabled by the arrival of the wife's understanding that she cannot overcome the status quo established at the outset and, perhaps, the husband's realization of his exposure to judicial reprisal for his substantial contribution to delay.

This chapter reviews prior research and writing as to the progress of the access to justice movement, the reported experiences of self-represented litigants, the value of structured decision-making, the importance of truth-finding, and the effects of formality in court-based family law dispute resolution processes. It discusses some potential objections to this project

under the heading “But We Do That Already” and briefly discusses innovative court models and systems.

2.1 Access to Justice

*Access to justice is a matter of political will.*⁸⁰

The Ontario Ministry of the Attorney General’s “Four Pillars” family law reform initiative, launched in 2008, was based upon submissions to the Attorney General by a number of stakeholder groups, including the Ontario Bar Association, the ADR Institute of Ontario and the Ontario Association for Family Mediation, with support from the Ontario Collaborative Law Federation and the Association of Family and Conciliation Courts.⁸¹ The “Four Pillars” were hailed for representing the arrival of sufficient consensus to mobilize reform;⁸² although sparse funding and a piecemeal approach to implementation were initially noted as concerns.⁸³ It has since been asserted that the Four Pillars have resulted in better access to information, improved intake processes, improved access to legal advice, and streamlined court processes.⁸⁴ Surveys of Ontario Family Law Information Centre users and participants in similar programs in British Columbia have reported that eighty percent of study participants regard program services as effective,⁸⁵ although concerns remain over underfunding and heavy reliance upon volunteer lawyers and law students.⁸⁶

⁸⁰ *Supra*, footnote 16. [Roach and Sossin]

⁸¹ Barbara Landau et al., “Home Court Advantage; Creating a Family Law Process That Works” Ontario Bar Association (2009).

⁸² *Supra*, footnote 9 at pages 271. [Bala, Reforming Family Dispute Resolution]

⁸³ See: *supra*, footnote 22 at page 413. [Semple and Rogerson]

⁸⁴ *Supra*, footnote 9 at pages 280-297. [Bala, Reforming Family Dispute Resolution]

⁸⁵ *Supra*, footnote 22 at page 420. [Semple and Rogerson] The authors report that “relatively high” numbers of survey subjects were not yet involved in a court process.

⁸⁶ *Supra*, footnote 9, at page 314. [Bala, Reforming Family Dispute Resolution]

Following the Four Pillars reforms, numerous studies have indicated that low and middle-income groups in Canada continue to have significant unmet legal needs.⁸⁷ The 2010 Ontario Civil Needs Project found that *in family law matters* thirty percent of low and middle-income Ontarians have unmet legal needs, and in general, almost eighty percent of Ontarians believe the justice system privileges the wealthy.⁸⁸ In 2011, Ontario Chief Justice Warren K. Winkler characterized the family justice system as “in crisis” and “in desperate need of repair,”⁸⁹ and the Rule of Law Index, published in the same year by the World Justice Project, placed Canada among the top ten countries in the world with respect to various categories related to upholding the rule of law, but in the category of “access to civil justice,” ranked Canada sixteenth out of twenty-three high income countries.⁹⁰ Similarly, a 2012 White Paper reported that seventy percent of self-represented litigants surveyed across Canada indicated that their needs are not adequately serviced in all types of courts.⁹¹ The White Paper pointedly describes what is at stake in the access to justice movement: whether *meaningful* access to justice systems is a legitimate societal expectation, or a privilege:⁹²

The justice system and its stakeholders must recommit to the core dispute resolution purpose for which the system was designed: to provide a meaningful, fair, just and accessible venue for citizens—represented or not—to resolve their disputes.⁹³

⁸⁷ Justice Thomas A. Cromwell, “Access to Justice: Towards a Collaborative and Strategic Approach” 33d Viscount Bennett Memorial Lecture (2012), 63 U.N.B.L.J. 38.

⁸⁸ Ontario Civil Needs Project Steering Committee Report (2010), online: http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf

⁸⁹ Warren K. Winkler, “Address to the Carleton County Law Association” online: <http://www.ontariocourts.on.ca/coa/en/ps/speeches/2011-Annual-Institute-Family-Law-CCLA.htm#>

⁹⁰ *Supra*, footnote 87. [Cromwell, Towards a Collaborative]

⁹¹ Trevor C.W. Farrow, Diana Lowe, Bradley Albrecht, Heather Manweiller, Martha E. Simmons, Addressing the Needs of Self Represented Litigants in The Canadian Justice System: A White Paper Prepared for the Association of Canadian Court Administrators” (March 27, 2012) at page 20 (the “White Paper”) online: <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Addressing%20the%20Needs%20of%20SRLs%20ACCA%20White%20Paper%20March%202012%20Final%20Revised%20Version.pdf>

⁹² *Ibid.*, at pages 24-25. [Farrow et al., White Paper]

⁹³ *Ibid.*, at page 25. [Farrow et al., “White Paper”]

The Family Justice Working Group Report⁹⁴ was released in 2013 by the Action Committee on Access to Justice in Civil and Family Matters, a committee of the Canadian Bar Association formed with the encouragement of Supreme Court of Canada Chief Justice Beverly McLachlin, and comprised of leaders in civil and family justice.⁹⁵ The Report describes substantive family law as “highly evolved and comprehensive,” and the procedures by which it is applied as “increasingly complex, unaffordable and inaccessible.”⁹⁶ The Report lists changes in the practice of family law over the past twenty-five years, including “revised rules and forms, increased involvement of judges in settlement discussions, legal information programs, subsidized mediation, post-separation parenting programs and the adoption by the legal profession of “non-adversarial approaches to family law,”⁹⁷ and concludes:

Canadians do not have adequate access to family justice. For many years now reports have been telling us that cost, delay, complexity and other barriers are making it *impossible* for many Canadians to exercise their legal rights.⁹⁸ [emphasis added]

The Family Justice Working Group Report has an activist tone; it states that “good ideas alone are not enough,” suggesting it is time for “concrete action and full implementation of ideas that have been on the books for some time now.”⁹⁹ As noted above, the Report states that family law research and previous inquiries have indicated a need for “a more dramatic shift to non-adversarial approaches,” and uses language such as “drastic change,” “fundamental overhaul” and “paradigm shift.”¹⁰⁰ The Report contains thirty-three specific recommendations aimed at

⁹⁴ *Supra*, footnote 23. [Family Justice Working Group Report]

⁹⁵ *Ibid.*, at page 1. [Family Justice Working Group Report]

⁹⁶ *Ibid.* [Family Justice Working Group Report]

⁹⁷ *Ibid.*, at page 2. [Family Justice Working Group Report]

⁹⁸ *Ibid.*, at page 8. [Family Justice Working Group Report]

⁹⁹ *Ibid.*, at page 3. [Family Justice Working Group Report]

¹⁰⁰ *Ibid.*, at page 3. [Family Justice Working Group Report]

more consensual processes, revised substantive law, access to legal services, and reformed court processes. Broad policy goals include: a “cultural change” in the justice system, a client-centered perspective (in place of a “professional- centered” or “access-to-lawyers” orientation), expanded legal aid funding, a greater role for paralegals and other non-lawyer experts, post-resolution support for families, completing the unification of family courts in Ontario, and increased funding for all family justice programs and services.¹⁰¹ The 2013 Access to Civil & Family Justice: A Roadmap for Change Report also calls for deep reform, suggesting a child-centred multi-disciplinary model for family dispute resolution.¹⁰²

Justice Cromwell has remarked that “a mountain of evidence” indicates that lack of access to courts and lawyers is only one aspect of the access to justice problem.¹⁰³ The overarching concern which undermines the accessibility of courts, and drives demand for alternatives to courts, is the well-known potential for family litigation to worsen conflict and damage long-term relationships. Indeed, the messaging of family courts appears to be “Danger - Do Not Enter.” In case this assertion strikes the reader as hyperbolic, the following passage from Judge Harvey Brownstone’s book *Tug of War: A Judge's Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court*,¹⁰⁴ illustrates the point:

Everyone who works in family law, including judges, agrees on two things: family court is not good for families, and litigation is not good for children. The emotional carnage resulting from family litigation, and its impact on the unfortunate children of warring parents, cannot be overstated. And yet, family courts everywhere are jammed with couples asking judges to decide who gets custody of their children, how often the

¹⁰¹ *Ibid.* [Family Justice Working Group Report]

¹⁰² Action Committee on Access to Justice in Civil and Family Matters. “Access to Civil & Family Justice: A Roadmap for Change” (2013), online:

http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf

¹⁰³ *Supra*, footnote 87 at page 39. [Cromwell, Towards a Collaborative]

¹⁰⁴ Harvey Brownstone, *Tug of War: A Judge's Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court* (Toronto: ECW Press, 2009).

children will see the noncustodial parent, how the matrimonial property is to be divided, and how much spousal and/or child support must be paid. More surprisingly, an alarmingly high number of people appear in court without a lawyer and try to navigate the court process on their own, without any idea of their rights and obligations, the procedural requirements, the rules of evidence, or the types of orders a court can and cannot make. As you might expect, the results for these people are often extremely frustrating at best and disastrous at worst...¹⁰⁵

Justice Brownstone has been quoted in academic literature¹⁰⁶ and government sponsored research,¹⁰⁷ suggesting the weight of his views extends beyond the popular culture audience for which *Tug of War* appears to have been written.

A similarly alarming tone is evident in the following comments of Quinn, J. in the 2010 case, *Bruni v. Bruni*,¹⁰⁸ which was reported in the *Globe and Mail*:¹⁰⁹

This is yet another case that reveals the ineffectiveness of Family Court in a bitter custody/access dispute, where the parties require therapeutic intervention rather than legal attention. Here, a husband and wife have been marinating in a mutual hatred so intense as to surely amount to a personality disorder requiring treatment.¹¹⁰

Chief Justice Warren K. Winkler's commentary, referred to above, includes a specific reference to the "stress that the court procedure places on the participants in an already highly emotional dispute," and compares the effect of the legal system on family disputes to "throwing gasoline on

¹⁰⁵ *Ibid.*, at page 3. [Brownstone]

¹⁰⁶ See, for example: Rachel Birnbaum, Nicholas Bala and Lorne Bertrand, "The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants" (2012) 91 Can. B. Rev. 67 at page 86; see also *infra*, footnote 714 at page 166, fn 75. [Mosher].

¹⁰⁷ The Federal-Provincial Territorial Ad Hoc Working Group on Family Violence, "Making the Links in Family Violence Cases: Collaboration Among the Family, Child Protection and Criminal Justice Systems" online: <https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mlfvc-elcvf/mlfvc-elcvf.pdf>

¹⁰⁸ Kirk Makin, "In family court, a judge turns to ridicule to defuse the rage" (*Globe and Mail*, December 16, 2010) referring to *Bruni v. Bruni*, 2010 CarswellOnt 8992 (S.C.J).

¹⁰⁹ *Ibid.* [*Globe and Mail*]

¹¹⁰ *Supra*, footnote 108 at para. 2. [Bruni]

a fire.”¹¹¹ The now-retired Chief Justice asserted a need for “dramatic and pragmatic revision” of the manner in which family law services are delivered.¹¹²

The apparent *intractability* of the problems discussed above is illustrated by a 2016 study undertaken by Michael Saini, Rachel Birnbaum and Nicholas Bala,¹¹³ in which new empirical research was conducted to better understand the experiences of parents in family law proceedings. The authors note that over the past four decades, services for separating families have been expanded; they summarize these developments as follows: mandatory attendance at an information program, improved information services at courts, special support services for domestic violence cases, improved access to legal advice through duty counsel for low income litigants, representation through legal aid for the lowest income groups for a limited range of issues (with greater access for domestic violence cases), early access to alternatives to litigation including court- connected mediation which is government-subsidized for low and middle income parties, increased use of judicial case conferencing and case management, and continued services of the Ontario Office of the Children’s Lawyer. While the authors note there has not yet been comprehensive, coordinated research on the effects of recent family law reforms, they report a *current* and growing awareness of the need to improve court services to improve access to justice:

Despite the efforts since 2010 to increase family dispute resolution services in Ontario, with a particular emphasis on mediation, at best many parents continue to experience dissatisfaction, while at worst many feel overwhelmed with the emotional and financial strain during a family breakdown. In this study we found that many reported that they do

¹¹¹ *Supra*, footnote 89. [Winkler]

¹¹² Law Times, September 19, 2010, Online: <http://www.lawtimesnews.com/201009207556/Commentary/Editorial-Winkler-sparks-important-debate-on-mediation>

¹¹³ Michael Saini, Rachel Birnbaum and Nicholas Bala, “Access to Justice in Ontario’s Family Courts: The Parents’ Perspective” (2016) 37 Windsor Rev. Legal & Soc. Issues 1.

not know enough about what services there are or how to access them. This is consistent with what has been found in prior studies¹¹⁴...This study highlights the need for a broad public policy discussion about the appropriate role of government in meeting the needs of families and children post-separation.¹¹⁵

The authors of this recent study surveyed 241 parent-litigants, a relatively large number of whom had received advice from a lawyer (72.6% had received advice; 27.4% had not) and interviewed an additional 22 parent-litigants. Specific, seemingly persistent, problems identified in the interview component of the study, reported in 2016, include:

- the court process provides the opportunity for ex partners to use children as a means of manipulation and retaliation for issues that occurred during the relationship;
- many parents are concerned about the financial strain caused by litigation as well as the emotional stress associated with the court process;
- the majority of parents describe the court process as inadequate for addressing their needs, resulting in decreased finances, increased stress, and increased conflict; specifically, the length of the family court process, the lack of enforcement of court orders, financial strain, emotional strain, “social risks,” the lack of helpful online resources and free legal advice, and access to therapeutic support;
- the emotional impact of the court process seems to exacerbate emotional vulnerabilities related to the family breakdown;
- online services are unhelpful and unclear, “makes it sound super easy and anyone can do it” but not relevant for the majority of people who are separating; and
- half an hour with a free lawyer is not enough.

¹¹⁴ *Ibid.*, at page 22. [Saini, Birnbaum and Bala]

¹¹⁵ *Ibid.*, at page 24. [Saini, Birnbaum and Bala]

The persistence of the problems *for children* in connection with high conflict family law litigation is illustrated in a 2017 review of the Ottawa Coordinated Case Management Project for High Conflict Custody and Access Cases, in which by-now familiar themes are repeated. It states that the issues involved in family law are increasingly complex, both legally and clinically, and the problem is complicated by increasing numbers of self-represented litigants, the adversarial nature of the legal system, delays inherent in the court process, and diminished government funding for family services. Most important, in my view, it states that high conflict family litigation can “exacerbate and perpetuate parental conflict leaving children at risk of negative long-term adjustment,”¹¹⁶ specifically: “lower school performance, behavioral problems, psychological and social adjustment difficulties, lower self-esteem, and mental health issues such as depression and eating disorders and alcohol and drug problems.”¹¹⁷

2.2 Self-Represented Litigants

*Many of my lawyer friends freely admit that they could not possibly afford their own services... It must be asked whether, for a large segment of the population, we have a functioning civil justice system at all.*¹¹⁸

(a) Experiences of Self-Represented Litigants

Reports on the rate of self-representation in Canadian family law cases vary, in part because parties may be represented or not at various stages of a proceeding. The federal government estimated, as of 2012, that between sixty-four and seventy-four percent of parties are self-represented at the time of filing a court application, and forty to fifty-seven percent are self-

¹¹⁶ Rachel Birnbaum, Michael Saini, Mark MacAuley, “Ottawa Coordinated Case Management Project for High Conflict Custody and Access Cases: Lessons Learned” (2017), 36 Can. Fam. L. Q. 291.

¹¹⁷ *Ibid.*, footnote 67. [Birnbaum et al., Ottawa Coordinated Case Management]

¹¹⁸ *Supra*, footnote 87 at page 40. [Cromwell, Towards a Collaborative]

represented when appearing in court.¹¹⁹ Birbaum and Bala quote Justice Winkler’s estimate of seventy percent, on average, and further cite Ontario government data that estimates the rate of self-representation at sixty-two percent in 2006-2007, and fifty-four percent in 2010.¹²⁰

American research indicates a rate of self-representation of over eighty percent in family law cases.¹²¹ According to recent Canadian empirical research studies, the number of self-represented litigants is likely to increase.¹²²

Among senior members of the judiciary, Chief Justice McLachlin has remarked that for self-represented litigants, “[p]utting the facts and the law before the court may be an insurmountable hurdle;”¹²³ Chief Justice Finch of the British Columbia Court of Appeal has remarked that courts are not the appropriate venue for solving underlying social problems, and it is unrealistic for courts to address “mental illness, substance abuse, poverty, lack of education, inadequate or no parenting, and dysfunctional relationships,” as these problems require “well-considered, evidence-based policy solutions;”¹²⁴ and Justice Cromwell has observed that the delay and added cost associated with self-represented litigants may “even jeopardize the rights of other, represented litigants.”¹²⁵ Commentary contained in the Canadian Judicial Council’s *Statement of*

¹¹⁹ Government of Canada, Department of Justice, online: <https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/jf-pf/srl-pnr.html>

¹²⁰ Rachel Birbaum and Nicholas Bala, “Views of Ontario Lawyers on Self-Represented Litigants” (2012), 63 U.N.B.L.J. 99 at pages 123-124.

¹²¹ See: Amy G. Applegate and Connie J.A. Beck, “Self-Represented Parties in Mediation: Fifty Years Later it Remains the Elephant in the Room” (2013), 51 Fam. Court Rev. 87.

¹²² Birnbaum and Bala, “Experiences of Ontario Family Litigants” online: <http://docplayer.net/16318797-Experiences-of-ontario-family-litigants-with-self-representation-rachel-birnbaum-1-nicholas-bala-2.html>

¹²³ Chief Justice Beverly McLachlin, “The Challenges We Face” (2007), 40 U.B.C. L. Rev. 819 at page 822.

¹²⁴ British Columbia Chief Justice Lance S.G. Finch, Remarks (June 6, 2013) online:

http://www.courts.gov.bc.ca/court_of_appeal/about_the_court_of_appeal/speeches/Retirement%20Dinner%20Remarks%20%28Final%20-%20Website%29.htm at paragraph 37.

¹²⁵ *Supra*, footnote 87. [Cromwell, Towards a Collaborative] See also *supra*, footnote 120, at pages 123-124. [Birbaum and Bala, Views of Ontario Lawyers]

Principles on Self Represented Litigants and Accused Persons, summarizes the problem as follows:

Self-represented persons are generally uninformed about their rights and about the consequences of choosing the options available to them; they may find court procedures complex, confusing and intimidating; and they may not have the knowledge or skills to participate actively and effectively in their own litigation... the average person may be overwhelmed by the simplest of court procedures.¹²⁶

Birnbaum and Bala's recent research on the experience of self-represented family litigants in Ontario, reports that sixty-four percent of those surveyed describe the family court system as "difficult or very difficult" to navigate,¹²⁷ and Julie Macfarlane's National Self Represented Litigants Project study describes the awkward fit between self-represented litigants and adversarial court systems, as follows:

The foundational principle of the justice system (even in family matters) is adversarial advocacy. Judges and lawyers are accustomed to framing every interaction in these terms. Self-represented parties who lack training in law do not fit easily into this framework; and when they make efforts to adopt this strategy, they are often seen as unreasonable, ignorant and obstructive.¹²⁸

The Macfarlane report points to an urgent need for innovation in dealing with self-represented litigants; its recommendations include: intensive face-to-face interaction at the intake stage; more process-related and tactical online information, and less emphasis on substantive law, interactive information systems; access to counseling services, re-thinking duty counsel, adopting a coaching model for legal advice services, onsite mediation services preceded by an orientation session, expanding the scope of what non-lawyers can do, and re-orienting the justice system

¹²⁶ Canadian Judicial Council "Statement of Principles on Self Represented Litigants and Accused Persons" (2006) online: https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf

¹²⁷ *Supra*, footnote 122. [Birnbaum and Bala, Experiences of Ontario Family Litigants]

¹²⁸ Julie Macfarlane, "The National Self Represented Litigants Project: Identifying and Meeting the Needs of Self Represented Litigants, Final Report" (May 2013) at page 108, online: https://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Self-represented_project.pdf

toward self-represented litigants through a multi-professional, problem-solving approach.¹²⁹ The study reports that the *personal costs* of self-representation occur on a scale which “commands recognition,” and may include the depleted savings, employment instability as a result of time devoted to litigation, and various mental and physical health issues, including debilitating anxiety over court appearances.¹³⁰

(b) Reasons for Self-Representation

Not surprisingly, research suggests that self-representation is primarily a result of the inability to “afford” legal services.¹³¹ The concept of “affordable” is not straightforward. Even those with sufficient assets or resources to pay for or finance legal representation may decide that the financial sacrifices involved, often compared to the cost of a university education or simply “using up the family assets,” are too great. Legal aid is, of course, only available to those with income below the regulated threshold, although greater access to representation is available in domestic violence cases,¹³² with the result that among cases where eligibility is based upon income, middle class people are perhaps the most vulnerable subjects in family litigation processes.

¹²⁹ *Ibid.*, at page 629. [Macfarlane]

¹³⁰ *Ibid.*, at page 14.

¹³¹ *Ibid.*, at page 8. [Macfarlane]

¹³² *Supra*, footnote 113 at page 9. [Saini, Birnbaum and Bala]

Both legal and cultural factors have been suggested to account for ever-rising numbers of self-represented litigants including, “Legal aid cuts...Mistrust of lawyers. The "do-it-yourself" credo. An unwillingness to accept legal advice. TV lawyer shows that make it look easy.”¹³³

Birnbaum and Bala’s research referred to above indicates that a significant *minority* of self-represented litigants regard representation as unnecessary; they do not believe lack of representation negatively affects outcomes.¹³⁴ The Ontario Civil Legal Needs Project reports an increasing desire on the part of litigants to take control of their legal problems, and concludes that *a majority* of Ontarians obtain legal advice when faced with legal problems, which they generally find satisfactory, but still indicate a preference for taking part in solving legal problems.¹³⁵

It obvious that a shift in power dynamics has occurred as a result of information technology. The Canadian Bar Association has acknowledged that some clients now question “the basic value proposition of lawyers,”¹³⁶ and has urged the legal profession to adapt to new expectations, noting that clients now demand lower costs, more participation in decision-making and better information on risks and potential outcomes, all of which is in keeping with other commentary suggesting an hourly billing structure is less well tolerated among those who are capable of

¹³³D. A. Rollie Thompson, “No Lawyer: Institutional Coping with the Self-Represented” (2001), 19 Can Fam LQ 455. See also Jeff Giddings, Merran Lawler and Michael Robertson, “It’s More Like Judge Judy” – Self-Help in a Hybrid Legal Forum” (2009), Paper presented to the International Legal Aid Group Conference, Wellington, New Zealand, online: http://www.ilagnet.org/conf_2009/papers/ILAG_Paper_-_Giddings_Lawler_&_Robertson11-3-09%5B1%5D.pdf

¹³⁴*Supra*, footnote 122. [Birnbaum and Bala, Experiences of Ontario Family Litigants]; see also *supra*, footnote 91 at page 4. [Farrow et al., White Paper]

¹³⁵ *Supra*, footnote 88. [Ontario Civil Needs Project]

¹³⁶ Canadian Bar Association Legal Futures Initiative, “The Future of Legal Services in Canada: Trends and Issues” (June 2013) online: <http://www.cbafutures.org/CBA/media/mediafiles/PDF/Reports/trends-issues-eng.pdf> at page 16.

gaining significant information and *understanding* by self-informing.¹³⁷ Indeed, the term “digital divide,” coined to capture the privilege once associated with access to computers and the capacity to fully exploit their uses, already seems anachronistic. To the extent such a divide remains, it likely applies to only the very marginalized – those who are perhaps more likely to gain access to legal aid.

The self-help ethic is now supported by an increasingly diverse range of resources, propelled by information-technology. At least 540 Canadian law and legal process blogs and podcasts are now reported to exist, featuring advice and commentary from lawyers, academics and social justice advocates.¹³⁸ The Macfarlane study referred to above combines research with activism; it is a component of the “National Self-Represented Litigants Project,” which is “committed to assisting all those affected by the self-represented litigant phenomenon,”¹³⁹ and recently acquired intervenor status in *Pintea v. Johns*,¹⁴⁰ in which an order dismissing the claim of a self-represented litigant, with costs, was reversed by the Supreme Court of Canada.

As all of the above suggests, the concept of self-help, in the context of individuals dealing with social institutions, seems increasingly perceived as much as a reflection of competence, autonomy and self-reliance, than as piteous disadvantage – a status claim implying spare time, intellectual capacity, and a refusal to succumb to traditional (and for some, discredited) power structures.¹⁴¹ It is important to note the obvious fact that not all self-represented litigants are

¹³⁷ Richard Susskind, *The End of Lawyers?* (Oxford University Press, 2008).

¹³⁸ Canadian Law Blog Awards (2017) website: <http://www.clawbies.ca>

¹³⁹ National Self-Represented Litigants Project website: <https://representingyourselfcanada.com>

¹⁴⁰ *Pintea v. Johns*, [2017] 1 SCR 470.

¹⁴¹ *Supra*, footnote 76. [Minow]

equally empowered by the self-help ethic; as the research noted above points out, only a *minority* of self-represented litigants believe representation is irrelevant to outcomes. To the extent there has been an evolution from stigma to status, it may explain the growing number of middle class self-represented litigants, but it does not necessarily imply that court processes have ceased to be a source of profound difficulty, and in family law cases, damage, for self-represented parties (and their dependents) as a whole.

Finally, the Macfarlane study referred to above indicates that self-represented parties question the inability of paralegals to provide family law services.”¹⁴² Paralegals were active in Ontario family law proceedings prior to 2007, at which time the Law Society of Ontario assumed responsibility for their licensing and simultaneously excluded family law from the scope of permitted paralegal practice. According to the Law Society, the “complexity of family law requires expertise only a lawyer can provide.” A motion to reinstate paralegals in family matters was put forward in 2010 but withdrawn following a vigorous campaign of opposition by the Ontario Bar Association and the Family Lawyers Association.¹⁴³ Bertrand, Birbaum and Bala report in a 2014 study that seventy-five percent of judges surveyed approved of family law paralegals, but only twenty-five percent of lawyers shared that view.¹⁴⁴ The Attorney General of Ontario and the Law Society of Upper Canada, as it then was, conducted a review of family legal services in 2016, which recommended the development of a specialized license for paralegals which would allow them to provide specified family law legal services, such as legal advice document preparation, representation in mediation, and court appearances up to, but not

¹⁴² *Supra*, footnote 2 at page 13. [Macfarlane]

¹⁴³ *Supra*, footnote 60. [Law Times, September 19, 2010]

¹⁴⁴ *Supra*, footnote 106. [Bertrand, Birbaum and Bala]

including, trial. This recommendation was opposed by the family law bar; the Law Society has nonetheless indicated support for the proposal, and a new regulatory framework may yet emerge.¹⁴⁵

2.4 Clear Law: Structured Decision-Making

Broad discretion and vague legal standards have been criticized for creating uncertainty in the negotiating environment, encouraging swift positioning and pursuit of claims because outcomes are unpredictable, and leading other claims to be abandoned due to the costs and other barriers inherent in “individualized justice systems;”¹⁴⁶ that is, court systems. Mnookin and Kornhauser point out that “different rules give various amounts of bargaining chips to the parties,” and an *inability to understand the rules* - because they are not articulated or articulated only vaguely - results in the need for legal advice to understand one’s “bargaining chips” and forecast probable outcomes.¹⁴⁷

An inability to assess probable outcomes may encourage extreme positions and contribute to the need for expert evidence to substantiate these positions, which lengthens the dispute resolution process, and advantages the party with deeper financial resources and greater capacity to withstand the inherent stresses. Moreover, immediate financial needs, often coupled with inaccurate information about a spouse's finances, may lead the weaker party to feel greater settlement pressure, and thereby frame their negotiation goals in terms of what they believe they

¹⁴⁵ Lisa Trabucco, What Are We Waiting For: It Is Time to Regulate Paralegals in Canada (2018) 35 Windsor Y.B. Access to Just. 149.

¹⁴⁶ *Supra*, footnote 27 at page 102. [Cromwell, Neither Out]

¹⁴⁷ Mnookin, Robert H.; Kornhauser, Lewis, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979), 88 Yale L.J. 950 at page 968.

can reasonably (and more easily) expect to get, rather than actual entitlements.¹⁴⁸ A study of lawyers' views on the self-represented litigant phenomenon arrives at the important, but unsurprising, conclusion that women who are victims of domestic violence are “especially vulnerable to making unfavourable economic settlements;”¹⁴⁹ the need to ensure the quality of settlement in cases of high parental conflict is well understood.¹⁵⁰

In family law the preference for rule-based law or vague law varies depending upon context; in the application of the best-interests-of-the-child test broad discretion is generally considered necessary to achieve the “individualized justice” deemed essential in these cases, whereas in the determination of child support and more recently, spousal support, a high degree of structure is seen as beneficial. The effect of structure on the *negotiating environment* can be illustrated by again looking at spousal support. According to a review study, the most frequent application of the *SSAG* takes the form of lawyers shaping the expectations of both payor and recipient clients, and preliminary evidence suggests fewer spousal support cases now require adjudication.¹⁵¹ What is more, Carol Rogerson has noted a “hunger” among lawyers and judges for additional guidance with respect to the *discretionary* entitlement aspect of spousal support law which, as noted, the *SSAG* do not address.¹⁵²

¹⁴⁸ Marcia Neave, “Resolving the Dilemma of Difference: A Critique of The Role of Private Ordering in Family Law” (1994), 44 University of Toronto Law Journal, 97 at page 123-126.

¹⁴⁹ *Supra*, footnote 120 at page 113. [Birnbaum and Bala, Views of Ontario Lawyers]

¹⁵⁰ Noel Semple, “Judicial Settlement Seeking in Parenting Cases: A Mock Trial (2013) J. Disp. Resol. 303 at page 303.

¹⁵¹ Carol Rogerson and D.A. Rollie Thompson, “The Canadian Experiment with Spousal Support Guidelines” (2011-2012), 45 Fam. L.Q. 241 at page 261. [Rogerson and Thompson, Canadian Experiment]

¹⁵² *Ibid.*, at page 264. [Rogerson and Thompson, Canadian Experiment]

Legal custody presumptions have come and gone; the shift from paternal preference for custody based upon a child's status as property of the father to maternal preference for custody occurred in step with the first wave of feminism, which advocated for a different concept of the child: as a person in need of nurturing and protection. Under the subsequent "tender years doctrine" the mother was the preferred custodial parent for very young children.¹⁵³ The second wave of feminism in the 1960s emphasized "formal equality," and in much the same way that formal gender equality led to *declining awards* of spousal support, rising numbers of women in the workforce coupled with a formal equality framework contributed to rejection of the tender years doctrine by 1972,¹⁵⁴ in favour of complete reliance upon the "gender neutral" best-interests-of-the-child test.

An influential American Law Institute Report¹⁵⁵ states that the best-interests-of-the-child test was better suited to the era of maternal preference presumptions, which allowed for its consistent and relatively straightforward application. The Report acknowledges that the maternal preference presumption is no longer socially viable but endorses the use of alternative presumptions, which have become the subject of "gender wars."¹⁵⁶ The rationale for presumptions is obviously to foster consistency and predicable outcomes, and consequently less litigation and a fairer negotiating environment. For example, a presumption in favour of the "primary caregiver" would make it less likely for custody litigation to be used as a bargaining chip, that is, less probable that

¹⁵³ Linda Elrod and Mildred D. Dale, "Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in The Balance" (2008), 42 F.L.Q. No. 1, 381 at page 391.

¹⁵⁴ Richard A. Warschak, "Parenting by the Clock: The Best Interest of the Child Standard, Judicial Discretion, and the American Law Institute Approximation Rule" (2011-2012), 41 U. Balt. L. Rev. 83 at page 92.

¹⁵⁵ American Law Institute, "Principles of the Law of Family Dissolution, Analysis and Recommendations" (2002), 8:1 Duke J. Gender L. & Pol'y, 1 online, <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1038&context=djglp>

¹⁵⁶ Elizabeth Scott and Robert E. Emery, "Gender Politics and Child Custody: The Puzzling Persistence of The Best-Interest Standard" (2014), 77 Law & Contemp. Probs. 69 at page 70.

a primary caregiver will make economic concessions to retain this role. Some American jurisdictions have adopted the “primary caregiver” presumption, and where it has not been adopted, it is often used as a factor in the application of the best-interests-of-the-child test.¹⁵⁷ As the name suggests, the person who acted as the primary caregiver before separation is presumed to become the custodial parent, sometimes interpreted as “sole custody” – a “winner-take-all outcome – and sometimes with parenting time and responsibilities of the non-custodial parent determined on a case by case basis. This approach is not as uncomplicated as it might seem; it requires factual determinations as to which parent performed what proportion of nurturing tasks, or in some interpretations of the presumption, which parent is the primary “psychological parent.” It is a retrospective exercise, however, and in that sense easier to apply than the best-interests-of-the-child test, which requires a prospective determination of probable future outcomes.

A somewhat different presumption, the “approximation rule,” divides parenting time and responsibilities after separation in accordance with parental care-taking functions prior to separation, subject to a number of exceptions. Critics of the approximation rule argue that: it increases post-separation conflict as it is difficult to apply, as it requires a more thorough analysis of parenting patterns than the primary caregiver presumption; it provides a poor estimate of parental contribution to the child’s best interests, as it conflates quantity and quality of child

¹⁵⁷ Rebecca Aviel, “A New Formalism for Family Law” (2013), 55 Wm. & Mary L. Rev. 2003 at pages 2019-2020; the author notes that West Virginia and Minnesota have “experimented” with a primary caregiver presumption; in “Pendulum Swings,” Elrod, et al. note that in Minnesota this led to a “frenzy of litigation,” see: *supra*, footnote 404 at page 401.

care;¹⁵⁸ and, it may lead to the “commodification of relationships”¹⁵⁹ whereby parties modify their behaviour to affect legal outcomes. Despite these criticisms, the approximation rule, like the primary caregiver presumption, has the benefit of being a retrospective test and seems consistent with the evolution in Canada toward a general societal expectation that parents should share, in some proportion, in the care of their children.”¹⁶⁰

Finally, a presumption in favour of shared parenting, reportedly pursued by “fathers’ rights advocates,”¹⁶¹ has twice been proposed in Canada in the form of amendments to the *Divorce Act*.¹⁶² It was opposed by mothers’ advocacy groups and the Canadian Bar Association, and both times failed to pass.¹⁶³ It has been observed that there is a lack of reliable empirical research on the effects of different custody arrangements, and although, in general, shared parenting is thought to be beneficial for amicable post-separation families that can bear the additional costs, it is not the norm, and on average fathers reportedly have significantly less parenting time than mothers in both separated and intact families.¹⁶⁴ A sort of middle ground, in the form of express support for shared parental *responsibility* together with a principle of maximizing the parenting time of each parent (the latter of which already exists in Canada under the *Divorce Act*) was legislated in Australia in 2006.

¹⁵⁸ *Supra*, footnote 154 at pages 88-89. [Warschak, Parenting by the Clock]

¹⁵⁹ Yuval Feldman and Shahar Lifshitz, “Behind the Veil of Legal Uncertainty” (Spring 2011), 74 *Law & Contemp. Probs.* 133.

¹⁶⁰ Rachel Birnbaum, Nicholas Bala, Shely Polak and Nida Sohani, “Shared Parenting: Ontario Case Law and Social Science Research” (2016), 35 *Can. Fam. L. Q.* 139 at page 142.

¹⁶¹ *Supra*, footnote 154 at page 95. [Warschak, Parenting by the Clock]

¹⁶² *Supra*, footnote 14. [*Divorce Act*]

¹⁶³ Denise L Whitehead, “Is Shared Custody the Alchemy of Family Law” (2015), 35 *Can. Fam. L. Q.* 1 at page 2.

¹⁶⁴ *Supra*, footnote 160 at page 142. [Birnbaum at al., Shared Parenting]

In support of more structured family law it has been observed that abstract goals of equality and gender neutrality have unduly overshadowed the need for practical and workable decision-making following separation, and the “entire area is permeated with symbolism that relates only tangentially to the realities of divorce.”¹⁶⁵ Further, an examination of symbolism and metaphor in child custody dispute resolution suggests that inherited myths and symbols affect outcomes *as much as evidence and reasoning*.¹⁶⁶ To the extent this is so, the value of “individualized justice” is diminished. Which is not to suggest presumptions are value-free; one criticism of the “primary caregiver” presumption is that in its application by judges it can be affected by contested notions of the ideal family, with the result that mothers who work outside the home are less likely than “stay-at-home mothers” to be regarded as the primary caregiver, regardless of the actual childcare responsibility undertaken.¹⁶⁷

The well-known effects of vague legal standards on the negotiating environment have been tolerated, presumably based upon the assumption inherent in adversarial systems that there can always be a trial in which power imbalances will be compensated for, with the assistance of legal representation or judicial activism. This assumption is undermined by “barriers to justice” in their many forms, discussed above.

¹⁶⁵ *Supra*, footnote 25. [Fineman, Anchoring Equality]

¹⁶⁶ Elizabeth J. Hughes, “Mother’s Vicarious Hand: Primary Caregiving Reconceived as Relationship and Responsibility” (2002), 20 Can. Fam. L. Q. 467.

¹⁶⁷ Linda L. Berger, “How Embedded Knowledge Structures Affect Judicial Decision-Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes” (2008-2009), 18 S. Cal. Interdisc. L.J. 259 at page 261.

The best-interests-of-the-child test has been described as both entrenched and contested;¹⁶⁸ and as “more an aspiration than a legal rule to guide custody decision-making.”¹⁶⁹ To the extent that the test does not allow for the assessment of probable outcomes, it adds to the disadvantages suffered by weaker parties. This, combined with the *genuine preference* for settlement in custody and access cases (quite apart from the institutional forces that drive settlement pressure) and the reported appetite for more structure in family law decision-making, combine to suggest potential ethical demand for a more structured approach to the best-interests-of-the-child test.

2.4 Truth-Finding

The mother is a high-status professional with a suspected drug problem, living in another province; the father works in a family business. The child, a girl, is about 4 years old. The parents have been separated, on and off, since shortly after her birth. Both have retained excellent lawyers, over a period of years. Both have anger problems – more precisely, their relationship is almost entirely characterized by mutual contempt and outbursts of rage. The child flies to access visits to see her father, accompanied by various friends and family. There are occasionally scenes, on at least one occasion resulting in the intervention of airport security and police.

Every kind of formal and informal conference has been prepared for and attended by counsel during the years leading up to the point at which the wife’s out-of-province lawyer telephones the husband’s lawyer to report that the wife is now alleging the child was sexually assaulted by a relative, a boy about ten years of age, in the presence of his younger sister during the child’s last access visit. The allegation specifically concerns inappropriate touching at a family event, while the children were playing out of sight of the adults. The wife’s lawyer is not sure how serious this claim is or how it should be dealt with.

¹⁶⁸ See Robert van Krieken, “The “Best Interests of The Child” and Parental Separation: On the “Civilizing” of Parents” (2005), *The Modern Law Review*, Vol. 68, No. 1 at page 25.

¹⁶⁹ *Supra*, footnote 156 at page 69. [Scott and Emery, Gender Politics]

Following a discussion with the husband's lawyer, the wife's lawyer reports the incident to the children's aid society in the husband's jurisdiction.

The local police immediately contact the parents of the accused children, as it is apparently the obligation of the society to report all sexual assault allegations to police. Ultimately, all of the children (including the four-year old) attend at a police station, where they are interviewed separately on video about the alleged assault. The parents of the accused children are incensed.

The new video evidence is interpreted and summarized by the parties' lawyers, new affidavits are drafted and sworn, medical professionals are consulted, further interim accounts for legal fees are rendered, and on it goes.

Family law disputes, especially custody cases, are highly fact driven. Indeed, precedent is not always easy to find, or even considered relevant, because of the enormous variation in fact patterns. A distinction is sometimes drawn between fact-finding and the more strenuous (some would say, unrealistic)¹⁷⁰ task of "truth-finding." This chapter discusses the importance attached to accurate findings of fact in custody proceedings.¹⁷¹

The archetypal adjudication paradigms, traditionally seen as competing and oppositional, are the adversarial and inquisitorial models. A detailed list of the attributes of each is set out below; broadly speaking, in a purely adversarial model the parties define the issues, determine the evidence needed and obtain it, and present their cases to a single judge in a highly structured, rule-bound and performative process. A purely inquisitorial model vests control in the decision-maker to determine scope of the issues and the evidence needed, gather evidence and conduct

¹⁷⁰ See: Carrie Menkel-Meadow, "The Trouble with the Adversary System in a Postmodern, Multicultural World" (1996-1997), 38 Wm. & Mary L. Rev. 5 at page 5. The author writes that "truth is elusive, partial, interpretable, dependent on the characteristics of the knowers as well as the known, and most importantly complex."

¹⁷¹ *Clayson-Martin v. Martin*, 2015 ONCA 596 at para. 109. (CanLII)

investigations; parties may or may not have a role in presenting evidence and questioning opponents. Despite that the actual processes currently used in both Anglo-American and European courts (and tribunals) are highly varied and seldom conform to either paradigm, these archetypes remain useful reference points.

Adversarial ideology holds that that truth rises out of the dust of courtroom conflict;¹⁷² however, adversarial systems have a long history of attracting criticism for their lack of efficacy in truth-finding,¹⁷³ including from judges. For example, Jerome Frank writes:

Even apart from differences in lawyer skills and resources, few attorneys believe that adversarial combat is the most effective way to determine the truth about past events. . . . Lawyers tend to scoff at the truth and stress that it is unknowable whether such a thing even exists. Finding out and revealing the truth is not their job. Instead, lawyers view the adversarial system as a vehicle to deliver a desired result for a client. Often that objective requires an attorney to confuse the issues or obscure the truth.¹⁷⁴

Similar criticism is far-ranging; it can be found in Roscoe Pound's 1906 analysis of the "sporting theory of justice,"¹⁷⁵ Jerome Frank's "Fight Theory" Versus the "Truth" Theory,"¹⁷⁶ and in the memoirs of a defense lawyer in the O.J. Simpson trial.¹⁷⁷

In defense of adversarial truth-finding in criminal proceedings it has been maintained that the intense partisanship of adversarial proceedings, reflected in party-driven fact-finding, party-hired

¹⁷² Christopher Slobogin, "Lessons from Inquisitorialism" (2013-2014), 87 S. Cal. L. Rev. 699 at page 710.

¹⁷³ *Ibid.* [Slobogin]

¹⁷⁴ Jerome Frank, *Courts on Trial, Myth and Reality in American Justice* (Princeton University Press, 1949) at page 288; see also: Jerome Frank, "The Cult of the Robe" (1945), 28 Saturday Review of Literature 41.

¹⁷⁵ Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge's Perspective*, 9 U.C. Davis J. Juv. L. & Pol'y 59 (2005), quoting Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, (1906), 29 A.B.A Rep. 395 online: <https://law.unl.edu/RoscoePound.pdf>

¹⁷⁶ *Supra*, footnote 174. [Frank] Jerome Frank, *Courts on Trial, Myth and Reality in American Justice* (Princeton University Press, 1949) at page 288.

¹⁷⁷ *Supra*, footnote 172 at page 706. [Slobogin]

experts, and lawyer-coached witnesses, is a form of protection afforded to the accused, warranted by the very high stakes of criminal trials, the higher standard of proof, and the disproportionate power and resources of the state.¹⁷⁸ This rationale is understandable but it does not contradict a study on high rates of wrongful criminal conviction, which reports, “[t]he number of wrongful convictions each year is in the “thousands to tens of thousands...well above insignificant or tolerable levels,” and recommends the use of blended adversarial and inquisitorial processes in criminal trials;¹⁷⁹ nor does it go to the heart of the question of truth-finding. Relatively recent academic literature conveys profound doubt as to the efficacy of truth-finding in adversarial systems;¹⁸⁰ for example, one author’s remarks: “if one were asked to start from scratch and devise a system best suited to ascertaining that in criminal cases...it is inconceivable that one would create a system bearing much resemblance to the criminal justice process we now have in the United States.”¹⁸¹

It seems significant for family law that a study reported in the law and economics literature concludes that inquisitorial approaches are more effective in circumstances where the one party is unaware of disclosure defects in material provided by the other;¹⁸² that is, a common concern with respect to income determination in child and spousal support cases. The study recommends that judges, rather than parties or their lawyers, control the production of evidence in cases for

¹⁷⁸ John H Langbein, “The German Advantage in Civil Procedure” (1985) 52 (4) University of Chicago Law Review 823 at page 842.

¹⁷⁹ Keith A. Findley, “Adversarial Inquisitions: Rethinking the Search for the Truth” (2011-2012), 56 N.Y. L. Sch. L. Rev. 911 at page 912.

¹⁸⁰ See: *supra*, footnote 170 at page 6. [Menkel-Meadow] See also: *ibid.*, at page 912. [Findley]; *supra*, footnote 172 at page 702. [Slobogin]; *supra*, footnote 7. [Australian Law Reform Commission, Discussion Paper]; and *infra*. footnote 309. [Australian Law Reform Commission, Issues Paper]

¹⁸¹ *Supra*, footnote 179 at page 918. [Findley] See also: *supra*, footnote 170 at page 5. [Menkel-Meadow]

¹⁸² M.K. Block, J.S. Parker, O. Vyborna and L. Dusek, “An Experimental Comparison of Adversarial Versus Inquisitorial Procedural Regimes” 2000 Am Law Econ Rev 2 (1) 170 at page 173.

which fact-finding is critical. It is, in my view, convincingly noted in the family law literature that:

The binary nature of the adversarial system and its particular methods and tactics often may thwart the goals any legal system¹⁸³...Binary, oppositional presentations of facts in dispute are not the best way for us to learn the truth; polarized debate distorts the truth, leaves out important information, simplifies complexity, and obfuscates rather than clarifies.¹⁸⁴

As Carrie Menkel-Meadow elegantly puts it, in family law “there may be more than just two sides to every story.”¹⁸⁵

The importance of truth-finding in the application of the best-interests-of-the-child test was noted by the Ontario Court of Appeal in *Clayson-Martin v. Martin*.¹⁸⁶ Moreover, the Court suggested that there is a corresponding effect upon expectations as to judicial conduct:

In this case the trial judge’s primary obligation was to determine the children’s best interests. In this context, I am particularly reluctant to criticize him for questioning witnesses in an attempt to get at the truth.¹⁸⁷

Similarly, in *Metis Child, Family and Community Services v. A.J.M. et al.*,¹⁸⁸ an appeal following child protection proceedings in which the judge had asked 150 questions of twenty witnesses, and it was alleged on appeal that sixteen interventions and 117 questions suggested bias, the Manitoba Court of Appeal held:

Where the welfare of children are concerned, the trial judge may intervene as much as is necessary in order to clarify the facts, confirm his understanding of expert testimony and generally make sure his appreciation of the evidence is correct. If necessary, he or she may intervene to keep the proceedings moving along efficiently. This is true in custody cases, but even more necessary in child protection cases where the state with all the

¹⁸³ *Supra*, footnote 170 at page 5. [Menkel-Meadow]

¹⁸⁴ *Ibid.*, at page 6. [Menkel-Meadow]

¹⁸⁵ *Ibid.*, at pages 5-6. [Menkel-Meadow]

¹⁸⁶ *Supra*, footnote 171. [*Clayson-Martin*]

¹⁸⁷ *Ibid.*, at para. 109. [*Clayson-Martin*]

¹⁸⁸ *Metis Child, Family and Community Services v. A.J.M. et al.*, 2008 MBCA 30 (CanLII).

resources at its disposal is intervening in a substantial way in the relationship between children and their parents.¹⁸⁹

2.5 Formality

Classically designed courtrooms are immediately distinguishable from rooms with other functions and have been characterized as having a “paralyzing effect” on all but seasoned courtroom participants.¹⁹⁰ Even empty, before the arrival of gowned judges, lawyers and court staff, courtrooms convey a mix of authority, tradition, formality and hierarchy.

American jurist and legal realist scholar Jerome Frank challenged many aspects of traditional adversarial processes, including sartorial formality.¹⁹¹ He characterized judicial robes as “heartless relics of the past,” and “priestly trappings” that create “an air of judicial aristocracy” and symbolize the notion that “courts must always preserve ancient ways, the past is sacred, and change impious.”¹⁹² He argued that the effect of robes in particular, and formality in general, runs deeper than their disquieting effects on the uninitiated. Long before the self-represented litigant phenomenon, Frank made several observations that now seem prescient: the administration of justice can be undermined by formality, as witnesses who are merely uncomfortable may appear to be disingenuous; informality encourages plain speaking, which is needed to further the progress of law from the “private possession of a professional guild” to something comprehensible to the “man on the street;” and finally, the need for fear of authority

¹⁸⁹ *Ibid.*, at para. 51. [*Metis*]

¹⁹⁰ Linda Mulcahy, “Architects of Justice: The Politics of Courtroom Design” (2007) 13(3) *Social & Legal Studies* 383.

¹⁹¹ *Supra*, footnote 102 at page 254. [Frank, *The Cult of the Robe*]

¹⁹² *Ibid.*, at page 259. [Frank, *The Cult of the Robe*]

is the mark of an “immature society.” It seems important to note Frank’s perspective is not universally appreciated,¹⁹³ and it some research suggests that more respect is accorded to decisions made in an atmosphere of formality.¹⁹⁴

Studies of courtroom dynamics indicate that aspects of courtroom design, such as sightlines and proximities among lawyers, judges, jurors and witnesses, affect perceptions of lawyer competence, and in alternative dispute resolution settings it has been demonstrated that even the location of tables and chairs can change behavior.¹⁹⁵ For example, a study of the effects of spatial dynamics upon the effectiveness of mediation processes it was found that some physical settings, such as a those that allow “cross corner interaction” between parties and a mediator seated at the same table, tend to bring people together and encourage interaction.¹⁹⁶ These studies suggest that efforts to adapt courtrooms to therapeutic, less adversarial processes face inherent challenges. Indeed, the deep significance of structure and symbolism is reflected in courtrooms built in post-war Germany and post-apartheid South Africa¹⁹⁷ – with glass walls and literally level “playing fields” to symbolize and promote equality and transparency.

¹⁹³ Charles Barzun, “Frank and the Modern Mind” (2010), 58 *Buff. L. Rev.* 1127 at page 1133.

¹⁹⁴ Oscar G. Chase and Jonathan Thong, “Judging Judges: The Effect of Courtroom Ceremony on Participant Evaluation of Process” (2012), 24 *Yale J Law Humanit* 221. The authors report on the results of their study and note that research subjects were law students whose perspectives and perceptions may differ from those of the public at large.

¹⁹⁵ Jeffrey S. Wolfe, “Toward a Unified Theory of Courtroom Design Criteria: The Effect of Courtroom Design on Adversarial Interaction” (1994-1995), 18 *Am. J. Trial Advoc.* 593 at page 604.

¹⁹⁶ Jeffrey S. Wolfe, “The Hidden Parameter: Spatial Dynamics and Alternative Dispute Resolution” (1996-1997) 12 *Ohio St. J. on Disp. Resol.* 685 at page 714.

¹⁹⁷ *Supra*, footnote 190. [Mulcahy]

2.6 But We Do That Already...

*Many reform initiatives are, understandably, ad hoc attempts to address specific problems with little thought given to the causes of the problem or to the impact of the proposed "solution" on the system as a whole.*¹⁹⁸

In casual discussions of this project, I have been met with the view that the practice of family law and the attendant court processes have been so extensively reformed that a tribunal model could not improve upon this new reality. This perspective is addressed below through a brief review of some of the more important developments in family law dispute resolution in Ontario and in other jurisdictions.

(a) Less Adversarial Processes

Ontario family court systems have incorporated less adversarial processes with the goal of making family court processes less damaging to families, and more accessible and for self-represented litigants,¹⁹⁹ including mandated (albeit limited) judicial assistance for self-represented litigants and time-limited free mediation services (in some locations, for some litigants). Some court locations provide information programs and student clinics to assist with the preparation of documents. The *Family Law Rules*²⁰⁰ have been amended to allow judges to appoint a single expert,²⁰¹ and a new summary judgment rule has been implemented²⁰² with the goal of promoting proportionality and overcoming the problem of long-standing interim orders made with limited information. Some of these innovations are relatively new and untested and may prove to be effective and beneficial.

¹⁹⁸ *Supra*, footnote 87. [Cromwell, Towards a Collaborative]

¹⁹⁹ *Supra*, footnote 88 at page 14. [Ontario Civil Needs Project]

²⁰⁰ *Supra*, footnote 28 [*Family Law Rules*]

²⁰¹ *Ibid.*, Rule 20.1(3) [*Family Law Rules*] See also Nicholas Bala, "Single Court-Appointed Experts for Family Cases" Lawyers Weekly, January 21, 2012, Seventh Annual FL Summit Materials, Osgoode Library.

²⁰² *Ibid.*, Rule 16. [*Family Law Rules*]

Despite a lengthy history of reform and further reform proposals, as noted above, the Family Justice Working Group Report points to an “implementation gap,” which it attributes to lack of funding and failure of the justice system to completely embrace non-adversarial processes; indeed, the Report suggests there is “still untapped potential for non-adversarial values and consensual dispute resolution processes.”²⁰³ The attribution of this implementation gap, in part, to justice system culture is disturbing given that cultural change within established systems is, as a matter of common sense, slow.

(b) Changing Roles of Lawyers and Judges

A Law Commission of Ontario study reports that the skills relevant to family law decision-making include facility with the *Family Law Rules*,²⁰⁴ applicable statutes and case law, as well as an understanding of the relevant social issues, which may include domestic violence, power dynamics, mental health, and high conflict.²⁰⁵ The knowledge, skills and training required for specialized family law judges are considered to reach well beyond traditional judicial roles and to include effecting “changes in parental behaviours and attitudes.”²⁰⁶ It has been recommended that judges undertake training in child development, and lawyers have been encouraged to become therapeutic actors, in part through multidisciplinary training as part of law school curricula.

²⁰³ *Supra*, footnote 23 at page 2. [Family Justice Working Group Report]

²⁰⁴ *Supra*, footnote 28. [*Family Law Rules*]

²⁰⁵ Law Commission of Ontario, “Voices from a Broken Family Justice System: Sharing Consultations Results” (September, 2010), online: <http://www.lco-cdo.org/en/family-law-process-consultation-results>

²⁰⁶ Nicholas Bala, Rachel Birnbaum, Donna Martinson, “One Judge for One Family: Differentiated Case Management for Families in Continuing Conflict” (2010), 26 Can. J. Fam. L. 395 at page 339.

It has further been suggested in family law writing that legal professionals, lawyers and judges alike, begin to see legal services as part of a larger, “seamless system of social services” for families, and accept the need to work on an even footing with other professionals.²⁰⁷ While family law lawyers have undoubtedly made immense practice changes (anecdotal reports suggest aggressive strategies are now derided as “old school”) it seems unlikely that the vision of a seamless system of social services can be realized through reliance upon extra training and the good intentions of judges and the family law bar.

The American literature describes some judges as “activists” who are energized by new judicial roles, and others as uncomfortable or openly opposed to change.²⁰⁸ The Macfarlane study similarly concludes that judges vary widely in their apparent willingness or ability to adapt to self-represented parties, and sets out contrasting reports of incivility on the part of some judges, and ready assistance on the part of others.²⁰⁹ This “Jekyll and Hyde response” to self-represented litigants has been attributed to an unsurprising systemic ambivalence to the presence of self-represented litigants within a system premised upon representation.²¹⁰ In the result, the role of judges is no doubt being shaped by new realities and institutional expectations, but on a highly individualized basis.

²⁰⁷ Lesley Jacobs, Academic Director, Canadian Forum on Civil Justice, A Multi-disciplinary Approach to Meeting Family Justice Needs, SLAW, February 13, 2012 Online: <http://www.slaw.ca/2012/02/13/a-multidisciplinary-approach-to-meeting-family-justice-needs/>

²⁰⁸ *Supra*, footnote 175 at page 72. [Hardcastle] Judge Hardcastle of the Family Court of Nevada writes that there is a battle for the heart of family court, between traditionalists committed to adversarial processes and the “mighty force” of advocates of therapeutic justice. He argues existing research demonstrates an adversarial system creates a greater public perception of fairness than an inquisitorial system.

²⁰⁹ *Supra*, footnote 2. [Macfarlane]

²¹⁰ *Supra*, footnote 133. [Thompson, No Lawyer: Institutional Coping]

(c) Multi-Disciplinary Decision-Making

*Judges with this type of caseload [family law]...need to have access to services such as family court counsellors, mediators, parenting coordinators, mental health professionals, and children's lawyers, attached to the court and easily accessible, to facilitate change in the behaviours and attitudes of parents who are not acting in their children's best interests...*²¹¹

Multidisciplinary input is widely considered desirable for family law cases,²¹² especially custody cases, for the obvious reason that custody cases involve predictions about *future outcomes* based upon social, developmental and psychological factors outside the expertise of most judges. This is consistent with an apparently growing recognition in many fields that decision-making is becoming more complex and is enhanced by multi-disciplinary perspectives.²¹³

It must be emphasized that in family law judges are not the problem; it is the ill-fit between judicial experience and qualifications and the requirements of family law, particularly custody and access disputes, that is problematic. Not only are judges often underqualified to apply a legal test requiring a prediction of the future effects of competing parenting plans, sometimes with insufficient or dubious information,²¹⁴ in my view, they are over-qualified to make holiday access orders.

²¹¹ *Supra*, footnote 206 at page 445. [Bala, Birnbaum, and Martinson]

²¹² See: Brenda Jacobs and Lesley Jacobs, "Multidisciplinary Paths to Family Justice: Professional Challenges and Promising Practices" Toronto: Law Commission of Ontario online: <http://www.lco-cdo.org/family-law-process-call-for-papers-jacobs.pdf>; see also Ministry of the Attorney General, online: <http://www.attorneygeneral.jus.gov.on.ca/english/news/2010/20101209-family-bg.asp>; Law Association of Ontario, Online: <http://www.lco-cdo.org/en/content/family-law-reform>; see also: *supra*, footnote 2 [Macfarlane]; and *infra*, footnote 340. [Doughty, Identity Crisis]

²¹³ Wendy P. van Ginkel, Daan Van Knippenberg, "Group Leadership and Shared Task Representations in Decision Making Groups" (2012), Vol 23 (1) Leadership Quarterly 104.

²¹⁴ Barbara J. Fidler and Rachel Birnbaum, "Child Custody Disputes: Private and Public Assessments" (2006), 25 Can. Fam. L. Q. 137. [Fidler and Birnbaum]

Bala and Saunders have observed that there is ongoing controversy in family law about the appropriate role of expert witnesses.²¹⁵ In the family court system, clinical input is primarily obtained through expert evidence in the form of custody and access assessments,²¹⁶ a practice that has attracted debate on several fronts, including as to judicial over-reliance upon outside assessments. Judicial comfort in assessments is understandable; as others have observed, courts are not well-positioned to weigh evidence and custody cases because in general, evidence is personal, behavioral and difficult to verify, and in particular, parental closeness to a child is important but difficult to prove.²¹⁷

In Canada, judges in family proceedings may appoint a mental health professional to perform an assessment of the child and parents, and provide a report.²¹⁸ Of course, one or both parents may obtain a private assessment as well. A judge-ordered assessment may be paid for by the parties, in proportions determined by the court, or a judge may request an assessment through the Office of the Children's Lawyer (OCL). The OCL determines whether a particular case warrants its attention and accepts about fifty percent of requests.²¹⁹ Obtaining assessments can be problematic, as indicated in a 2017 study:

As with many other issues related to the family justice system, some of the most pressing challenges concerning experts relate to a lack of resources and inadequate access to the services of qualified mental health professionals for this type of work. Lack of training, education, and support has resulted into a few professionals who can do this type of work, and often significant delays in getting access to those who do it.²²⁰

²¹⁵ Nicholas Bala & Annalise Saunders, "Understanding the Family Context: Why the Law of Expert Evidence is Different in Family Law Cases" (2003) 20 Can. Fam. L.Q. 277 at page 1. (Westlaw)

²¹⁶ Nicholas Bala, "Mohan, Assessments & Expert Evidence: Understanding the Family Law Context, Working Paper No. 07-02" (14 April 2007), Queen's Faculty of Law Legal Studies Research Paper Series.

²¹⁷ *Supra*, footnote 156 at page 70. [Scott and Emery, Gender Politics]

²¹⁸ Nicholas Bala, Rachel Birnbaum and Carly Watt, "Addressing Controversies About Experts in Disputes Over Children" (2017), 30 Can. J. Fam. L. 71 at page 2. (Westlaw)

²¹⁹ *Ibid.*, at page 81. [Bala et al., Addressing Controversies]

²²⁰ *Ibid.* [Bala et al., Addressing Controversies]

This study suggests that reliability is a further problem. Private assessments are performed by a variety of actors, and social workers, psychologists and psychiatrists use a variety of methodologies,²²¹ none of which are standardized.²²² The problem is taken a step further by concerns about the uneven qualifications of experts *hired to critique the reports of other experts*.²²³

It should be noted that a research project which examined the consistency between assessment recommendations and custody decisions in Ontario found a low overall concurrence rate of fifty-two percent (compared to concurrence rates of over ninety percent in other jurisdictions) variable depending upon the source of the recommendation. The Ontario data reportedly demonstrated an overall concurrence rate for OCL social worker custody recommendations of fifty-two percent, whereas for OCL lawyer recommendations the concurrence rate was eighty-three percent.²²⁴ The author suggests that this difference may be the result of less judicial deference to social workers than to lawyers (and to psychologists and psychiatrists, who typically conduct assessments in other jurisdictions) with the proviso that further research is needed to confirm this conclusion.²²⁵ The difference in overall Ontario and international concurrence rates is attributed to delays in the Ontario family court system which result in “stale” assessments that are of little use in judicial decision-making.²²⁶

²²¹ Nicholas Bala, “Bringing Canada’s *Divorce Act* into the New Millennium: Enacting a Child-Focused Parenting Law” (2014-2015) 40 *Queens L.J.* 425.

²²² Daniel W. Shuman, “The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment” (2002-2003) 36 *Fam. L.Q.* 135.

²²³ *Supra*, footnote 218. [Bala et al., Addressing Controversies]

²²⁴ Noel Semple, “The Eye of the Beholder: Professional Opinions About the Best Interests of a Child” (2009), 49 (4) *Fam. Ct. Rev.* 760.

²²⁵ *Ibid.*, at pages 766-767. [Semple, Eye of the Beholder]

²²⁶ *Ibid.*, at pages 767-768. [Semple, Eye of the Beholder] The author reports an average of 1.08 years from the date of OCL recommendations and the date of decision, and an average of 0.9 years in cases where the recommendation was accepted, compared to 1.22 years in cases in which the recommendation was rejected.

The most common complaint *among judges* about expert witnesses is a tendency among assessors to abandon neutrality and become advocates for one side.²²⁷ The law of evidence requires that expert evidence which suggests an opinion regarding an “ultimate issue” be subject to special scrutiny as to its admissibility;²²⁸ the reported tendency on the part of assessors to become “hired guns”²²⁹ suggests it is essential that assessments be subject to informed scrutiny.

Accountability is a further problem; despite that experts are not permitted to offer an opinion on the ultimate issue; in cases where judges *over-value* assessments, they may effectively transfer decision-making authority to social workers and mediators.²³⁰ Indeed, over-reliance on assessments has been characterized as “almost as a form of delegated fact finding on behalf of the court,” essentially introducing an “inquisitorial element” into family law court proceedings.²³¹ Finally, statutes containing criteria for the application of the best-interests-of-the-child test (which lend at least minimal structure to the test) do not apply to recommendations made in custody assessments, for which the sole criterion is the broad best-interests-of-the-child concept.²³²

Custody and access assessments create dual problems of cost and delay. The cost of an assessment was recently reported as typically ranging from \$5,000 to \$10,000, at minimum, and

²²⁷ *Supra*, footnote 172 at page 707. [Slobogin]

²²⁸ *Supra*, footnote 218 at page 2. (Westlaw). [Bala et al., Addressing Controversies]

²²⁹ *Ibid.*, at page 2. (Westlaw) [Bala et al., Addressing Controversies]

²³⁰ Martha Albertson Fineman, “Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking” (1988), 101 Harv. L. Rev. 727 at page 738.

²³¹ D.A. Rollie Thompson, “Are There Any Rules of Evidence in Family Law?” (2006), 21 Can. Fam. L. Q. 245.

²³² *Supra*, footnote 214 at page 138. [Fidler and Birnbaum]

assessments can take months to complete,²³³ delaying the resolution of cases involving children, “who experience added stress as their cases are prolonged.”²³⁴

Should a judge wish to rely upon information outside an assessment or other party-produced evidence, there is the problem of judicial notice. Bala and Saunders explain that self-directed judicial education can be useful, but is problematic; that is, although there is thought to be more scope for the admission of independent judicial research on “social framework facts” in family law cases, this practice has been accepted as a ground of appeal.²³⁵ They write that while judicial education programs offer programs on “social context” issues, (such as child development and family dynamics) judges should be cautious about using this knowledge as the information conveyed in judicial training programs is general in nature and may not easily be applied in specific cases, or may represent only one of any number of credible perspectives and it may be difficult for a judge to assess its reliability.²³⁶ They further note that if counsel provides social science literature, and opposing counsel objects, this material should not be received by the court.²³⁷ These limitations seem significant given that psychological and social science literature can be highly relevant to custody decision-making; indeed, it has been noted that assessment recommendations are often more highly dependent upon social science literature than the results of child-specific testing.²³⁸

²³³ *Supra*, footnote 218. [Bala et al., Addressing Controversies]

²³⁴ *Ibid.*, at page 95. [Bala et al., Addressing Controversies]

²³⁵ *Supra*, footnote 215. [Bala and Saunders]

²³⁶ *Ibid.*, at pages 2-3. (Westlaw) [Bala and Saunders]

²³⁷ *Ibid.*, at page 3. (Westlaw) [Bala and Saunders]

²³⁸ *Supra*, footnote 218. [Bala et al., Addressing Controversies]

The importance of clinical input in family law dispute resolution is illustrated by a recent initiative aimed at identifying high conflict family cases and isolating them for special treatment within the Ottawa family court system, through an experimental multi-disciplinary model. The goals of the Ottawa Coordinated Case Management Project for High Conflict Custody and Access Cases (“CCMP”) are taken from the report of Action Committee on Access to Justice in Civil and Family Matters,²³⁹ and include reducing family conflict and improving communication through early connection between families and “appropriate multidisciplinary family services,” and coordinating and integrating the delivery these services. The CCMP was implemented for a small number of cases in 2011 and expanded in 2015.²⁴⁰

A 2017 review of the CCMP concludes that the project was useful in cementing the goal of a community-based approach to high conflict family law. It also notes that cases took longer to resolve in the CCMP model than in a control group, which was attributed to these cases receiving more attention, and the wait lists attached to some services to which families were referred. Feedback from participating families was reportedly sparse; the two parents who responded noted “no difference in the CCMP model” and complained about a lack of follow up. Among lawyers it was remarked that the CCMP revealed unmet needs, including: a need for more judges with experience in case management and in working with high conflict families; a need for more communication and collaboration between the Project’s “service advisory committee” and lawyers and judges; a need for a project manager to oversee and monitor the overall CCMP; and a need for more follow-up with parents and lawyers after service advisory suggestions are made. It was further noted that the cost of the project appeared to raise questions

²³⁹ *Supra*, footnote 102. [Roadmap for Change]

²⁴⁰ *Supra*, footnote 116. [Birnbaum et al., Ottawa Coordinated Case Management]

about its sustainability.²⁴¹ Participating judges noted that parents lacked financial resources to pay for such services, but unanimously supported intensive case management approach for high conflict families. Most interesting from the perspective of this project, the authors conclude that the study demonstrated a need for “a more integrated collaborative approach,”²⁴² that is, social services working alongside lawyers and courts.

(d) Information and Triage

Some information services are intended to operate as a self-help tool; it has been argued that government sponsored information is generally of limited utility to those subject to other barriers to justice, such as lack of education, trauma, language problems, isolation or disability.²⁴³ The argument is that self-help should not be a policy foisted upon individuals who already face disadvantages in daily life,²⁴⁴ and moreover, government support for the self-help ethic may lead to unwarranted assumptions on the part of self-represented parties as to the level of litigation preparation that may be accomplished by reading brochures.²⁴⁵ In other words, although information services are an important component of access to justice, they may be seen as substituting information for *meaningful* assistance.²⁴⁶ For example, a connection has been

²⁴¹ *Ibid.*, at page 11. [Birnbaum et al., Ottawa Coordinated Case Management]

²⁴² *Ibid.*, at page 12. [Birnbaum et al., Ottawa Coordinated Case Management]

²⁴³ Community Legal Education Ontario, “Final Report: Tapping the Community Voice: Looking at Family Law Self-Help through an Access to Justice Lens: Themes and Recommended Next Steps” (2008) online: http://www.cleo.on.ca/_oldweb/english/pub/onpub/PDF/boardmanual/thinktankreport.pdf at page 9.

²⁴⁴ *Supra*, footnote 91. [Minow]

²⁴⁵ Lorne D. Bertrand, Joanne J. Paetsch, Nicholas Bala, Rachel Birnbaum, *Self-Represented Litigants In Family Law Disputes: Views Of Alberta Lawyers*, Canadian Research Institute for Law and the Family, December 2012 Online: <http://celarc.ca.ezproxy.library.yorku.ca/cppc/236/236413.pdf>

²⁴⁶ Julie Doughty and Mervyn Merch, “Judicial Independence and the Restructuring of Family Courts and Their Support Services” (2012), 24 *Child & Fam. L. Q.* 333 at page 343.

claimed between the “gutting” of legal aid in British Columbia and the proliferation of government sponsored self-help information.²⁴⁷

Other information services are designed to explain court process and alternative options; for example, the Ontario Mandatory Information Program (MIP), which does not act as a self-help tool, but rather explains court and alternative dispute resolution processes with the intent of “informing parents of current understandings about the risks involved in exposing children to conflict and protracted litigation, and encouraging them to exhibit behaviours and make legal decisions in child-related matters that take their children's needs into account...”²⁴⁸ The Parent Information Program, which operated in Ontario until September 1, 2011, when it was replaced with the MIP, was reviewed in a recent study, which found the program was rated as “very helpful” by a large majority of respondents along dimensions such as improving understanding of legal processes and the availability of alternatives. Six-month follow-up surveys demonstrated a continuing statistically significant effect upon knowledge, attitudes and parenting behaviour.²⁴⁹

A recently expanded network of Family Law Information Centres provides written information as well as interactive “information about separation and divorce and related family law issues, family justice services, alternative forms of dispute resolution, local community resources and

²⁴⁷ *Supra*, footnote 243 at page 3. [Community Legal Education Ontario, Themes and Recommended Next Steps]

²⁴⁸ Ministry of the Attorney General, online:

http://www.attorneygeneral.jus.gov.on.ca/english/family/family_justice_services.asp#mip

²⁴⁹ Shelley M. Kierstead, *Parent Education Programs in Family Court, Balancing Autonomy and State Intervention*, (2011) 49 Fam Ct Rev 140.

court processes.”²⁵⁰ At designated times, Information and Referral Coordinators are available to make referrals and assist self-represented litigants to understand their needs.

Although it may be a question of semantics, Ontario family court systems appear to contain elements of both “tiered” and “triage” approaches. As in tiered systems, legal and parenting information is provided, usually without professional assistance, as a preliminary step to encourage settlement, and if settlement does not ensue the parties may attempt mediation in which a custody and access assessment may be recommended; failing settlement, a court application may be filed, which leads to a multi-layer conference process, and may also result in a referral to the Office of the Children’s Lawyer; if the case is not settled through the conference process, a trial is scheduled.²⁵¹ The alternative to a tiered system is a “triage” approach, in which cases are assessed early on to identify the issues in dispute and the level of conflict, and the parties are swiftly engaged with service providers most likely to lead the parties to settlement.²⁵²

A triage process has been characterized as an alternative to both a tiered approach and a mandatory mediation model in which mediators perform a triage function by screening out cases inappropriate for mediation.²⁵³ Elaborate triage systems reportedly involve trained court staff interviews of all family litigants at the time of filing a court application, with referrals to the most appropriate government or subsidized program, which may include mediation, counseling,

²⁵⁰ Ontario Ministry of the Attorney General, Family Law Information Centres, online: <https://www.attorneygeneral.jus.gov.on.ca/english/family/infoctr.php>

²⁵¹ *Supra*, footnote 206 at page 441. [Bala, Birnbaum, and Martinson]

²⁵² *Ibid.*, [Bala, Birnbaum, and Martinson]

²⁵³ Peter Salem, “The Emergence of Triage and Family Court Services: The Beginning of the End for Mandatory Mediation?” (2009) 47 (3) *Fam. Ct. Rev.* 371; and Hugh McIsaac, “A Response to Peter Salem’s Article “The Emergence of Triage and Family Court Services: The Beginning of the End for Mandatory Mediation?”” (2010) 48 (1) *Fam. Ct. Rev.* 190.

or custody assessment, as part of a comprehensive gatekeeping function designed to optimize the use of publicly funded services.²⁵⁴ As noted, this may be the role of Family Law Information Centres, although not all services associated with triage systems appear to be publicly funded or subsidized in Ontario.

In Ontario, various forms of “informal” triage operate: the Office of the Children’s Lawyer performs a “limited form of triage” by deciding which cases to accept and whether they warrant clinical investigation, child representation, or both; mediators are expected to perform a “limited gate keeping function” by identifying cases for which mediation is not appropriate; family lawyers in private practice may engage in “a kind of triage” by identifying cases that are suitable for collaborative processes and those that should commence with a court application; and Ontario judges perform “informal triage” in case conferences and interim motions by encouraging mediation of appropriate cases, suggesting the involvement of an assessor or a referral to the Ontario Office of the children’s lawyer. Bala notes that this function is undertaken with limited information and depends upon the initiative of individual judges. In addition to the foregoing, Information and Referral Coordinators provide procedural and substantive legal information, referrals and limited assistance with forms. Bala has characterized Information and Referral Coordinators (as of 2012) as performing a voluntary form of triage, and suggests that due to inadequate training and resources, use of these services should not be mandatory.²⁵⁵

There are arguments for and against all of these approaches; for example, triage may be seen as an additional bureaucratic layer, whereas mandatory mediation immediately engages the parties

²⁵⁴ *Supra*, footnote 9, at pages 285-286. [Bala, Reforming Family Dispute Resolution]

²⁵⁵ *Supra*, footnote 9, at pages 285-286. [Bala, Reforming Family Dispute Resolution]

in settlement efforts, but may not be suitable or worthwhile in all cases.²⁵⁶ There seems to be increasing emphasis upon the benefits of triage; Saini, Birnbaum and Bala’s 2016 research on court-related services in Ontario indicates that existing information and referral services are “provided by non-lawyers and do not formally triage cases,”²⁵⁷ and suggests a need for a better triage system “to identify and direct cases to the type of service and program that matches the different levels of conflict.”

(e) Legal Advice: Duty Counsel (Provincial Courts)

Recent research has reported that assistance from court adjunct counsel sometimes leaves self-represented parties “more confused, and even panicked, than before,” due to short and sometimes hurried sessions, and has recommended a re-assessment of summary advice services.²⁵⁸ The concern noted above with respect to some information services applies here, too; investing in self-help tools that provide inadequate assistance to those who most need help risks diverting resources away from other initiatives which might increase meaningful access to justice.²⁵⁹

In Ontario Provincial Courts “duty counsel” and “advice counsel” are funded by Legal Aid Ontario and available onsite to meet with family law litigants.²⁶⁰ In brief informal interviews with Provincial Court duty counsel lawyers, it was explained that on a busy day, onsite lawyers

²⁵⁶ See: *supra*, footnote 253. [Salem; McIsaac]

²⁵⁷ *Supra.*, footnote 113 at page 37. [Saini, Birnbaum and Bala]

²⁵⁸ *Supra*, footnote 2. [Macfarlane]

²⁵⁹ *Supra*, footnote 243. [Community Legal Education Ontario, Themes and Recommended Next Steps]

²⁶⁰ It was explained by a duty counsel and advice counsel lawyers at a provincial court location that duty counsel advises parties with court appearances scheduled for the same day, whereas advice counsel deals with those with future court appearances.

meet with as many twenty clients, allocating about twenty minutes to each. Litigants rarely see the same lawyer more than once; the point is to provide basic summary advice and, very rarely, to appear in court. There are income eligibility criteria, but they are not the same as for a legal aid certificate, and there is no requirement to provide proof of income or assets. Duty and advice counsel do not assist with forms; this is the role of students at Family Law Information Centres, and Provincial Court litigants who require this sort of assistance are referred to a Superior Court Family Law Information Centre.

(f) Case Management

The Ontario *Family Law Rules*²⁶¹ have established a specialized case management system for family law intended to smooth the litigation process and facilitate settlement. Some form of case management is seemingly an essential component of dispute resolution systems. It has been observed that the conference process is not uniformly understood by self-represented family law litigants,²⁶² and lack of preparation can make conferences unproductive.²⁶³ For cases unlikely to settle, multiple pre-trial processes likely exacerbate conflict, as each step requires the parties to literally re-invest in their respective positions. For cases that are capable of settlement, it is far not clear that judicial conferences are consistently or ideally suited to pursuing that goal. Moreover, extreme cases may reportedly involve pre-trial conferences and hearings before five to ten different judges over a period of years, during which uncertainty endures and the needs of the family continually change.²⁶⁴

²⁶¹ *Supra*, footnote 28. [*Family Law Rules*]

²⁶² See: Nancy Ver Steegh, “Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process” (2008), 42 Fam. L.Q. 659.

²⁶³ D.A. Rollie Thompson, “The Evolution of Modern Canadian Family Law” (2003), 41 Fam. Court Rev. 155.

²⁶⁴ *Supra*, footnote 206 at page 402. [Bala, Birnbaum, and Martinson]

Refined case management systems are frequently at the centre of family law reform proposals. Justice Landerkin’s proposal referred to earlier suggests a one-family, one-judge approach combined with a modified three-stage case management system in which a single judge meets with the parties to gather information, after which the same judge conducts mediation; if parties do not reach an agreement, mediation is followed by an informal “mini-trial” which may proceed with adjournments and consent orders; at the conclusion of the mini-trial a non-binding decision is delivered, which if not acceptable to the parties, is followed by a full trial before a different judge.²⁶⁵ Bala, Birnbaum and Martinson have proposed a system of “differentiated” case management,²⁶⁶ whereby judicial roles vary in the course of the case management process, depending upon the requirements of each case.²⁶⁷

(g) Counselling

The British Columbia *Family Law Act*²⁶⁸ allows judges to order counselling, and in the Australian Less Adversarial Trial system the court may order an investigation by a mental health consultant. In Ontario, judicial opinion is reportedly divided over the power of courts to order counselling,²⁶⁹ suggesting there is no clear legislative or common law basis upon which courts can rely.

²⁶⁵ *Supra*, footnote 36. [Landerkin]

²⁶⁶ *Supra*, footnote 206. [Bala, Birnbaum, and Martinson]

²⁶⁷ *Ibid.*, at page 409. [Bala, Birnbaum, and Martinson]

²⁶⁸ *Supra*, footnote 13. [B.C. *Family Law Act*]

²⁶⁹ Shelley Kierstead, “Therapeutic Jurisprudence and Child Protection” (2011-2012), 17 *Barry L. Rev.* 31 at page 44.

In Toronto there are some subsidized counselling services, such as *Families in Transition*, a social service agency affiliated with the *United Way* that charges fees on a sliding scale based upon income, and typically has a wait list of several months. The potential to combine counselling and adjudication services in court systems obviously exists, as illustrated by the report on the CCMP and the study of the Toronto IDVC referred to earlier; its efficacy seems to be a question of funding and degree of integration, or at minimum, co-ordination.

(h) Alternative Dispute Resolution

(i) Settlement

In many jurisdictions around the world, a very high percentage of cases settle in all areas of the law; indeed, a 2012 HiiL Report asserts that on a worldwide basis judges in official courts now primarily supervise the settlement process.²⁷⁰ In the United States the overall rate of settlement for civil litigation cases has been estimated at ninety-eight percent.²⁷¹ The Law Commission of Ontario reports that that the proportion of *family law* cases that result in judicial decision-making *of any kind* is in the minority, and only two to five percent of cases proceed to trial.²⁷²

It has been suggested that high settlement rates, combined with generally declining levels of conflict following separation, indicate that existing family law systems work “reasonably well” for the majority of separating families.²⁷³ In my view, the fact that settlement is *ultimately*

²⁷⁰ HiiL Trend Report/Summary, “Towards Basic Justice Care for Everyone, Challenges and Promising Approaches” (2012) online: http://www.hiil.org/data/sitemanagement/media/TrendReport_BasicJusticeCare_Executive_Summary_030412.pdf

²⁷¹ Susan Daicoff, “The Future of the Legal Profession” (2011), 37 *Monash U. L. Rev.* 7.

²⁷² *Supra*, footnote 3. [Law Commission of Ontario, Towards a More Efficient...]

²⁷³ *Supra*, footnote 9 at page 277-278. [Bala, Reforming Family Dispute Resolution]

reached is not a reliable indicator of the effectiveness of existing processes. Cases that eventually settle may first proceed some distance through the court system, and profound costs (of every kind) may have been incurred in settlements reached on the courthouse steps.²⁷⁴

The term “settlement mission” refers to the pressure to settle that is now exerted at every stage of the family dispute resolution process by lawyers, judges, dispute resolution officers, mediators and others.²⁷⁵ A recent international family law conference reported that pressure to settle is felt by both parties and mediators in court-adjunct family mediation, and recommended policies be adopted to counteract this pressure by encouraging mediators not to “over-aggressively push for settlement where settlement is neither appropriate nor desired by the parties.”²⁷⁶ Others have noted the effects of pre-trial processes on settlement pressure, including judges sometimes pushing for settlement to the point of acting as “coercive mediators.”²⁷⁷

As noted above, in my view, the policy rationale for resolving family law disputes through the court system in an era that not only prefers settlement, but discourages the use of courts, is unclear. The obvious answer is that courts are a fallback mechanism for the enforcement of legal entitlements, the structure that casts the “shadow of the law.” However, it is explicit in Mnookin and Kornhauser’s analytical framework that the shadow of the law is only effective if it is clear and well-defined, and its source accessible. In family law cases settlement is encouraged for all the standard reasons: efficiency, cost, superior outcomes, better “buy-in;” however, settlement is

²⁷⁴ *Supra*, footnote 104. [Brownstone]

²⁷⁵ Noel Semple, “Mandatory Family Mediation and the Settlement Mission: A Feminist Critique” (2012), 24 *Can. J. Women & L.* 207.

²⁷⁶ Yishai Boyarin, “Court-Connected ADR – A Time of Crisis, a Time of Change” (2011-2012), 95 *Marq. L. Rev.* 993.

²⁷⁷ *Supra*, footnote 17 at page 1166. [Macaulay]

also encouraged because of the well-known potential, as noted above, for family trials to permanently rupture ongoing family relationships to the detriment of children. In 2006, Rollie Thompson recounted that, “for middle class people, family litigation has been described as “a catastrophic experience – expensive, painful, requiring extraordinary financial arrangements with lenders or lawyers, and to be avoided whenever possible.”²⁷⁸

The recent family law research and literature discussed in this chapter does not appear to have been eclipsed by reform. In my view, to the extent that trials are portrayed as a disastrous outcome *in and of themselves*, an “avoidance imperative” is created: a “process effect” that has negative implications for access to justice, both in terms of access to authoritative adjudication and access to a fair negotiating environment. The result of valorizing settlement while adjudication is problematized is, in my view, to problematize *both*.

It must be noted that others have rejected the argument that encouragement of settlement by court systems is “ineffectual or inappropriate;”²⁷⁹ however, I argue here that judicial systems *ought not to* encourage settlement without *also facilitating good settlements*. In the Ontario court system, good settlements may be impeded by relatively short onsite mediation that may be ineffectual or perceived as coercive; reliance upon judge-led case conferences, which are a sub-optimal settlement mechanism; and a trial process that the system itself acknowledges is damaging and which “good parents” avoid.

²⁷⁸ D. A. Rollie Thompson, “The Judge as Counsel, Canadian Forum on Civil Justice” (Spring 2005) online: <http://cfcj-fcjc.org/sites/default/files/docs/2006/thompson-en.pdf>

²⁷⁹ *Supra*, at footnote 150 at page 302. [Semple, Judicial Settlement Seeking]

The overwhelming *institutionalized* preference for settlement within family court systems has, in my view, made the well-known, indeed seminal, work of Owen Fiss and Mnookin and Kornhauser newly compelling. Fiss' controversial piece *Against Settlement*,²⁸⁰ which is echoed in feminist literature,²⁸¹ argues against the assumption that all settlements are good settlements, in part because of inequities inherent in the bargaining environment. Written in 1983, when the popularity of Alternative Dispute Resolution was growing rapidly, Fiss expressed the unpopular view that power imbalances (more subtle than those that would currently disqualify a family from mediation) are problematic for the integrity of private negotiations. He wrote:

The disparities in resources between the parties can influence the settlement in three ways. First, "the poorer party may be less able to amass and analyze the information needed to predict the outcome of the litigation, and thus be disadvantaged in the bargaining process." Second, he may need the damages he seeks immediately and thus be induced to settle as a way of accelerating payment, even though he realizes he would get less now than he might if he awaited judgment. All plaintiffs want their damages immediately, but an indigent plaintiff may be exploited by a rich defendant because his need is so great that the defendant can force him to accept a sum that is less than the ordinary present value of the judgment. Third, the poorer party might be forced to settle because he does not have the resources to finance the litigation, to cover either his own projected expenses, such as his lawyer's time, or the expenses his opponent can impose through the manipulation of procedural mechanisms such as discovery. It might seem that settlement benefits the plaintiff by allowing him to avoid the costs of litigation, but this is not so. The defendant can anticipate the plaintiff's costs if the case were to be tried fully and decrease his offer by that amount. The indigent plaintiff is a victim of the costs of litigation even if he settles.²⁸²

²⁸⁰ Owen Fiss, "Against Settlement" (1983-1984), 93 Yale L.J. 1090.

²⁸¹ Janet Rifkin, "Mediation from a Feminist Perspective: Promise and Problems" (1984), 2 Law & Ineq. 21 at page 26. The author argues that to the extent that mediator neutrality masks an "objectivist" (reasonable man) paradigm of law, it further institutionalizes male power.

²⁸² *Supra*, footnote 280 at page 1076. [Fiss]

Published 1984, “Against Settlement” is a foundational piece in alternative dispute resolution literature, and continues to engender discussion and debate.²⁸³ Its central theme is that private bargaining permits disputes to be resolved according to personal preferences, rather than law and legal principles, which may erode public values, that is, moral ideals about justice, rights and social cohesion, and permit individual interests to replace redistributive justice.²⁸⁴ A number of interpretations of the piece were presented in a 2009 symposium titled “Against Settlement Twenty-Five Years Later,” including one in which “Against Settlement” is interpreted as a warning that subordinating judicial adjudication to alternative dispute resolution may lead to a social, political and cultural drift toward neoliberalism, away from state responsibility for social well-being.²⁸⁵

It is generally accepted that the state has an interest in protecting “vulnerable” members of society,²⁸⁶ but how this should be reflected in accessible adjudication is far from clear; indeed, it has been argued that the promotion of non-subsidized mediation contributes to the privatization of dispute resolution and may weaken the public perception of dispute resolution as a fundamental state responsibility.²⁸⁷ Differing perspectives on the need for accessible adjudication in family law are illustrated in the following judicial commentary:

One view is that while alternative dispute resolution should be readily available, this must not be provided instead of courts, which should remain at the center of family law. This is because alternative dispute resolution operates in the shadow of the law. That is to say that alternative dispute resolution is influenced by family law statutes and leading cases

²⁸³ See: Howard M. Erichson, “Foreword: Reflections on the Adjudication-Settlement Divide *Symposium – Against Settlement Twenty-Five Years Later*” 78(3) *Fordham L. Rev.* 1143 at page 1117.

²⁸⁴ Amy Cohen, “Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values” (2009) 78(3) *Fordham L. Rev.* 1143 at page 1144. [Cohen]

²⁸⁵ *Supra*, footnote 289 at page 1148. [Cohen]

²⁸⁶ Hon. Peter Boshier, Hon. Judith Kreeger, Hon. George Czutrin, and Julia Spelman, “The Role of The State in Family Law” (2013) 51 (2) *Fam. Ct. Rev.* 184 at page 187.

²⁸⁷ *Supra*, footnote 91. [Minow, *Lawyering for Human Dignity*]

and the courts play a pivotal role and interpreting the law and providing a forum whose decisions are disseminated publicly. This is vital for the evolution of the law. *Additionally, courts serve to protect rights of the vulnerable, offer resolution where the alternative dispute resolution fails, and provides for parties who seek enforcement or wish to appeal the outcome of an alternative dispute resolution process... a family law system must be designed so that it is accessible for all who need it.*²⁸⁸ [Emphasis added]

In the 2016 study of parents' experiences of family litigation referred to earlier, the authors note that government has an important role to play in providing services to separated parents, and that further research is required to guide them in this regard.²⁸⁹ Government responsibility for access to justice in a "substantive equality" sense is implicit in vulnerability theory, and also resonates with observations made in law and economics literature that, "access to justice must be situated in the context of social and economic redistribution," and "only the political branches of government can advance the unfinished access to justice agenda."²⁹⁰

It is troubling that criticism of the *family courts* is often addressed primarily by referring to the benefits and accessibility of *non-court processes*. An excerpt from of online discourse illustrates this point. In 2017, two mediators associated with "Family Dispute Resolution of Ontario," a well-known Toronto mediation firm, posted a response to a series of Christie Blatchford's then-recent *National Post* columns, which, they describe as being about "those feeling unfairly treated by the family courts," portraying "indifferent judges, biased laws and tragic endings," and concluding that "the family law system is broken." The mediators' response to Blatchford was, in part, as follows:

But the real story is this. The vast majority of separating Canadians resolve their family law disputes peacefully, affordably, and in a way that allows their children to live happy

²⁸⁸ *Supra*, footnote 286 at page 189. [Boshier et al.]

²⁸⁹ *Supra*, footnote 113 at pages 24-25. [Saini, Birnbaum and Bala]

²⁹⁰ *Supra*, footnote 16. [Roach and Sossin]

and healthy lives. Not as interesting as Blatchford's stories, but the family law system is not as broken as you might think.

We know this because we are among the hundreds of skilled, affordable family dispute resolution professionals who resolve these cases every day. Some of us do it as family mediators working in the courts Blatchford describes, where hundreds of cases are settled each year with free and subsidized mediation, available to virtually every separating couple in the province. Others of us do it as privately hired mediators, arbitrators and collaborative professionals...

Significant progress is happening. Family Law Information Centres in family courts have Information & Referral Coordinators who, for free, provide a vast array of support and information for separating couples. Free and subsidized family mediation programs across the province are universally rated very highly. Counselling, legal advice and supports for victims of violence are now available through the Family Court Support Worker program.

The number of "self-reps" in family court (over 70% in some) is a significant problem. Judges spend too much time explaining procedure to unrepresented parties, leaving insufficient time to deal with trials, motions and case conferences. But here too, there is progress.

The recommendations of the Bonkalo Report (to expand the use of family law paralegals) may assist those who cannot afford lawyers to be better prepared and to understand the court process. Legal Aid Ontario has introduced Certificates specifically for those in mediation— meeting a real need. But income thresholds are still too low and funding continues to fail to meet demand.

There are real challenges and we cannot stop seeking answers. But there is also a lot that is working well and getting better. Blatchford's stories are important to hear and more important to be placed into context.²⁹¹

Despite that this was written by stakeholders, it is illustrative of a mindset in which progress in alternative dispute resolution is equated to progress in family law dispute resolution *in total*. As noted above, the point made in the Australian Law Reform Commission Discussion Paper – that developments in alternative dispute resolution *do not help families who need an adjudication process* – is, in my view, compelling.²⁹² While only a small percentage of cases fall into the

²⁹¹ Lorne Wilson and Hilary Linton, "The Family Court "Crisis" And Why Dispute Resolution Matters" (Family Dispute Resolution of Ontario, May 5, 2017)

²⁹² *Supra*, footnote 7 at page 138. [Australian Law Reform Commission, Discussion Paper]

category of those that “cannot or should not settle,” if one accepts that an accessible alternative to settlement would improve the negotiating environment, benefits would be conferred upon parties whose cases *can and do* settle. Moreover, if one accepts that the consequences for children of adversarial family litigation are a matter of public interest, the percentage of cases in which this interest is engaged no longer seems legitimately determinative.

The deterrence of trials by court systems is not unique to family law cases; it has been argued that the real function of all civil trials is no longer dispute resolution, but the deterrence of trials,²⁹³ and the resulting emphasis on alternative processes has been described as “negotiated process rationality.”²⁹⁴ Again, I suggest that family law is different; a court system that promotes alternative dispute resolution as the only rational choice because of the system’s own negative effects seems less like “negotiated process rationality” than abandoning a vulnerable population to a sub-optimal settlement environment. As Mnookin and Kornhauser have pointed out, if the role of the legal system is to emphasize settlement, “the inadequacies of our current system are readily apparent.”²⁹⁵

(ii) Mediation

In the UK, at least ten American states, and now British Columbia, attendance at an informal mediation or assessment session is mandatory before a family law court application involving children may be commenced.²⁹⁶

²⁹³ *Supra*, footnote 55. [Macaulay]

²⁹⁴ *Ibid.*, at page 1168. [Macaulay]

²⁹⁵ *Supra*, footnote 147 at page 996. [Mnookin and Kornhauser]

²⁹⁶ See: *supra*, footnote 246 at page 341. [Doughty and Merch]; *supra*, footnote 121. [Applegate and Beck]; Lord Neuberger Of Abbotsbury, *Has Mediation Had Its Day?* The Gordon Slynn Memorial Lecture,

The two paradigmatic styles of mediation are “facilitative” and “evaluative.” Roughly speaking, the former, sometimes called “interest-based,” focusses upon identifying needs and interests, assessing options, and encouraging the parties to resolve the dispute as independently as possible. Highly interest-based mediation is described as including: no consideration of legal entitlements but ensuring that both parties “feel heard,” encouraging parties to “work out their problems in a spirit of compromise;²⁹⁷ and, providing a cathartic forum for discussion, regardless of outcome.²⁹⁸ Facilitative mediation has been characterized as well-suited to custody and access disputes as it is more future-oriented, and more likely to improve, or at least not further damage, the ongoing parental relationship.²⁹⁹ It has been suggested that judges are not ideally suited to act as facilitative mediators, given that it is at odds with their training and judges are expensive resource.³⁰⁰ Evaluative mediation is more “rights-based” and examines the strengths and weaknesses of legal positions and forecasts litigation outcomes.³⁰¹ It is the style of mediation typically adopted by judges in the Ontario case conferencing process,³⁰² and is thought to be less likely to foster joint problem solving, both in the course of mediation and between the parties, following settlement.³⁰³ There are, of course, any number of mediation styles that combine elements of both, and mediators within the same system may interpret their roles very

November 2010, Online, <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/moj-speech-mediation-lectureA.pdf> at page 8.

²⁹⁷ *Supra*, footnote 223 at pages 25-27. [Rifkin]

²⁹⁸ Richard Delgado, “The Unbearable Lightness of Alternative Dispute Resolution: Critical Thoughts on Fairness and Formality” (2017), 70 S.M.U.L. Rev. 611 at pages 622-624.

²⁹⁹ *Supra*, footnote 150 at page 323. [Semple, Judicial Settlement Seeking]

³⁰⁰ *Supra*, footnote 40 at page 14. [Semple and Bala, Reforming the Family Justice System]

³⁰¹ *Supra*, footnote 121. [Applegate and Beck]

³⁰² *Supra*, footnote 40 at page 27. [Semple and Bala, Reforming the Family Justice System]

³⁰³ *Ibid.*, at page 29. [Semple and Bala, Reforming the Family Justice System]

differently and conduct very different processes. It is not surprising that “resource intensive” mediation is considered most effective in family law cases.³⁰⁴

Ontario’s court-integrated mediation program, implemented as part of the *Four Pillars* reforms, provides two hours of free onsite mediation to parties referred to mediation by a judge or Dispute Resolution Officer, which may be followed by eight hours of subsidized offsite private mediation, with fees set on a sliding scale based upon income. Commentary on the onsite mediation program has noted some concerns, including the relatively short initial time allotment, and the lack of any mechanism to ensure that parties have prior legal advice.³⁰⁵

According to interviews with court staff in Toronto, most clients of court-adjunct mediation services are self-represented. The percentage was estimated at about eighty percent, and while mediators may suggest parties obtain legal advice in advance of mediation, there is no requirement to do so. In Toronto, court-adjunct mediation is available at the Superior Court only; there is no onsite mediation at the Provincial Court level. There is reportedly no uniformity in mediation styles or the manner in which self-represented litigants are informed (or not) of legal entitlements in the course of on-site mediation. Mediators in court-adjunct mediation have various types of training including in law and social work; depending upon availability, social workers are reportedly the preferred mediators for custody disputes.

³⁰⁴ *Supra*, footnote 9 at page 287. [Bala, Reforming Family Dispute Resolution] See also: Sandra J. Perry, Tanya M. Marcum, Charles R. Stoner, “Stumbling down the Courthouse Steps: Mediators’ Perceptions of the Stumbling Blocks to Successful Mandated Mediation in Child Custody and Visitation” (2010-2011), 11 *Pepp. Disp. Resol. L.J.* 441.

³⁰⁵ Lene Madsen, “Family Mediation Policy and Practice: Overview of Ontario’s New Family Mediation Initiative – Part One” (2013), 32 *Can. Fam. L. Q.* 193 at page 194.

It has been maintained in the literature that efforts to achieve settlement should be pursued through processes, and by individuals, most likely to achieve this result; that is, for custody cases, through facilitative mediation by non-judges.³⁰⁶ I would extend this argument to every stage of the dispute resolution process, including adjudication; that is, all dispute resolution processes ought to be conducted by the most qualified professionals.

2.8 Innovative Court Models and Systems

(a) Problem-Solving Courts

Two waves of change have been identified in the evolution of Anglo-American legal processes; the first aimed at improving efficiency by creating specialized rules and case conference processes (as occurred in Ontario with the enactment of the *Family Law Rules*³⁰⁷) and the second aimed at developing a problem-solving approach for categories of cases marginalized within the court system.³⁰⁸ A problem-solving approach attempts to address the behavioral problems and risks that underlie a dispute, with the goal of achieving a more sustainable resolution. It connects parties to relevant support services and may involve judicial oversight of progress with respect to desired behavioral change, through “part-heard proceedings.”³⁰⁹ The Australian Law Reform Commission Discussion Paper describes a problem-solving approach as follows:

Problem-oriented courts attempt to facilitate a team approach and encourage close collaboration between agencies involved in the justice process. The problem-oriented court acts as the ‘hub’ connecting various ‘spokes’, such as drug and alcohol treatment

³⁰⁶ Noel Semple, “A Third Revolution in Family Dispute resolution: Accessible Legal Professionalism” (2017) 34 Windsor Y.B. Access to Just. 130 at page 146.

³⁰⁷ *Supra*, footnote 28. [*Family Law Rules*]

³⁰⁸ David B. Rottman, “Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges)?” (2000), 37 Amer. Judges Ass'n. Ct. Rev. 22, 25. The American Center for Court Innovation characterizes “community courts, drug courts, re-entry courts, domestic violence courts, and mental health courts” as problem-solving courts. See: Center for Court Innovation, Online: <http://www.courtinnovation.org/>

³⁰⁹ Australian Law Reform Commission, “Review of the Family Law System: Issues Paper” (2018) Osgoode Hall Law School Library) at page 65.

agencies, community based corrections, probation services and domestic violence agencies, forming a holistic and integrated approach. This approach encourages magistrates and judges to take a pro-active and overtly leading role in the creation of better, well coordinated services for clients.³¹⁰

A study of the “international problem-solving court movement,” reports that specialized problem-solving courts have been accepted in the United States with “enthusiasm, boldness and pragmatism,” whereas in Canada and some other common law jurisdictions the movement has been marked by “moderation, deliberation and restraint.”³¹¹ The American Unified Family Court model, which provides divorce, custody and access and child welfare services, emerged in the 1990s, and has reportedly changed the way family law cases are resolved:

Both the methods and goals of legal intervention for families in conflict have changed. The roles of judges and lawyers are fundamentally different and less important in this new regime where dispute resolution has largely moved out of the courtroom to "problem-solving" teams. Taking a "holistic" approach, these interdisciplinary teams seek to address both legal and non-legal problems facing the families that come to courts seeking legal remedies. These developments have profound implications for the family justice system. They also reflect a broader jurisprudential shift away from the traditional values of the adversary system in both civil and criminal justice.³¹²

Commentary suggests *judicial actors* are most comfortable with self-represented litigants in problem-solving courts.³¹³ There are some reported problems, however, including concerns that the goals of problem-solving models are insufficiently funded, making it difficult to implement a mandate to provide inter-disciplinary holistic services, and moreover, that it may simply ask too much of judges and court systems to expect them to adopt to a multitude of roles. As one commentator remarked:

³¹⁰ *Supra*, footnote 7 at page 142. [Australian Law Reform Commission, Discussion Paper]

³¹¹ James L. Nolan Jr., “The International Problem-Solving Court Movement: A Comparative Perspective” (2011), 37 *Monash U. L. Rev.* 259 at page 261-262. See also *supra*, footnote 73 at paragraph 41. [Finch]

³¹² Jane C. Murphy, “Revitalizing the Adversary System in Family Law” (2009-2010), 78 *U. Cin. L. Rev.* 891.

³¹³ Richard L. Wiener and Eve M. Brank (Eds.), *Problem Solving Courts: Social Science and Legal Perspectives* (Springer Science + Business Media, 2013).

Courts with their “limited remedial imaginations,” may not be the best institutional settings for resolving the non-legal issues proponents wish to place within their authority. As a result, the restructured family courts may be incapable of achieving the formidable task of “provid[ing] coordinated holistic services ... to address the physical and mental needs of the family.”³¹⁴

A problem-solving model has not been adopted in all American family courts; recent commentary suggests the use of widely divergent dispute resolution processes. It has been claimed that many American states “practice more reluctance than implementation”³¹⁵ with respect to problem-solving methods, and that Canada and Australia are more advanced in the use of therapeutic processes.³¹⁶ Conversely, others write that family courts “across the country” have embraced a paradigm shift away from adversarial processes, and judges now function more as ongoing conflict managers than as adjudicators, although [e]ven a restructured Family Court may be incapable of achieving the formidable task of improving the well-being and functioning of families and children,” and “the more comprehensive and forward-looking tasks envisioned by the new paradigm call for very different skill sets and institutional capabilities.”³¹⁷

(b) Ontario UFCs and the IDVC

In Ontario, Unified Family Courts (UFCs) currently operate in seventeen locations,³¹⁸ excluding Toronto. The Federal Budget passed in February 2018 approved funding for the expansion of UFCs to approximately one-half of Ontario Superior Courts, which will make UFCs available to

³¹⁴ *Ibid.*, at page 898. [Murphy]

³¹⁵ Marsha B Freeman, “Comparing Philosophies and Practices of Family Law Between the United States and Other Nations: The Flintstones vs The Jetsons” (2010) 13 Chap. L. Rev. 249 at page 254.

³¹⁶ *Ibid.*, at pages 255 and 259.

³¹⁷ *Supra*, footnote 1 at page 367. [Singer]

³¹⁸ UFCs currently exist in Barrie, Bracebridge, Brockville, Coburg, Hamilton, Cornwall, Kingston, L’Orignal, Lindsay, London, Nappanee, Newmarket, Ottawa, Oshawa/Whitby, Perth, Peterborough and St. Catherines.

roughly one-half of the province's population,³¹⁹ with plans to complete a province-wide expansion by 2025.³²⁰ This is a very significant development which has been the subject of decades of reform advocacy.³²¹

An important rationale for UFCs is jurisdictional; if a divorce is sought, the federal *Divorce Act*³²² governs custody and support; if no divorce is sought provincial legislation governs custody and support, in Ontario under the *Family Law Act*³²³ and the *Children's Law Reform Act*.³²⁴ In UFCs, proceedings under all of the above statutes, as well as the *Child, Youth and Family Services Act*³²⁵ can be heard in the same court.

UFCs were reportedly inspired by the "multi-door courthouse" concept in which doors in the same hallway lead to different process options.³²⁶ UFCs offer mandatory information programs, non-mandatory free on-site mediation for two hours, reduced fee offsite mediation, community referral coordinators, and limited legal advice and assistance at Family Law Information Centers.³²⁷ Bala notes that the UFC's specialized judges are better able to assist self-represented litigants,³²⁸ and that UFCs are the best option for limiting delay and managing continuing

³¹⁹ *Supra*, footnote 12. [Epstein, *This Week in Family Law*] The author reports that the new Ontario UFC sites will be located in St. Thomas, Welland, Kitchener, Simcoe, Cayuga, Belleville, Picton and Pembroke; other provinces in which UFCs will be newly located or expanded include Alberta, Newfoundland and Nova Scotia. See also: The Lawyers Daily, Lexis-Nexis, "Ontario Unified Family Court Proposal Calls for Province Wide Expansion By 2025" (September 25, 2017) reporting upon an interview with Nicholas Bala.

³²⁰ *Ibid.* [Epstein, *This Week in Family Law*] Further funding appears to be anticipated, but not yet formally granted.

³²¹ *Ibid.* [Epstein, *This Week in Family Law*]

³²² *Supra*, footnote 14. [*Divorce Act*]

³²³ *Family Law Act*, RSO 1990, c. F.3.

³²⁴ *Children's Law Reform Act*, R.S.O. 1990, c. 12.

³²⁵ *Child, Youth and Family Services Act*, 2017, S.O. 2017, c. 14, Sched. 1

³²⁶ *Supra*, footnote 40 at page 11. [Semple and Bala, *Reforming the Family Justice System*]

³²⁷ *Ibid.*, at page 188. [Semple and Bala, *Reforming the Family Justice System*]

³²⁸ *Supra*, footnote 319. [Bala, *Ontario Unified Family Court Proposal*]-

conflict cases.³²⁹ The newly created UFCs will be specialized, although the extent to which the UFCs incorporate related family services seems unclear as yet, and will depend upon funding.³³⁰

The Integrated Domestic Violence Court (IDVC) was established in Toronto in 2011 as part of the Ontario Court of Justice (Provincial Court) and is reportedly an effective problem-solving court. Its mandate is to facilitate consistent decision-making informed by knowledge of domestic violence, and to increase efficiency by dealing with family and related criminal law matters in one forum, in sequence, before a single judge.³³¹ The goal of domestic violence courts is to increase accountability of offenders, provide a better connection to social services, encourage treatment, and improve safety for victims and children.³³² The IDVC is a branch of the Ontario Court of Justice, and therefore its jurisdiction over family law is limited to custody and support issues.³³³ Its goals are to increase expertise and facilitate informed decision-making, consistently handle multiple cases involving the same parties, eliminate conflicting orders, decrease delay, and reduce cost.³³⁴ The court is relatively well-resourced: it has a dedicated Crown attorney, criminal and family duty counsel, a community resource worker, a “victim witness services court worker,” a “family support worker” to provide community referrals for victims of violence, and a Family Law Information Centre staff member available for consultation.³³⁵

³²⁹ *Supra*, footnote 206 at page 446. [Bala, Birnbaum, and Martinson]

³³⁰ *Supra*, footnote 9, at page 313. [Bala, Reforming Family Dispute Resolution]

³³¹ Julianna Dalley, “One Family, One Judge: Towards a New Model for Access to Justice for Families Facing Violence in BC” (2013), 18 *Appeal: Rev. Current L. & L. Reform* 3 at page 8.

³³² Rachel Birnbaum, Nicholas Bala and Peter Jaffe, “Establishing Canada’s First Integrated Domestic Violence Court: Exploring Processes, Outcomes, and Lessons Learned” (2014) 29 *Can. J. Fam. L.* 117 at page 127.

³³³ *Supra*, footnote 331. [Dalley]

³³⁴ *Supra*, footnote 332 at page 143-144. [Birnbaum, Bala and Jaffe]

³³⁵ *Ibid.*, at page 147. [Birnbaum, Bala and Jaffe]

A 2014 qualitative study of the IDVC examined the experiences of twenty-one “stakeholders,” a group comprised of seventeen professionals (including judges, crown attorneys, court support workers, and criminal and family lawyers), one male offender, one female offender, and two female victims.³³⁶ The reported findings include: judges regard information sharing as valuable, Crown prosecutors had generally positive views, lawyers representing parents were generally optimistic about the potential for the court, although less satisfied than Crown attorneys, and (surprisingly) *too many* services are provided in “an uncoordinated way.” The authors report that the majority of stakeholders were “on the whole positive” about the potential of the court and their experiences to date but conclude that to be successful the court will require more specialized support services and greater administrative support. The authors note the need for further research in which the experiences of victims, offenders and children are explored. The two abuse victims and two offenders interviewed reported positively both on their own experience with the court, and its impact upon their children.³³⁷

With the exception of the IDVC, Ontario courts that routinely deal with family law cases (Provincial Courts, and Superior Court-Family Division) do not appear to be problem-solving courts, and with the exception of UFCs, they are not highly specialized. Generalist judges still deal with family law matters in many Ontario courts, and specialized expertise within UFCs does not generally extend beyond a thorough knowledge of the law. It does not necessarily include an informed understanding domestic violence, power dynamics, mental health and high conflict, as

³³⁶ *Ibid.*, at page 154. [Birnbaum, Bala and Jaffe]

³³⁷ *Ibid.*, at page 169. [Birnbaum, Bala and Jaffe]

recommended by the Ontario Law Reform Commission Report referred to above.³³⁸ As one author notes:

[T]he reality is that our Rules were meant to have both specialized judges running a specialized court, clearly something we do not have. Instead, we have a patchwork of courts, nominally united under the rubric of the Family Court of the Superior Court of Justice, but without any consistency of approach or practice.”³³⁹

Increasing the family-related expertise of judges and expanding access to family services may well be a goal under the planned UFC expansion.

(c) Specialized Family Courts in the UK and Australia

In England and Wales, specialized family courts with “an integrated social welfare function” were first established in 1975,³⁴⁰ and as of 2001, the Children and Family Court Advisory and Support Service (Cafcass) has carried out this social welfare function through a staff of social workers known as Family Court Advisers.³⁴¹ The Final Report of the UK Family Justice Review, known as the “Norgrove Report,” was released in 2011; it describes the family court system in England and Wales as “facing immense stress and difficulties” and “failing children and families through its disorganised, fragmented structure, and experiencing chronic delay.”³⁴² These problems are attributed in part to a three-tiered court process, the reform of which was uncontroversial, and in part to problems related to coordinating family services. It had been noted in commentary that judges in family courts were increasingly cast in the role of case managers and “team leaders” for a range of court related support services, including Cafcass, all

³³⁸ *Supra*, footnote 205. [Law Commission of Ontario, *Voices from a Broken Family*]

³³⁹ Stephen Grant, “Alternative Dispute Resolution in Family Law: What's Not to Like?” (2008), 27 *Can Fam LQ* 235.

³⁴⁰ Julie Doughty, “Identity Crisis in the family courts? Different approaches in England and Wales and Australia” (2009) 31(3) *Journal of Social Welfare and Family Law* 231 at page 236.

³⁴¹ See: cafcass.gov.uk

³⁴² *Supra*, footnote 246 at page 340. [Doughty and Merch]

of which were accountable to the judge.³⁴³ Moreover, it was noted that “individuals and organisations across different parts of the system often did not trust each other and there was “no set of shared objectives to bind agencies and professionals to a common goal.”³⁴⁴

The Norgrove Report recommended an increased focus on mediation, with court proceedings as a last resort, and in 2011, a new mediation information and assessment program (MIAMs) was introduced as part of the family court system; it did not attract large numbers, but the following year became mandatory for cases involving children.³⁴⁵ Julie Doughty observes that the practice of directing cases away from formal hearings and into a less formal mediation process has not been accepted by lawyers or the public, and has raised questions about legitimacy.³⁴⁶ She notes an ongoing tension between the social welfare and legal functions of family justice systems:

Within both the English and Australian family justice systems, a relationship between the judicial system and a social welfare or behavioral science service is seen as vital in resolving parenting disputes, but the expectations of such a service are inherently contradictory...both systems have been seen by policymakers and the public as unduly delaying and obstructing parental agreement.³⁴⁷

The UK government has reportedly accepted almost all of the Norgrove Report’s recommendations and responded with a “radical reorganization” of UK family courts, including the creation of a new multi-disciplinary “Family Justice Service” with responsibility for court social work services, mediation (with a stronger triage component), information services, and

³⁴³ *Ibid.*, at page 341. [Doughty and Merch]

³⁴⁴ *Ibid.*, at page 340, [Doughty and Merch]

³⁴⁵ *Supra*, footnote 246 at page 341. [Doughty and Merch]

³⁴⁶ *Supra*, footnote 340 at page 231. [Doughty, Identity Crisis]

³⁴⁷ *Ibid.*, at page 239. [Doughty, Identity Crisis]

continuing professional development.³⁴⁸ The reforms have led to concern about the effects of an “interdisciplinary teamwork” approach upon judicial independence.³⁴⁹

Significant reform of Australia’s family law system began with the opening of its first Family Court in 1976; policy objectives included creating a specialist court with an informal process, and “one-stop shop” for legal and counseling services to help resolve family law disputes.³⁵⁰

Doughty writes that “helping courts” in Australia did not, for decades, prove more satisfactory than the English system, but through the Less Adversarial Trial, the Australian family justice system appeared to have achieved a better balance between social welfare and legal functions, and greater public acceptance of diverting cases away from the courts.

The Less Adversarial Trial (“LAT”), emerged out of the Children’s Cases Program (“CCP”) which was inspired by a 2002 court-based study undertaken to learn more about European inquisitorial-based approaches to children’s cases.³⁵¹ By 2004 the court had developed a pilot model (the CCP), the goals of which were: minimizing delay, early identification of the issues, judicial authority to limit evidence to these issues, reduced focus on past parental grievances, emphasizing the best interests of the child, minimizing adversarialism, and developing strategies to assist parents in future cooperation.³⁵² An empirical research study on parental experiences of the CCP reported that a majority of parents described better management of conflict, less damage to relationships, greater satisfaction with living arrangements, and improved children’s

³⁴⁸ *Supra*, footnote 8 at page 200. [Parkinson]

³⁴⁹ *Supra*, footnote 246 at page 334. [Doughty and Merch]

³⁵⁰ *Supra*, footnote 309 at pages 16-17. [Australian Law Reform Commission, Issues Paper]

³⁵¹ *Supra*, footnote 6 at page 126. [McIntosh et al]

³⁵² *Ibid.*, at page 127. [McIntosh et al]

adjustment. A control group that experienced a traditional adversarial court process reported further antagonism and significantly higher levels of strain on children.³⁵³

Legislative amendments known as “Part VII Division 12A”³⁵⁴ created the successor to the CCP, the Less Adversarial Trial. The LAT is a strong judicial case management system, not a single-event trial, and is based upon inquisitorial processes.³⁵⁵ It is self-described as more flexible and informal, and less costly than ordinary court systems.³⁵⁶ Except in family violence cases, applications to the court involving children must be preceded by attendance at a Family Relationships Centre (FRC) or similar service for informal dispute resolution. Family Relationship Centres are government run and provide information and referral services aimed at developing a parenting plan. Mediation, known as “Family Dispute Resolution” is provided free of charge regardless of income for one hour; an additional two hours is charged at the rate of \$30 per hour for clients with an annual income of \$50,000 or more. These centres also offer information sessions and referrals to outside services such as “family law counselling” and “programs about parenting after separation.”³⁵⁷

In the event that settlement is not reached, a first trial day is scheduled, also known as an assessment conference. Parties are required to complete and file a Parenting Questionnaire

³⁵³ *Supra*, footnote 6 at page 130. [McIntosh et al]

³⁵⁴ See: John Faulks, “A Natural Selection – The Potential and Possibility for the Development of Less Adversarial Trials by Reference to the Experience of the Family Court of Australia” (2010) 35 U.W. Austl. L. Rev. 185 at page 189-194.

³⁵⁵ *Supra*, footnote 6. [McIntosh et al.]

³⁵⁶ Family Court of Australia, online services:
<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/court-events/less-adversarial-trials>

³⁵⁷ Family Relationships Centres, an Australian Government Initiative, online:
<https://www.familyrelationships.gov.au/talk-someone/centres>

twenty-eight days in advance of the first day.³⁵⁸ A Financial Questionnaire and Balance Sheet must be filed later, within nine weeks of the initial assessment conference.³⁵⁹

A Family Consultant attends the assessment conference and remains involved throughout the LAT process. The role of a family consultant can include providing parenting plan advice, conducting a child or family assessment, holding child-inclusive mediation, and acting as an expert adviser to the court by presenting research-based recommendations.³⁶⁰ Julie Doughty observes that Family Consultants have come to be seen as esteemed experts, whereas the reputation of Cafcass' Family Court Advisers has bureaucratic overtones, in part because they work in both public and private family law cases and are regarded as "operatives of the welfare state."³⁶¹

In the assessment conference, parties are encouraged to explain what they are seeking directly to the judge or, if they wish, may have a lawyer speak for them. The judge identifies the evidence required (in conjunction with lawyers, if present) and is meant to restrict it to that which is required to decide the issues. The judge decides what expert reports are required and what they will address, and may make referrals to community-based services, such as counseling or parenting education programs, or make interim orders with respect to child care. The judge is empowered to control the order in which witnesses are called, what evidence is to be given orally or in documentary form, and the extent of cross examination.³⁶² Between the first and final days,

³⁵⁸ *Supra*, footnote 356. [Family Court of Australia, online services]

³⁵⁹ *Ibid.* [Family Court of Australia, online services]

³⁶⁰ *Supra*, footnote 340 at page 239. [Doughty, Identity Crisis]

³⁶¹ *Ibid.*, at page 232. [Doughty, Identity Crisis]

³⁶² *Ibid.* [Doughty, Identity Crisis]; see also: *supra*, footnote 356. [Family Court of Australia, online services]

the hearing may be continued by telephone: affidavits and expert reports may be discussed, further evidence may be identified, and interim and procedural orders may be made.³⁶³ It has been noted that among judges, the LAT “is not everyone’s cup of tea.”³⁶⁴

The Australian Law Reform Commission recently reviewed the operation of Australian family courts,³⁶⁵ as noted above. Its mandate was to consider “redevelopment “of the family law system “as a whole, in an integrated and holistic, rather than piecemeal, way.”³⁶⁶ The first document to emerge from this Inquiry, the Issues Paper, was released in 2018. It asserts that current problems in the family law system include increasing delays in the courts, increasing cost of legal services and expert reports, limited support for children’s participation in proceedings, difficulty achieving safe outcomes for victims of family violence and their children, and “concerns about the *adversarial nature* of legal processes and the impact on parental and child well-being.”³⁶⁷ The report observes growing debate in Australia over the affordability of services and processes related to family dispute resolution, the proportionality of costs incurred in family law cases, the continued conceptualization of family dispute resolution as a “single event process,” and, once again, “the appropriateness of *adversarial processes, and the ethics of adversarial practices*, in any system concerned with the well-being of children.”³⁶⁸ [emphasis added]

The mandate assigned to the Australian Law Reform Commission has familiar ring; it speaks of the need “for reform to the culture, structure and governance of the family law system” and “to

³⁶³ *Supra*, footnote 354 at pages 189-190. [Faulks, A Natural Selection]

³⁶⁴ *Ibid.*, at page 195. [Faulks, A Natural Selection]

³⁶⁵ *Supra*, footnote 309. [Australian Law Reform Commission, Issues Paper]

³⁶⁶ *Ibid.*, at page 13. [Australian Law Reform Commission, Issues Paper]

³⁶⁷ *Ibid.*, at page 19. [Australian Law Reform Commission, Issues Paper]

³⁶⁸ *Ibid.* [Australian Law Reform Commission, Issues Paper]

encourage the resolution of family disputes as quickly and affordably as possible, and in a way that is the least harmful, and most protective, of the safety and well-being of all involved, particularly children.” The Commission notes further needs: to identify the objectives of a contemporary family law system and the principles that should guide it, as well as barriers that might affect access to the system; to develop *integrated* services for families with complex needs; to support the involvement of children in the family law system; and to identify the competencies and skills required of family law system professionals.³⁶⁹

The second document to emerge from the Australian Law Reform Commission review is the Discussion Paper, released in October 2018.³⁷⁰ It, too, solicits further public and stakeholder input. The Discussion Paper makes proposals for change similar to those suggested in Canadian literature and reports³⁷¹ including clearer legislation,³⁷² and the establishment of multi-disciplinary community-based “Families Hubs” to provide separating families and children with visible entry points for access to a wide range of legal and support services in areas including family violence, legal assistance services, informal dispute resolution, family counseling, housing, and health services.³⁷³

The LAT is reportedly the process used in most cases that require adjudication in Australia.³⁷⁴ The Issues Report says little that expressly relates to the LAT, other than to note that the use of Part VII Division 12A (the LAT case management approach) has “waned over time,” and that its

³⁶⁹ *Ibid.*, at pages 12-19. [Australian Law Reform Commission, Issues Paper]

³⁷⁰ *Supra*, footnote 7. [Australian Law Reform Commission, Discussion Paper]

³⁷¹ *Supra*, footnote 23. [Family Justice Working Group Report]

³⁷² *Supra*, footnote 7 at page 34. [Australian Law Reform Commission, Discussion Paper]

³⁷³ *Ibid.*, at page 158. [Australian Law Reform Commission, Discussion Paper]

³⁷⁴ *Supra*, footnote 340 at page 240. [Doughty, Identity Crisis]

processes may “consume too much judicial time,” given the persistent problem of hearing delays.³⁷⁵ The Discussion Paper notes that some submissions to the Commission have praised the LAT initiative, but many stakeholders described a need for less adversarial processes “for children’s matters more generally,” and movement toward a more “solution-based” process.³⁷⁶ It approvingly refers to problem-solving courts “such as those that are increasingly used in other jurisdictions to deal with matters where behavioural problems complicate the resolution of legal disputes...where an ongoing relationship between the parties needs to be preserved, as is the case in most disputes about the care of children.”³⁷⁷

2.10 Summary

This chapter has discussed problems associated with family litigation in court systems, particularly with respect to self-represented litigants.

³⁷⁵ *Supra*, footnote 309 at page 65. [Australian Law Reform Commission, Issues Paper]

³⁷⁶ *Supra*, footnote 7 at page 140. [Australian Law Reform Commission, Discussion Paper]

³⁷⁷ *Ibid.*, at page 141. [Australian Law Reform Commission, Discussion Paper]

3. VULNERABILITY THEORY AND ANALYSIS

3.1 Theory

Martha Fineman's vulnerability theory advocates for "a more responsive state and a more egalitarian society."³⁷⁸ The term "vulnerability," often associated with stigma, victimhood, dependency, deprivation and even pathology,³⁷⁹ is claimed by Fineman to designate a constant and universal aspect of the human condition, indeed, the "primal human condition."³⁸⁰ The theory holds that while vulnerability is constant and universal, it is manifested and experienced episodically, and levels of vulnerability vary in degree throughout a lifetime.

Vulnerability theory suggests the "vulnerable subject" replace the "universal liberal subject" constructs,³⁸¹ which valorize autonomy, self-sufficiency and personal responsibility and are, in their general application, oblivious to vulnerability. She writes that the liberal subject, when these concepts were formed, envisioned a white, property-owning, tax-paying adult male,³⁸² and while legal subjectivity has grown to encompass formerly excluded groups, the modern legal subject still centres on the needs and political sensibilities of a narrow and privileged minority.³⁸³ In contrast, the vulnerable subject is subject to constant change, fragile in embodiment and life

³⁷⁸ *Supra*, footnote 17 at page 1. [Fineman, Anchoring Equality]

³⁷⁹ *Supra*, footnote 77. [Mboya]

³⁸⁰ Martha Albertson Fineman, "Equality and Difference – The Restrained State" (2015) 66 Ala. L. Rev. 609 at page 614.

³⁸¹ Martha Albertson Fineman, "Equality, Autonomy and the Vulnerable Subject in Law," in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, Anna Grear, Martha Albertson Fineman (eds.) *supra* footnote 67.

³⁸² *Supra*, footnote 380. [Fineman, Restrained State] at page 616.

³⁸³ Martha Albertson Fineman, "Vulnerability and Inevitable Inequality" (2017) 4 Oslo L.Rev 133 at page 148.

circumstance, and socially interdependent.³⁸⁴ The theory suggests the vulnerable subject is a more accurate and complete figure than the “liberal subject” to place at the heart of social policy and state responsibility.³⁸⁵

A vulnerability theory analysis does not disregard the importance of typical group identifiers such as race and gender, although it argues that they may obscure institutional forces that distribute privilege and disadvantage in ways that do not correlate to traditional identity categories, and justify limited government responsibility by implying that state processes are fair, except for rare and discoverable instances of discrimination.³⁸⁶ Vulnerability theory is intended to supplement and complement identity-based analyses, by considering the effects of law and social institutions upon segments of the population that do not have common characteristics other than vulnerability.³⁸⁷

The “vulnerability paradigm” recognizes the sameness of individuals (their common vulnerability) as well as their individual differences.³⁸⁸ Vulnerability obviously manifests itself in various ways on the individual level simply due to the vicissitudes of life; it is also manifested variously because personal characteristics, such as infancy, old age, race, gender, and sexual orientation contribute to different types and fluctuating levels of vulnerability,³⁸⁹ and because humans are differently “embedded” in social relationships and within social institutions.³⁹⁰ The

³⁸⁴ Deborah Dinner, “Vulnerability as a Category of Historical Analysis: Initial Thoughts in Tribute to Martha Albertson Fineman” (2018) 67 *Emory L.J.* 1149 at page 1151.

³⁸⁵ *Supra*, footnote 17 at page 8. [Fineman, Anchoring Equality]

³⁸⁶ *Supra*, footnote 60 at page 254. [Fineman, Responsive State]

³⁸⁷ *Supra*, footnote 17 at page 21. [Fineman, Anchoring Equality]

³⁸⁸ *Supra*, footnote 380 at page 624. [Fineman, Restrained State]

³⁸⁹ *Ibid.*, at page 619. [Fineman, Restrained State]

³⁹⁰ *Supra*, footnote 380 at page 613. [Fineman, Restrained State]

“vulnerability paradox” lies in the simultaneous recognition of vulnerability as both universal and particular.³⁹¹

The consequences of manifested vulnerability are obviously greatly influenced by the resources one can command to deal with them; in vulnerability theory this is framed in terms of levels of resilience.³⁹² No one is born with resilience; it is society-generated.³⁹³ It is accumulated over a lifetime through individual interaction with social constructs such as the family, and public and private institutions, including education and justice systems, which confer support, privilege and power.³⁹⁴ The role of the state and its institutions is to foster resilience: to enhance individual capacity to withstand harm by ensuring equal access to resource-generating social institutions³⁹⁵ and actively structure institutions to ensure they do not privilege any group of citizens over another. Vulnerability theory is premised upon the vulnerable subject having been ignored in favor of a “neoliberal fixation on personal responsibility, buoyed by an insistence that only a severely restrained state can be a responsible one.”³⁹⁶ In case this should strike the reader as a radical and outsider perspective, I note that Justice Cromwell has written of justice system reform that it tends to improve the system for the benefit of those who already benefit from it, with little fundamental change.³⁹⁷

³⁹¹ *Ibid.*, at page 618. [Fineman, Restrained State]

³⁹² *Supra*, footnote 17 at page 19. [Fineman, Anchoring Equality]

³⁹³ Martha Albertson Fineman, (2015) “Vulnerability and the Institution of Marriage” 54 *Emory L.J.* 2089 at page 2090.

³⁹⁴ *Supra*, footnote 17 at page 6. [Fineman, Anchoring Equality]

³⁹⁵ Nina A. Kohn, “Vulnerability Theory and the Role of Government” (2014) 26 *Yale J.L. & Feminism* 1 at page 9.

³⁹⁶ *Supra*, footnote 380 at page 616. [Fineman, Restrained State]

³⁹⁷ *Supra*, footnote 27. [Cromwell, Neither Out]

The vulnerable subject is not limited to the individual. Vulnerability theory argues that institutions are also vulnerable: they can be captured, corrupted, damaged, outgrown, and compromised by legacies of practices, patterns of behavior and “entrenched interests that were formed during periods of exclusion and discrimination, but are now invisible in a haze of lost history.”³⁹⁸ According to vulnerability theory, it is typical for the state to minimally monitor whether its institutions confer assets that foster resilience.³⁹⁹

A vulnerability theory analysis examines whether social institutions enable individuals to behave in ways that perpetuate resource imbalances, such that those already privileged are benefited, and those already less privileged are *further disadvantaged*.⁴⁰⁰ The theory holds that the valorization of autonomy and individual responsibility has permitted profound institutionally embedded inequality to be tolerated. Fineman advocates for a legal culture in which the state is obliged to either justify inequality or remedy it by reforming institutional arrangements.⁴⁰¹

Vulnerability theory is often discussed in terms of a formal and substantive equality. In a recent article, Fineman argues that vulnerability theory goes beyond equality, which she characterizes as a “limiting aspiration” for social justice.⁴⁰² She notes that “inevitable inequality” (not always a bad thing, for example, in such parent-child and employer-employee relationships), is typically addressed in law and policy by declaring that an equality mandate does not apply because the individuals to be compared are positioned differently, or by imposing a “fabricated equivalence”

³⁹⁸ *Supra*, footnote 17 at page 18. [Fineman, Anchoring Equality]

³⁹⁹ Ani B. Satz, “Disability, Vulnerability and the Limits of Antidiscrimination” (2008) 83 Wash. L. Rev. 513 at page 528.

⁴⁰⁰ *Supra*, footnote 395 at page 7. [Kohn, Role of Government]

⁴⁰¹ *Supra*, footnote 17 at page 18-19. [Fineman, Anchoring Equality]

⁴⁰² *Supra*, footnote 383 at page 134. [Fineman, Inevitable Inequality]

between individuals, despite that they occupy obviously unequal bargaining positions.⁴⁰³ It is the latter that is troubling, as it suggests ignoring power imbalances for which there is no justifying rationale, for example, by way of a compensatory benefit to the weaker party.

Fineman acknowledges that vulnerability theory was crafted for an American audience, and indeed, the theory clearly challenges the Lockean foundations of American liberalism and the bootstraps underpinnings of the American dream. Its application, however, has not been restricted to American law and society. Fineman herself locates the liberal subject in “liberal Western democracies”⁴⁰⁴ and notes that vulnerability theory “allows for the adaptation of solutions appropriate to differing legal structures and political cultures.”⁴⁰⁵ She states that the theory has potential to extend even beyond the Anglo-American context, because neoliberalism informs social relations within European and Latin American countries as well.⁴⁰⁶

While neoliberalism ebbs and flows at the provincial and federal government levels in Canada, it is an enduring political current, plainly visible in present-day Ontario. I argue that vulnerability theory’s challenge to neoliberalism’s focus on personal responsibility has relevance here. Despite that Canadian and American culture and society obviously differ in fundamental ways, it does not, of course, follow that Canadian laws and social institutions are fully responsive to the vulnerable subject.

⁴⁰³ *Ibid.* [Fineman, Inevitable Inequality]

⁴⁰⁴ *Supra*, footnote 383 at page 133. [Fineman, Inevitable Inequality]

⁴⁰⁵ *Ibid.*, at page 134. [Fineman, Inevitable Inequality]

⁴⁰⁶ *Ibid.*, at page 134 FN 1. [Fineman, Inevitable Inequality]

A vulnerability theory analysis is not merely critical, it is also “generative;” it is intended to be useful for constructing a critical perspective on political and social institutions.⁴⁰⁷ Vulnerability theory has been applied in contexts as varied as assisted reproductive technology and housing policy,⁴⁰⁸ disability law,⁴⁰⁹ climate change,⁴¹⁰ legal history⁴¹¹ and colonial capitalism.⁴¹² For example, Anna Grear has argued that capitalism has progressed by rendering human subjectivity either partial or nonexistent, and law must now face up to an emerging ethical demand.⁴¹³ She cites examples of instances in which human subjectivity is, or has been, ignored or trampled upon, including the disposition of indigenous people by colonialism, corporate neocolonialism in the developing world, the effects of global industry on the environment, and predictable patterns of advantage and disadvantage in the developed world. Atieno Mboya has conducted a vulnerability theory analysis of climate change in which individual states are cast as the vulnerable subject under international law, and their levels of vulnerability are connected to geographic location and positioning within the global political economy.⁴¹⁴ The argument there is that a legal subject built upon ideology that prioritizes liberal values over equality distorts

⁴⁰⁷ *Supra*, footnote 77 at page 95. [Mboya]

⁴⁰⁸ *Supra*, footnote 395 at page 3, footnote 9. [Kohn, Role of Government] The author refers to Helen Carr, “Housing the Vulnerable Subject: The English Context” in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, *supra*, footnote 67 at page 107 (Kindle Edition) and Rachel Fenton, “Assisted Reproductive Technology Provision and the Vulnerability Thesis: From the UK to the Global Market” in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, *Ibid.*, footnote 67 at page 125 (Kindle Edition).

⁴⁰⁹ *Supra*, footnote 399. [Satz]

⁴¹⁰ *Supra*, footnote 77. [Mboya]

⁴¹¹ *Supra*, footnote 384. [Dinner]

⁴¹² Anna Grear, “Vulnerability, Advanced Global Capitalization and Co-Symptomatic Injustice: Locating the Vulnerable Subject” in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, *supra*, footnote 67 at page 41 (Kindle Edition).

⁴¹³ *Ibid.*, at page 41. [Grear]

⁴¹⁴ *Supra*, footnote 77 at page 86. [Mboya]

concepts such as “choice” and “consent,” and justifies the ongoing exploitation of weaker states.⁴¹⁵

Vulnerability theory’s momentum as an analytical tool for the justification of policy change has drawn criticism. It has been asserted that the theory tends to promote unduly paternalistic policies and has limited prescriptive value,⁴¹⁶ fails to appreciate that autonomy and independence are deeply held social values, particularly in the United States;⁴¹⁷ and that in its application it has adopted the identity-based approach that the theory is considered (by some) to oppose.⁴¹⁸

In my view, what for some are “unduly paternalistic policies” may be entirely consistent with Fineman’s concept of the “more responsive state.”⁴¹⁹ Similarly, the use of identity categories in a vulnerability analysis is consistent with Fineman’s articulation of the theory, in which identity-based characteristics may be a complementary, rather than competing, analytical tool. As to the theory’s prescriptive value, the argument is that vulnerability theory provides little guidance as to how to prioritize among vulnerable subjects (and makes this decision more problematic by emphasizing the universality of vulnerability), and should be refined by defining vulnerability in relation to a particular problem – the result of a relationship between an individual and a context, environment or situation.⁴²⁰ In my view vulnerability theory analysis does just that – through its analysis of relationships between vulnerable individuals and social institutions.

⁴¹⁵ *Ibid.*, at page 80. [Mboya]

⁴¹⁶ *Supra*, footnote 395 at page 5. [Kohn, Role of Government]

⁴¹⁷ Morgan Cloud, “More than Utopia” in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, *supra*, footnote 67 at page 77.

⁴¹⁸ *Supra*, footnote 395 at page 27. [Kohn, Role of Government]

⁴¹⁹ *Supra*, footnote 60 at page 251. [Fineman, Responsive State].

⁴²⁰ *Supra*, footnote 397 at page 26-27. [Kohn, Role of Government] The author points to a need to “move beyond stereotypes and assumptions about who is or who is not vulnerable to a particular problem toward “evidence-based understandings of social needs and risks.”

3.2 Analysis

I argue that legal institutions responsible for custody and access dispute resolution should be designed for the vulnerable subject. Vulnerability theory holds that the universal “liberal subject” envisions a competent, fully functioning adult, whereas the “vulnerable subject” may have social, economic, or biological limitations⁴²¹ that must inform the operation of law state institutions. Indeed, research regarding self-represented litigants in family law court systems suggests that *for a significant number*, the emotional effects of family upheaval may be similar to manifested physical disability, that is “a simultaneous experience of threat and the weakening of coping mechanisms.”⁴²² And then there are the children.

Fineman has described children as “the paradigmatic vulnerable subjects.”⁴²³ She describes “derivative dependence” as a form of dependence that attaches to a social role or position, and is manifested as a consequence of the vulnerability of someone else.⁴²⁴ Fineman cites the example of a male family member who suffers emotionally and financially as a consequence of adopting a caretaking role; the burden and resulting dependence are unrelated to his own identity. In my view, the same may be said of children whose parents are dependent upon family law systems in custody cases. The literature suggests the effects of parental engagement in family litigation are often passed on to their children, who, moreover, may suffer long-term adverse consequences, as noted in Chapter Two. Vulnerability theory suggests the state has an obligation to build structures from which every person will benefit, and to enhance resilience in the face of

⁴²¹ *Supra*, footnote 399 at pages 527 and 530. [Satz]

⁴²² *Ibid.*, at page 524-525. [Satz]

⁴²³ *Supra*, footnote 393 at page 2089. [Fineman, Vulnerability and the Institution of Marriage]

⁴²⁴ *Supra*, footnote 380 at page 621. [Fineman, Restrained State]

manifested vulnerability.⁴²⁵ This obligation is, with respect to children, further supported by the argument that the societal obligation to protect children does not end at the boundary between public and private law, and surely must include effectively shielding children from the damaging effects of the state's own institutions. The United Nations Convention of the Rights of the Child, provides, among other things, that all children are *entitled* to protection.⁴²⁶

I argue that vulnerability to family upheaval is universal and constant and may become manifest in a myriad of ways within the broad context of separation and divorce. Once manifested it is managed through family law systems: that is, legislation and social institutions such as state-sponsored courts and their adjunct services. On the level of individual experience, I argue that the following are examples of those for whom this common vulnerability has become manifest:

- self-represented parties who face a represented party;
- self-represented parties who face an opposing party with more resilience; that is, one who can more easily bear the financial and/or emotional costs of family litigation, or who has more social capital to apply to self-informing and navigating family law systems;
- parties who have been or continue to be victims of domestic violence;
- parties who are drawn into family law processes through manipulative claims, such as custody applications filed to further a pattern of dominance and control, or motivated primarily to reduce child support;

⁴²⁵ *Supra*, footnote 399 at page 526. [Satz]

⁴²⁶ United Nations Convention of the Rights of the Child (1990) online: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

- parties who are drawn into family law processes through false claims of child abuse or parental alienation;
- parties who avoid legal systems out of fear and thereby further risk their own safety, and possibly that of their children;
- parties involved in cases cannot and should not settle and for whom the only affordable alternative to negotiation is a state-sponsored dispute resolution system that is damaging to families; and
- children whose who are placed in a position of derivative dependency because their parents are dependent upon family court systems.

Consistent with vulnerability theory, the non-exclusive list of vulnerable subjects set out above is not based upon identity categories such as gender, race, or social class. It must be understood that vulnerability theory does not suggest that all individuals within a vulnerable population are identically or equally disadvantaged as a result of manifested vulnerability. To the extent that some vulnerable subjects are more resilient than others, vulnerability theory suggests other social systems and institutions, such as the family and educational institutions, have provided them with more resources, and hence more resilience. At the level of individual experience, a vulnerability theory analysis engages the persistent family law theme of power imbalance.

Fineman notes that the universal subject is given “modified legal subjectivity” based only upon certain kinds of deviation from the legal subject.⁴²⁷ Examples in family law would include the doctrines of mistake, unconscionability, and duress, which may be used to challenge marriage

⁴²⁷ *Supra*, footnote 383 at page 144. [Fineman, Inevitable Inequality]

contracts and separation agreements, and which allow the law to respond, in some cases, to exceptional peculiarities and sensitivities. Vulnerability theory argues that this sort of targeted approach to *some* manifestations of power imbalance implies that power imbalances are, on the whole, exceptional, and that everyday power imbalances (or, as vulnerability theory would put it, uneven “levels of resilience”) are not worthy of redress.

Vulnerability theory argues that the ideologies of autonomy, self-sufficiency and personal responsibility have so idealized individual “choice” that the ways in which social institutions perpetuate and sometimes exacerbate inequality are taken for granted; they are tolerated as the inevitable effects of free choice and individual responsibility. Vulnerability theory acknowledges that autonomy is a desirable aspiration but asserts that it cannot be attained without societal support through social institutions, which *provide the resources* needed to “create options and make choices.”⁴²⁸ It points to the need to question the autonomy-based choices which law and legal institutions appear to offer, and, in my view, supports the argument made in this thesis that the “choice” to negotiate or settle is illusory in the absence of accessible adjudication.⁴²⁹

Several authoritative sources are cited in Chapter Two in support of the general proposition that, as the Canadian Judicial Council put it,

[s]elf-represented persons...may find court procedures complex, confusing and intimidating; and they may not have the knowledge or skills to participate actively and effectively in their own litigation...[and] the average person may be overwhelmed by the simplest of court procedures.⁴³⁰

⁴²⁸ *Supra*, footnote 60 at page 260. [Fineman, Responsive State]

⁴²⁹ As noted above, the illusory nature of this choice is reflected in commentary in which family litigation, the state-sponsored alternative to settlement, has been described as “a catastrophic experience” for the middle class. See *supra*, footnote 278. [Thompson, Judge as Counsel]

⁴³⁰ *Supra*, footnote 126. [Statement of Principles on Self Represented Litigants]

Family court systems have, of course, been modified in numerous ways to adapt to self-represented litigants, as discussed above. Nonetheless, as I have argued above, court-based reforms do not yet appear to have significantly ameliorated the effects of family litigation. Moreover, a vulnerability theory analysis suggests, based upon the reported experiences of self-represented litigants in family court systems, that existing Ontario court systems do not yet adequately compensate for the embedded advantages and disadvantages they confer upon represented and self-represented litigants. I argue that to the extent that court systems provide constrained assistance to self-represented litigants in the face of obviously unequal bargaining positions, they silently endorse what Fineman has termed “fictitious equality.”⁴³¹

A vulnerability analysis is distinct in that it is focused upon whether existing institutional arrangements are responsive across groups with shared vulnerability (or whether, conversely, they perpetuate existing advantages and disadvantages), and it avoids blaming the individual for his or her manifested vulnerability⁴³² or treating it as a mere side-effect. To the extent that the vulnerable subjects described in the list set out above are disadvantaged *by the operation of the family court system* – for example, due to limited assistance available to self-represented litigants in a fundamentally adversarial institution, judicial discomfort with custody decisions, institutionalized settlement pressure, family dynamics which require something other than judicial expertise to unwind and redress, or simply childhood status – a vulnerability theory analysis suggests that the court system perpetuates existing patterns of advantage and disadvantage.

⁴³¹ *Supra*, footnote 383 at page 135. [Fineman, Inevitable Inequality]

⁴³² *Supra*, footnote 60 at page 257. [Fineman, Responsive State]

Vulnerability theory suggests that true equal access to justice requires the state to “take existing structural differences into account and work toward their neutralization, so that those who have been historically disadvantaged are uplifted to a more level playing field.”⁴³³ Despite that this is an existing goal of some access to justice initiatives, it is not, in my view, surprising that it has proven difficult to achieve, given that “levelling the playing field” is a vague and contested vision. How level? What about unfairness to represented parties? What about bias? In a vulnerability theory framework, which seeks substantive equality for all persons served by state institutions, “levelling the playing field” is not a controversial or counter-intuitive goal. As noted, vulnerability theory aims to redefine the parameters of social justice⁴³⁴ through a responsive state. I argue here that shifting the focus of policy from the autonomous subject to the vulnerable subject could help to empower access to justice reform initiatives, including the Family Justice Working Group Report recommendation for “a more dramatic shift to non-adversarial approaches,” through “drastic change,” “fundamental overhaul” and a “paradigm shift.”⁴³⁵

Vulnerability theory’s focus on institutional change is at odds with reform proposals which rely upon individuals to independently choose to adopt new work habits. For instance, in a vulnerability theory analysis of disability law it was argued that it is “both a Sisyphean effort and an unjust request” to expect employers to change their practices in disadvantageous ways, as it

⁴³³ *Supra*, footnote 380 at page 626. [Fineman, Restrained State]

⁴³⁴ *Supra*, footnote 383 at page 133. [Fineman, Inevitable Inequality]

⁴³⁵ *Supra*, footnote 23. [Family Justice Working Group Report]

amounts to asking them to dilute their own privilege. The study concludes that only a “top down” approach to can result in uniform practice reform.⁴³⁶

As discussed in Chapter Two, the best-interests-of-the-child test has evolved along with changing social constructions of gender roles, has been the subject of “gender wars,”⁴³⁷ and as a result, best-interests-of-the-child presumptions are widely considered to be politically unfeasible.⁴³⁸ A vulnerability theory analysis recognizes identity characteristics as factors that contribute to levels of resilience, but not as a basis for competing entitlements. It avoids allowing identity arguments to obscure the institutional forces that distribute privilege and disadvantage in ways that *do not* correlate to traditional categories of identity. I argue that in family law systems these forces include an uncertain and litigation-inducing best-interests-of-the-child test.

As noted, vulnerability theory is fundamentally entwined with the concept of substantive equality. According to Fineman, a “cramped notion of equality”⁴³⁹ has evolved in American law, which merely requires formal equal treatment based upon non-discrimination. She writes that generalized harm or deprivation are not considered forms of inequality that the law can address,⁴⁴⁰ and a formal equality perspective isolates state accountability to cases of impermissible bias and provides no framework for challenging existing allocations of power and

⁴³⁶ *Supra*, footnote 399 at page 532. [Satz]

⁴³⁷ *Supra*, footnote 156 at page 70. [Scott and Emery, Gender Politics]

⁴³⁸ Martha Albertson Fineman, “The Politics of Custody and the Transformation of American Custody Decision Making” (1989) 22 U.C. Davis L. Rev. 829.

⁴³⁹ *Supra*, footnote 380 at page 609. [Fineman, Restrained State]

⁴⁴⁰ *Ibid.*, at page 610. [Fineman, Restrained State]

resources.⁴⁴¹ Vulnerability theory is intended to push back against this “impoverished sense of equality.”⁴⁴²

The Supreme Court of Canada, in contrast, has been clear that the equality rights guaranteed under section 15 of the *Charter* are not limited to formal equality but extend to substantive equality. The Supreme Court has rejected of a formal equality paradigm by acknowledging that discrimination may stem from group-based differential treatment, but also from the inequitable effects of similar treatment, that is, from failure to consider underlying differences between individuals “in a world of real social and economic group-based differences.”⁴⁴³ Supreme Court jurisprudence has described “substantive equality” as requiring the acknowledgment of, and response to, differences in the experiences of members of a particular group in order that they may be treated equally, and to “take into account patterns of disadvantage that may require proactive responses to address.”⁴⁴⁴

It is easy to discern parallels between the concept of equality in Canadian law and vulnerability theory. Notwithstanding this apparent resonance, constitutional scholars have reported widespread disappointment and frustration with the Supreme Court’s inconsistent

⁴⁴¹ *Supra*, footnote 60 at page 624. [Fineman, Responsive State] The author writes: “The ability of social institutions to operate in an inclusive, equitable and just manner should be as important to law and policy as deliberate discrimination against an individual belong to a protected category.”

⁴⁴² *Supra*, footnote 17 at page 2. [Fineman, Anchoring Equality]

⁴⁴³ Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (McGill University Press, 2010) at page 40.

⁴⁴⁴ Patricia Hughes, “Supreme Court of Canada Equality Jurisprudence and Everyday Life” (2012) *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* Vol. 58 Article 9 at page 246.

interpretation⁴⁴⁵ and application of the substantive equality standard.⁴⁴⁶ This response suggests that vulnerability theory has not been rendered redundant in Canada by judicial acceptance of a broad concept of equality. Most importantly, perhaps, the reportedly robust concept of equality under Canadian law (despite uneven judicial treatment) has legitimized substantive equality as a policy objective;⁴⁴⁷ I argue that this bodes well for the potential to effectively “level the playing field” through polices supported by the “vulnerability paradigm.”

I do not argue that self-represented litigants are a vulnerable population *only* within family court systems. As the empirical research component of this project described in detail below suggests, self-represented litigants are also vulnerable subjects in the tribunals studied. In particular, a highly uneven approach to the use of processes such as active adjudication, designed and adopted to assist self-represented litigants, suggests a random distribution of resources that privileges and protects those self-represented litigants who happen to be assigned to an active adjudicator, while tolerating the disadvantage of those who do not. Similarly, self-represented litigants who are given constrained levels of assistance by adjudicators who, but for the

⁴⁴⁵ *Supra*, footnote 383 at page 135. [Fineman, Inevitable Inequality] Fineman notes that in *Quebec (Attorney General) v. A.*⁴⁴⁵ Justices LeBel and Abella agreed that section 15(1) of the *Charter* guarantees substantive rather than formal equality, but LeBel, J. interpreted substantive equality as requiring a distinction based on the enumerated grounds of discrimination or the perpetuation of prejudice or stereotyping, even when it otherwise imposed disadvantage on the complainant, whereas Justice Abella did not consider the element of prejudice or stereotyping necessary, and instead adopted a flexible and contextual inquiry into “arbitrary disadvantage on the claimant.”

⁴⁴⁶ Diana Majury, “Equality Kapped; Media Unleashed” (2009) 27 Windsor Y.B. Access Just. 1 at page 2. See also Patricia Hughes, “Supreme Court of Canada Equality Jurisprudence and Everyday Life” *supra*, footnote 444 at page 258, and Colleen Sheppard, *supra*, footnote 456 at page 38; and Jonette Watson Hamilton, Jennifer Koshan, “Adverse Impact: The Supreme Court’s Approach to Adverse Effects Discrimination under Section 15 of the Charter” (2015) 19 Rev. Const. Stud.191. The authors argue that it is difficult for claimants to succeed on a substantive equality basis because the Court still uses direct discrimination through stereotyping as “the paradigmatic case” and therefore often fails to “see” adverse effect discrimination

⁴⁴⁷ *Supra*, footnote 444 at page 257. [Patricia Hughes, Supreme Court of Canada Equality Jurisprudence and Everyday Life]

unresolved tension between adversarial norms and institutionally endorsed inquisitorial processes, would willingly adopt an enabling approach, are subjected to a system of fabricated equality despite the good intentions of the adjudicator.

Vulnerability theory regards the relationship between the state and its institutions as mutually dependent. Fineman suggests there is a state interest in taking corrective action if institutions fail to operate effectively, as the result will be to better ensure that each individual has the resources needed to withstand manifested vulnerability and function as a productive and participating citizen.⁴⁴⁸ This argument is deeply relevant to our common vulnerability to family upheaval, as it is especially likely to manifest in ways that interfere with optimum functioning, not only for the parties themselves, but for their children. I adopt Fineman's argument that the state ought not to be cowed by the "autonomy myth"⁴⁴⁹ in responding to the present and potential *future harm* its institutions may inflict.

⁴⁴⁸ *Supra*, footnote 380 at page 625. [Fineman, Restrained State]

⁴⁴⁹ *Supra*, footnote 17 at page 2. [Fineman, Anchoring Equality]

4. TRIBUNAL CULTURE AND DECISION-MAKING

This chapter reviews prior research and writing regarding access to justice in administrative systems, the reported experiences of tribunal users, the use in tribunal systems of structured decision-making and the ways in which tribunals deal with self-represented parties. The essential components of adversarial and inquisitorial models are identified and discussed.

4.1 Access to Justice

Access to justice is a relatively new concern in administrative law systems,⁴⁵⁰ and one of its themes is that tribunal reform has been known to complicate tribunal processes by making them more court-like. The risk of tribunals becoming “over-judicialized” has been attributed to the “due process explosion”⁴⁵¹ that began with the adoption of the *Statutory Powers Procedure Act*⁴⁵² (“*SPPA*”) in 1966 and is thought to have intensified as a result of efforts to keep up with “progressive developments” in court systems, such as multiple layers of case management. It has been observed that tribunals tend to defensively overreact to criticism by adopting more court-like processes.⁴⁵³ In striking parallel with what has occurred in court systems, there is now a concern that some tribunal processes may become so expensive and alienating as to result in settlements primarily motivated by a desire to avoid the dispute resolution process.⁴⁵⁴

⁴⁵⁰ Lorne Sossin, “Access to Administrative Justice and Other Worries” (2007) online, http://www.law.utoronto.ca/documents/conferences/adminjustice08_Sossin.pdf

⁴⁵¹ Law Reform Commission of Saskatchewan, “Appeals from the Exercise of Statutory Powers of Discretion, Final Report” (March 2012), online: http://lawreformcommission.sk.ca/Appeals_from_Statutory_Decisions_Final_Report.pdf

⁴⁵² *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (“*SPPA*”).

⁴⁵³ David Mullan, “Tribunals Imitating Courts - Foolish Flattery or Sound Policy?” (Spring, 2005), 28 *Dalhousie L.J.* 1.

⁴⁵⁴ *Ibid.* [Mullan, *Tribunals Imitating Courts*]

It has been suggested that administrative law systems may counter over-judicialization by offering a variety of hearing models, “ranging from the formal process characterized by close proximity to criminal and civil trials...through conference hearings, summary adjudicative hearings, and emergency hearings,”⁴⁵⁵ as there may be points between mediation and full adjudication at which innovative processes can be developed.⁴⁵⁶ The empirical research for this project indicates that in some of the tribunals studied, this is, in fact, what has occurred.

The accessibility of a justice system is, of course, ultimately a question for its users. Within the limits of this project, accessibility is gauged through the reported experiences of adjudicators in dealing with self-represented litigants. As noted above, the experience of tribunal users is a vital topic for further research.

4.2 Self-Represented Litigants

It is December, close to the holidays. The tenant is behind in her rent payments and the landlord’s representative is seeking an eviction.

The tenant, a woman seemingly in her thirties, talks about her three children and needing to buy them Christmas presents. She has no representative and appears to have no legal argument and no plan other than appealing to the sympathy of the adjudicator.

The adjudicator explains that he cannot order a landlord to become a tenant’s creditor and issues an eviction order. The tenant leaves the hearing room in tears.

A man dressed in a suit, who appears to be a lawyer seated with his clients, follows the just-evicted tenant out of the hearing room. From a distance I hear him assure her that there is a service to which she can apply for immediate assistance in paying the overdue rent.

⁴⁵⁵ *Ibid.* [Mullan, Tribunals Imitating Courts]

⁴⁵⁶ David J. Mullan, *The View from North America: A Canadian Perspective on Three Troubling Issues*, (2004) 17 Can. J. Admin. L. & Prac. 167.

The National Survey of Tribunal Responsiveness to Self-Represented Parties– Measuring Access to Justice for Canadian Administrative Tribunals⁴⁵⁷ reports upon the results of a quantitative study of Canadian adjudicative tribunals in which service to self-represented parties was assessed. The study calculates national and regional “baselines” and provides various “comparative indices,” including a national average score (or “national index”) that gauges responsiveness to self-represented litigants. The national index is reported as 62%, which was interpreted as suggesting room for improvement. Identified areas of weakness include hearing planning and preparation, mid-range capability was reported with respect to information-related services, public education and case management, and reported strengths include dealing with language issues, timeliness, and hearings. The study concludes that tribunals with a *higher* prevalence of self-represented parties had a *lower* focus on the needs of self-represented parties; this unlikely result was attributed to several possible factors, including high volumes of work in tribunals with large numbers of self-represented parties which may have hindered the implementation of systemic access to justice measures, or conversely, to these tribunals having developed a culture so well-adapted to working with self-represented parties that strategies for dealing with them are less obvious and were therefore under-reported.⁴⁵⁸ Survey criteria will be refined in follow-up studies; the current recommendation is that strategies for improvement be developed on a tribunal-specific basis due to the variable needs of self-represented parties across different tribunal systems.

⁴⁵⁷ Lillian Ma, Anthanasios Hadjis, Garry Yee, Marilyn McNamara and Taivi Lobu, sponsored by the Council of Canadian Administrative Tribunals, “The National Survey of Tribunal Responsiveness to Self-Represented Parties– Measuring Access to Justice for Canadian Administrative Tribunals” (2016), 29 Can. J. Admin. L. & Prac. 165.

⁴⁵⁸ *Ibid.*, at pages 169-170. [Ma et al.]

The 2006 Genn Report,⁴⁵⁹ which is the product of a study of select tribunals in the United Kingdom, reports upon a survey of tribunal *users*, and includes a statistical analysis of tribunal decisions, as well as findings on access to tribunal justice, public perception of tribunals, and reported user experiences of tribunal proceedings. This study found that approximately half of tribunal participants were self-represented and had generally positive assessments of their experiences. Nonetheless, the study found that self-represented parties were less likely to succeed, and representation was generally regarded as valuable. Despite the positive reports of tribunal users, the study concluded that in some cases representation may be crucial to procedural and substantive fairness. The study examined tribunal users' *perceptions* of fairness, such as how comfortable parties felt during hearings, how well they understood procedures and questioning, the extent to which they believed they were given an opportunity to participate, whether they felt understood and whether adjudicators listened equally to what they and others had to say.⁴⁶⁰ The study reported positive findings in the range of seventy to ninety percent in all of these areas.

With respect to representation by counsel, it states:

Perhaps somewhat surprisingly, representation appeared to have little effect and users said that they had felt comfortable in the tribunal. Some 69% of represented users and 72% of unrepresented users when questioned after the end of the hearing said that they had felt comfortable during the hearing.⁴⁶¹

The demand for tribunal services, and their popularity among policy-makers has reportedly grown in step with the burgeoning self-represented litigant population and its increasing diversity:

⁴⁵⁹ The Genn Report examined the Appeals Service (TAS) Criminal Injury Compensation Appeals Panels (CICAP) and Special Education Needs and Disability Tribunals (Sendist).

⁴⁶⁰ Genn, Hazel; Lever, Ben; and Gray, Lauren, "Tribunals for Diverse Users" (UK: Research Unit, Department for Constitutional Affairs, Justice Rights and Democracy, 2006) at page 44. online: http://www.dca.gov.uk/research/2006/01_2006.pdf

⁴⁶¹ *Ibid.*, at page 215. [Genn, Tribunals for Diverse Users]

Individuals are looking to these tribunals as simpler and more economical avenues to review administrative decision making and to resolve their disputes, free from the many formal trappings of the law courts – a trend which is likely to continue as the cost of access grows as a concern, not only for socially and economically disadvantaged individuals but also for the politically significant middle class.⁴⁶²

As noted above, the user experience is a critical aspect of tribunal functioning that is recommended as a subject of further study.

4.3 Soft Law and Structured Decision-Making

*Fairness and predictability are woven into the idea of the rule of law in the context of administrative discretion and its aversion to arbitrary decision-making.*⁴⁶³

In interviews conducted for this project it was frequently remarked that decision-making guidelines for an adjudicative tribunal would be an illegitimate fetter upon discretion. Given that guidelines are most controversial in the context of administrative adjudicative tribunals, the category into which a custody and access tribunal would fall, the rationale for guidelines, their potential uses, and their sources of legitimacy are discussed in some detail.

A legislature may articulate binding decision-making guidelines in a tribunal's enabling statute, or it may give a tribunal authority to issue binding guidelines. In the absence of this authority a tribunal may still generate *non-binding guidelines*, a form of "soft law."⁴⁶⁴ Houle and Sossin

⁴⁶² Lorne Sossin and Jamie Baxter, "Ontario's Administrative Tribunal Clusters: A Glass Half-Full or Half-Empty for Administrative Justice?" (2012), 12 Oxford U. Commw. L.J. 157 at page 10.

⁴⁶³ France Houle and Lorne Sossin, "Tribunals and Guidelines: Exploring the Relationships between Fairness and Legitimacy in Administrative Decision-Making" (2006), 46 Canadian Public Administration 282.

⁴⁶⁴ *Ibid.*, at page 287. [Sossin and Houle] Soft law refers to non-legislative instruments intended to guide decision-making, and includes non-binding "policy guidelines, technical manuals, rules, codes, operational memoranda, training materials, enter interpretive bulletins, or even oral directions" see *infra*, footnote 482 at page 466-467. [Sossin, Discretion unbound]

identify three ways in which tribunal-generated guidelines may be utilized: to complete the legal order, develop the legal order, or remodel the legal order. Developing the legal order means to adopt specific interpretations of the law a tribunal it is charged with applying, tied to certain circumstances, with or without a specific mandate.⁴⁶⁵ Guidelines of this sort can clarify, expound upon and communicate the framework for tribunal decision-making,⁴⁶⁶ and enhance consistency, accountability, transparency and fairness.⁴⁶⁷ In my view, this is the guideline function that would be most useful for a family law tribunal.

The *legitimacy* of guidelines is dependent upon several factors, including: the scope of a tribunal’s policy-making function, the extent to which it is appropriate for consistency to be encouraged, independence and accountability concerns, and *Charter* compliance.

(a) Policy-Making

*Policymaking - the reconciliation and elaboration of lofty values into operational guidelines for the daily conduct of society's business.*⁴⁶⁸

All tribunals studied for this project are administrative adjudicative tribunals. According to first principles, administrative *regulatory* tribunals have a *policymaking* role (suggesting they may develop soft law) whereas *adjudicative* tribunals have a *policy implementing* role (suggesting they may not).⁴⁶⁹ The extent of a tribunal’s involvement in “crafting policy” is one way of distinguishing “quasi-executive” (more regulatory) and “quasi-judicial” (more adjudicative)

⁴⁶⁵ *Ibid.*, at page 287. [Sossin and Houle]

⁴⁶⁶ *Ibid.*, at page 283. [Sossin and Houle]

⁴⁶⁷ Anna Pratt and Lorne Sossin, “A Brief Introduction of the Puzzle of Discretion” (2009), 24 No. 3 Can. J. L. & Soc. 301.

⁴⁶⁸ Colin S. Diver, “Policymaking Paradigms in Administrative Law” (1981) 95 Harv. L. Rev. 393 at page 393.

⁴⁶⁹ S. Ronald Ellis, *Unjust by Design, Canada’s Administrative Justice System* (Vancouver, UBC Press, 2013) at page 226.

tribunals.⁴⁷⁰ The principle at stake is that governments cannot both make law and judge its application; an independent forum is needed in which the government perspective on its laws can be challenged, except where law is merely applied in a regulatory way.⁴⁷¹

In *Consolidated Bathurst*,⁴⁷² the Supreme Court of Canada held that within the broad discretion conferred upon the Ontario Labour Relations Board (an adjudicative tribunal) decision-making is inevitably entwined with policy considerations. The Board successfully argued that, “law and policy are to a large degree inseparable...and come to be promulgated through the form of case by case decisions.”⁴⁷³ In the same decision the Supreme Court emphasized the importance of consistency in administrative adjudication, noting, “it is obvious that coherence in administrative decision making must be fostered.”⁴⁷⁴ The implication is that discretionary decision-making itself is a form of policy-making, and the further step of consolidating these policy choices in the form of guidelines is a legitimate exercise for administrative adjudicative tribunals; nonetheless, the *degree* to which consistency should be encouraged through the use of guidelines was not entirely clarified.⁴⁷⁵

Administrative adjudicative decision-making is subject to contradictory imperatives: it is not bound by precedent, but cannot disregard past tribunal decisions; it may be subject to guidance,

⁴⁷⁰ *Idid.* [Ellis, *Unjust by Design*]

⁴⁷¹ *Ibid.* The example Ellis provides is that whether or not a license is issued is something that the government can delegate to a regulatory agency, but once there is a dispute between the government and individuals (or just between individuals) as to whether a license should or should not be issued (as occurs when a government decision is under appeal or there is a private dispute over licensing) an independent decision-maker is required.

⁴⁷² *Iwa v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282.

⁴⁷³ *Ibid.*, at page 315. [*Consolidated Bathurst*]

⁴⁷⁴ *Ibid.* [*Consolidated Bathurst*]

⁴⁷⁵ *Supra*, footnote 463 at page 294. [Houle and Sossin]

but discretion must not be fettered.⁴⁷⁶ While the nature of a tribunal is relevant to the need for consistency, categorization alone does not resolve the problem of degree.⁴⁷⁷ For example, the tribunals studied for this project are “administrative adjudicative” in nature, yet as discussed in detail below, a significant number of tribunal members interviewed appeared to strongly identify with judges in court systems and reported that any decision-making guidelines would be an inappropriate fetter upon discretion, although it was almost universally reported that consistency with prior decisions is an important tribunal value.

(b) Independence and Accountability

Judicial independence has traditionally been defined as follows:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: *no outsider* - be it government, pressure group, individual or even another judge, should interfere, in fact, with the way in which a judge conducts his or her case makes his or her decision.⁴⁷⁸ [emphasis added]

Interference in tribunal decision-making by “outsiders” such as government is only problematic in a “back-channel” sense,⁴⁷⁹ given that a tribunal exercises a statutory power of decision, legislation adopted in the ordinary course may constrain administrative adjudication without triggering independence concerns. “Outsider” interference may, however, also include guidelines generated by the tribunal itself, but only if they constrain the discretion of decision-makers to the extent of compromising independence and impartiality.⁴⁸⁰ Therefore, non-binding guidelines

⁴⁷⁶ *Ibid.*, at page 294. [Houle and Sossin]

⁴⁷⁷ *Ibid.* [Houle and Sossin]

⁴⁷⁸ *Supra*, footnote 472 at page 332. [*Consolidated Bathurst*]

⁴⁷⁹ *Supra*, footnote 48 at page 6. [Sossin, Independence, Accountability]

⁴⁸⁰ *Supra*, footnote 463. [Houle and Sossin]

may not contain language that suggests they are binding, or otherwise interfere with an adjudicator's consideration of the facts in individual cases, or freedom to exercise judgment.⁴⁸¹

The legal legitimacy of guidelines is assessed in the course of judicial review cases in which they have been applied, and subsequently challenged through the *ultra vires* doctrine.⁴⁸² If guidelines tread beyond the scope of delegated authority they are outside a tribunal's jurisdiction, as is any individual decision that exceeds the scope of delegated authority, due, for example, to an adjudicator considering irrelevant evidence, acting for an improper purpose, or deciding on an unprincipled basis or in bad faith. In this framework, guidelines *unduly* fetter discretion if they go beyond indicating the appropriate scope for tribunal decisions or providing a framework for decision making; they may illustrate reasonable interpretations of the tribunal's powers but may not provide mandatory answers or solutions.

Finally, guidelines may be problematic in that granting a tribunal authority to develop guidelines may inadvertently give significant power to officials who are not subject to any meaningful measure of political accountability.⁴⁸³ It has been suggested that political accountability can be addressed through transparency, achieved by making guidelines publicly available and seeking input from members of the constituent community as part of an open policy development process.⁴⁸⁴ Broad-based input in the development of guidelines reflects a "bottom-up" approach

⁴⁸¹ *Supra*, footnote 450 at page 8. [Sossin, Access to Administrative Justice]

⁴⁸² Lorne Sossin, "Discretion unbound: Reconciling the Charter and soft law" (2003) 45(4) Can. Pub. Admin. 465.

⁴⁸³ *Supra*, footnote 463 at page 304. [Houle and Sossin]

⁴⁸⁴ Lorne Sossin and Charles W. Smith, "Politics of Transparency and Independence Before Administrative Boards" (2012), 75 Sask. L. Rev. 13 at paragraph 77.

to norm production,⁴⁸⁵ which similarly occurs when tribunals communicate input on policy matters to the executive branch.⁴⁸⁶ The technology-driven demand for greater transparency in many fields has intensified the potential for this form of policy-making, and a “collaborative governance” model, which is consistent with New Governance Theory, has been suggested as a replacement for the traditional “command and control” approach to policy-making. In a collaborative governance model, the “policy process” is informed by broad-based community participation in identifying approaches to issues and expanding the range of options for dealing with them, utilizing an array of methods of public engagement, both in-person and online.⁴⁸⁷

(c) Charter Compliance

The constitutionality of guidelines can only be assessed in individual cases in which the *Charter* is invoked upon review.⁴⁸⁸ It has been suggested that the caselaw offers lessons for the development of guidelines: first, a guideline that is constitutional on its face may, in its application, offend the equality rights contained in section 15 of the *Charter* and second, a grant of broad discretion with little guidance as to its application may fail to protect against “arbitrary conduct” as required by section 7 of the *Charter*.⁴⁸⁹ In short, guidelines intended to be non-binding must be non-binding on their face and in their application, and in their application they must not deny equal treatment or enable arbitrary conduct.

⁴⁸⁵ *Supra*, footnote 463 at page 284. [Houle and Sossin]

⁴⁸⁶ *Supra*, footnote 484. [Sossin and Smith]

⁴⁸⁷ Lisa Blomgren, “The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance” (2010), *Wis. L. Rev.* 297 at page 300; see also *supra* footnote 57 at page 88. [Nourse and Shaffer]

⁴⁸⁸ *Supra*, footnote 482. [Sossin, Discretion unbound]

⁴⁸⁹ *Supra*, footnote 463 at page 304. [Houle and Sossin]

It is one of the many complexities of administrative law that guidelines may be variously interpreted as enhancing or detracting from the legitimate exercise of a tribunal mandate. In the result, a range of considerations must inform the development and implementation of guidelines, but the administrative adjudicative nature of a tribunal does not, contrary to the views expressed in interviews for this project, indicate that guidelines *per se* are an inappropriate fetter upon adjudicator discretion.

4.4 Less Adversarial Processes

The landlord has obtained an order evicting a tenant for marijuana use. The tenant has applied for leave to review an eviction order. Leave is granted by the Vice-Chair and the review hearing commences immediately thereafter.

It is a comfortable and well-appointed hearing room, and the lighting is soft. The parties testify from counsel tables, rather than “taking the stand.” Both parties are represented. The tenant, a soft-spoken man seemingly in early middle age, is guided through his testimony, which discloses that he waited almost 9 years for his subsidized apartment, is on ODSP with an income of \$777 per month, suffers from schizophrenia, and has a 16-year-old daughter. He further testifies that at an earlier time he was homeless and lived in a bus terminal, and he has nowhere to go if his tenancy is terminated; his mental health has improved since moving into the subsidized apartment, which has allowed him to spend more time with his daughter. His evidence is given in a straightforward manner, without self-pity. He makes concessions against interest without hedging.

During cross-examination the tenant answers more slowly and takes on a dazed look, becoming confused over details of dates and locations. The adjudicator takes notes throughout his testimony. Landlord’s counsel is attempting to establish that the tenant could find another place to live. The adjudicator interjects to ask whether the landlord concedes that the tenant would lose his rent subsidy if the tenancy is terminated, and landlord’s counsel indicates he does not know. The adjudicator says she thinks this is so. Tenant’s counsel says he believes the subsidy will be lost. The adjudicator asks the tenant if he believes he can find another place without losing his subsidy, whether it would be reasonable to adjourn for a month to let him look. It is a discussion led by the

adjudicator, in which each side speaks to alternative remedies. The adjudicator's manner is matter-of-fact, without a hint of condescension. She is both supportive of the landlord's zero tolerance drug policy and sensitive to the tenant's obvious vulnerability.

The adjudicator states, as if it is a proven fact, that the tenant will be devastated if, after a nine-year wait, he loses the apartment over a single incident. She indicates that the member who made the eviction order considered (but did not make) a conditional order based upon the tenant's ability to transfer the rent subsidy. She suggests another option: a conditional order reinstating the tenancy on the condition that there is no further marijuana use on the premises and providing for automatic termination of the tenancy if the order is breached.

The atmosphere in the room is almost intimate. The tenant's difficult circumstances have been discussed quietly and respectfully. Although extremely soft-spoken, the tenant is not asked to speak up. Questioning by landlord's counsel was purposeful but not harsh. The adjudicator's approach was a problem solving one, in which all of the participants seemed comfortable and invested.

The adjudicator reserves her final decision to consider a procedural matter, saying that if it is not a fatal flaw she will write a conditional order allowing the tenant to stay provided there are no further incidents of drug use. The appeal was filed on October 8 and heard on October 20. The hearing lasted about 45 minutes.

While tribunal process design is highly varied, unless the enabling legislation provides otherwise, all Ontario tribunals that hold hearings must follow procedures mandated by the *SPPA*,⁴⁹⁰ which are meant to protect certain rights: to notice of proceedings, to know the case to be met, to representation, to conduct cross-examination of witnesses, and to be provided with reasons for decisions. Within this framework, section 25.0.1 of the *SPPA* provides that tribunals are free to develop detailed procedural rules to allow for flexibility, innovation and informality, provided that the appropriate standard for fairness is met.⁴⁹¹ Therefore, within the limits of the

⁴⁹⁰ *Supra*, footnote 452. [*SPPA*]

⁴⁹¹ Sara Blake, *Administrative Law in Canada, 4th Edition* (Toronto: LexisNexis Butterworths, 2006).

natural justice requirement of fairness, a tribunal is empowered to tailor its decision-making processes to its mandate and clientele. This power is echoed in the *Social Justice Tribunals Ontario Common Rules*,⁴⁹² applicable to all of the tribunals studied here, in which it is stated that the rules and procedures of a tribunal shall be “liberally and purposively interpreted and applied to promote the fair, just and expeditious resolution of disputes” and to “allow parties to participate effectively in the process whether or not they have a representative.”⁴⁹³[emphasis added] The *Rules* further provide that “a tribunal may vary or waive the application of any rule or procedure, on its own initiative or on the request of a party, except where to do so is prohibited by legislation or a specific rule.”⁴⁹⁴

(a) Hybrid Models

Hybrid systems have been described as the “new normal” in administrative justice,⁴⁹⁵ and in family justice systems they have been defined as “those that combine efforts to bring about consensual dispute resolution with efforts to identify and impose a just resolution.”⁴⁹⁶ Hybrid adjudication systems can be considered as points on a continuum between adversarial and inquisitorial models⁴⁹⁷ or as existing on a continuum between adversarial and non-adversarial processes.⁴⁹⁸ This is important to keep in mind, as “inquisitorial” and “non-adversarial” do not

⁴⁹² *Social Justice Tribunals Ontario Common Rules*, online: <http://www.sjto.gov.on.ca/documents/sjto/Common%20Rules%20of%20Procedure.html>

⁴⁹³ *Ibid.*, Rule A3.1.

⁴⁹⁴ *Ibid.*, Rule A4.2.

⁴⁹⁵ Samantha Green and Lorne Sossin, “Administrative Justice and Innovation: Beyond the Adersarial/Inquisitorial Dichotomy” in *The Nature of Inquisitorial Processes in Adversarial Regimes*, *supra*, footnote 281 at page 71. 272

⁴⁹⁶ *Supra*, footnote 40 at page 48. [Semple and Bala, Reforming the Family Justice System]

⁴⁹⁷ Robin Creyke, “Pragmatism v. Policy: Attitude of Australian Courts and Tribunals to Inquisitorial Process” in *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives*, Laverne Jacobs & Sasha Baglay, eds., (Surrey, UK: Ashgate, 2013) at page 37.

⁴⁹⁸ *Supra*, footnote 23. [Family Justice Working Group Report]

mean the same thing. This chapter discusses hybrid systems in terms of blending adversarial and inquisitorial elements.

As noted above, “pure” adversarial and inquisitorial paradigms are poor reflections of current reality.⁴⁹⁹ It has been suggested that contrasts between adversarial and inquisitorial systems have been grossly exaggerated,⁵⁰⁰ as European inquisitorial systems often utilize elements of adversarial procedure⁵⁰¹ and only certain French administrative tribunals can accurately be described as purely inquisitorial.⁵⁰² Despite this, as noted above, the characteristics associated with these paradigms remain useful for distinguishing between the fundamental orientation of different justice systems, that is, understanding their ideological starting point. It is therefore worthwhile to consider the archetypal features of each paradigm, the strengths and weaknesses attributed to them, and how they have endured or eroded.

As noted, the components of proceedings with inquisitorial elements vary greatly in different forums and jurisdictions, but *may include* any or all of the following:⁵⁰³

- claims, documents and other written materials produced by a party are addressed to the court or tribunal, and forwarded to the responding party;

⁴⁹⁹ *Supra*, footnote 75 at page 3. [King, Freiberg et al.]

⁵⁰⁰ *Supra*, footnote 178. [Langbein]

⁵⁰¹ *Ibid.* [Langbein] See also: *supra*, footnote 172 at page 702. [Slobogin]

⁵⁰² Jean-Bernard Auby, “About the Inquisitorial Character of Administrative Litigation Procedure in French Law” in *The Nature of Inquisitorial Processes in Adversarial Regimes*, *supra*, footnote 281 at page 113.

⁵⁰³ See: *Supra*, footnote 495 at page 74. [Sossin and Green] and *infra*, footnote 506. [Asimow]

- the judge or adjudicator is empowered to determine the facts that must be established, and the evidence required, including witnesses and documentary evidence;
- the tribunal may engage in independent fact-finding by requesting additional information from the parties, calling witnesses, and/or requesting documentary evidence;
- the decision-maker determines when the case is ready to be heard and sets the date for hearing;
- the decision-maker is permitted to consider arguments concerning essential aspects of the law, regardless of whether invoked by the parties;
- the judge or adjudicator is not bound by formal rules of evidence, and is permitted to modulate the burden of proof;
- the decision-maker may help a party to prove the necessary facts, provided the exercise is worthwhile;
- there is no cross-examination of witnesses by the parties;
- most of the evidence is in written form;
- all documentary evidence is collected in a file assembled by the decision-maker;
- the decision-maker may be empowered to conduct or supervise an investigation;
- there is typically an absence of legal representation; and

- witnesses may be restricted to answering questions only from tribunal members, with parties having no right to question the other party or independently address the tribunal.

The reported strengths of inquisitorial systems include: 1) ability to compensate for differences between the parties as to resources, ability and knowledge, by allowing the decision-maker to assist the weaker party; 2) ability to better ensure the accuracy of fact-finding or “truth-finding;” and 3) greater efficiency and less susceptibility to strategic delay.

The foregoing list illustrates that in inquisitorial systems responsibility for important aspects of the decision-making process is shifted from the individual to the state; it further suggests that the extent to which many hybrid systems have been endowed with inquisitorial elements is quite limited. Indeed, in the UK tribunals are often described as “user-friendly,” but may not assist a party to prepare a case or to gather evidence.⁵⁰⁴ Similarly, despite that it is a foundational principle of administrative law in Australia that tribunals are not bound to follow adversarial procedures, no Australian court has given unconditional support for the use of inquisitorial processes, and among Australian tribunals expressly empowered to conduct investigations these powers have reportedly seldom been used, although in some tribunals this is reportedly changing.⁵⁰⁵

Tribunals that tend to attract inquisitorial powers have some common features. First, the work of these tribunals tends to suggest an underlying *public interest*, coupled with specific

⁵⁰⁴ *Supra*, footnote 497. [Creyke]

⁵⁰⁵ *Ibid.* [Creyke]

vulnerabilities that trigger concerns about the use of adversarial processes.⁵⁰⁶ For example, in Australia family courts have developed the Less Adversarial Trial, and inquisitorial elements are permitted in refugee hearings; the latter has been attributed to the perceived public interest in proper and consistent implementation of immigration policies, the vulnerable populations involved, and related efficiency concerns.⁵⁰⁷ Similarly, in UK tribunals an “enabling approach” (in which every possible assistance is provided to self-represented parties, including bringing out relevant facts) has generally been advanced, but has been most consistently *adopted* where self-represented parties face a repeat-player institutional litigant, for example, in social security cases.⁵⁰⁸ Lastly, in the United States, some inquisitorial methods are used in problem-solving family courts, and for claims related to entitlement programs such as Veterans’ Benefits and Social Security, where the perceived public interest lies in assisting highly “deserving” claimants, and efficiency concerns are engaged by vulnerability, large caseloads and backlogs.⁵⁰⁹

In the context of public law, Shelley Kierstead has noted that “few would argue against the proposition that emotionally and physically healthy children are essential to a thriving society;”⁵¹⁰ indeed, the documented consequences for children of high conflict separation and divorce, and the common knowledge that these consequences can be made worse by the court system, support a public interest in the private law sphere as well. What is more, the growing

⁵⁰⁶ Michael Asimow, “Inquisitorial Adjudication and Mass Justice in American Administrative Law” in *The Nature of Inquisitorial Processes in Adversarial Regimes*, *supra*, footnote 281 at page 93.

⁵⁰⁷ Gerald Heckman, “Inquisitorial Approaches to Refugee Protection Decision-making: The Australian Experience and Possible Lessons for Canada” in *The Nature of Inquisitorial Processes in Adversarial Regimes*, *supra*, footnote 281 at page 126.

⁵⁰⁸ Robert Thomas, “From “Adversarial v Inquisitorial” to “Active, Enabling, and Investigative:” Developments in UK Administrative Tribunals” in *The Nature of Inquisitorial Processes in Adversarial Regimes*, *supra*, footnote 281 at page 66.

⁵⁰⁹ *Supra*, footnote 506. [Asimow]

⁵¹⁰ *Supra*, footnote * at page 44. [Kierstead, Therapeutic Jurisprudence]

population of self-represented litigants in family law disputes has clearly triggered *efficiency* concerns which, paired with a public interest, further justify inquisitorial dispute resolution processes. I argue that a system for custody and access dispute resolution (and perhaps for “ordinary” family law cases) should fully empower adjudicators to use all available means to assist self-represented litigants and obtain all relevant information as expeditiously as possible.

A comparison between hybrid processes and a “Star Chamber” is clearly extreme, and so too is a stereotypical portrayal of adversarial systems, given the drift away from dogmatism on both ends of the continuum. With this in mind, the essential components of a *traditional* adversarial model include:⁵¹¹

- a passive adjudicator who makes rulings as requested by counsel and rarely, if ever, interacts directly with parties or witnesses;
- party control of the evidence (including figuring out what is needed to build a case, how to obtain it and in what form it should be presented (that is, in bound form, with indices and tabs) and providing this material to the opposite party and to the court in accordance with deadlines;
- no “independent fact-finding” on the part of the decision-making body (all findings must be based upon the parties’ evidence);
- complex rules of evidence;
- party responsibility for presenting all evidence to the court in a manner consistent with procedural norms, including opening statements, giving testimony, examining and cross-examining witnesses, making appropriate

⁵¹¹ *Supra*, footnote 495 at page 73. [Sossin and Green]

- objections, responding to the opposing party's objections, properly filing documentary evidence in the form of exhibits, qualifying expert witnesses and challenging the qualification of the opposing party's expert witnesses, and making closing statements;
- party responsibility for pretrial processes, including case conferences, settlement conferences, and trial management conferences, all of which involve preparation and filing of documents with the court and the opposing party, and the same with respect to any interim motions; and
 - an emphasis on "winning" such that a favourable outcome is typically valued more than a decision considered correct by reference to some external standard.

The endurance of the adversarial model has been attributed to a tendency to regard existing law and legal systems as "inevitable," otherwise known as "path dependence" or, more harshly, as a "paralysis inducing" mind-set.⁵¹² An alternative (or compounding) explanation is ignorance on the part of the public as to the real alternatives presented by inquisitorial-based approaches to justice.

It is trite, but worth noting, that traditional adversarial processes have been glamourized in American popular culture (*Inherit the Wind*, *To Kill a Mockingbird*...more recently, *The People v. O.J. Simpson*) and in the United Kingdom the archaic symbolism of adversarial justice is famously rich and remains largely in place. As "path dependence" suggests, adversarial systems

⁵¹² *Supra*, footnote 33 at page 607. [Dagan]

tend to be equated to “fairness” in cultures in which they are the traditional form of justice. Indeed, it seems likely that even those with no substantial knowledge of legal systems are able to articulate the symbolic meaning of the blindfolded maiden grasping the scales of justice. The result is a perception, even in the minds of self-represented litigants *who are disadvantaged by adversarial systems*, is that justice depends upon *combative and performative* process.

The public perception of the relative “fairness” of adversarial processes is, in my view, confounding; indeed, a recent study indicates only fourteen percent of the American public have extreme confidence in lawyers, whereas thirty-two percent have extreme confidence in judges.⁵¹³ The study notes that it is difficult to reconcile a finding of more public confidence in judges than lawyers with public faith in adversarial systems, in which lawyers have more control than judges.⁵¹⁴ In my view, the fact that parties, through their lawyers, *control* adversarial processes is likely not well understood by most people, who may well assume that judges *are in charge of everything*.

It is a question for further research whether, to the extent that there is a public preference for adversarial systems, it stems from cultural conditioning and ignorance of alternatives, discussed earlier, obliviousness to the fact that adversarial systems only work well when there is some semblance of equality between the skills and resources on either side, a combination of these factors, or something else altogether. Perhaps research subjects, particularly self-represented litigants, who are informed of the potential for modified *inquisitorial* processes to “level the playing field” would express different preferences. Finally, the strength of the adversarial model

⁵¹³ *Supra*, footnote 506. [Asimow]

⁵¹⁴ *Ibid.*, at page 94. [Asimow]

has been attributed to the use of an adversarial court process in judicial review of administrative proceedings – encouraging the view that adversarial procedures are more authoritative, or even “more correct.”⁵¹⁵

Encouragement for the use of inquisitorial elements in some types of adjudication can be seen in the “Pinto Report,” discussed below with reference to the Human Rights Tribunal of Ontario, and the Family Justice Working Group Report, which recommends exploring the use of inquisitorial or “modified inquisitorial models” for family law and suggests a pilot project to evaluate the use of such models in Canada.⁵¹⁶ Many hybrid inquisitorial-based systems use elements of adversarial civil procedure; for example it has been observed that the German justice system (which reportedly inspired the Australian LAT) was designed to avoid “the worst excesses” of the adversarial model; toward that end it has eliminated strictly partisan fact-finding, partisan experts, and coached witnesses.⁵¹⁷ Others have noted that “suppressing facts,” using “tricks and surprises,” and “manipulating fact-finders”⁵¹⁸ also require elimination.⁵¹⁹ The point is that reportedly effective reforms have been aimed at cabining (but not eliminating) adversarial processes.

Working examples of the convergence of adversarial and inquisitorial models include the tribunals studied for project, and more prominently perhaps, the Canadian Immigration and Refugee Board (“IRB”). The IRB adopted an inquisitorial element by issuing “Guideline 7”

⁵¹⁵ *Supra*, footnote 497. [Creyke]

⁵¹⁶ *Supra*, footnote 23 at page 9. [Family Justice Working Group Report]

⁵¹⁷ *Supra*, footnote 178 at page 842. [Langbein]

⁵¹⁸ *Supra*, footnote 179 at page 912. [Findley]

⁵¹⁹ *Supra*, footnote 170 at page 6. [Menkel-Meadow]

pursuant to Board authority under the *Immigration and Refugee Protection Act* to “issue guidelines...to assist members in carrying out their duties.”⁵²⁰ Guideline 7 allows adjudicators to question claimants in advance of counsel; the Board claimed that Guideline 7 was needed to curtail rambling examinations in chief,⁵²¹ (an efficiency concern). Although the Federal Court of Appeal in *Thamotharem v. Canada (Minister of Citizenship & Immigration)*⁵²² found that Guideline 7 fettered discretion by being, in effect, mandatory, the Court otherwise supported a “pseudo-inquisitorial role” for IRB members, specifically noting it did not imply less *fairness*.

Thamotharem illustrates that inquisitorial innovations extend beyond active adjudication and other hearing room strategies, and include hearing, pre-hearing and intake processes designed to make tribunals more manageable (consistent with the most pressing needs of self-represented litigants identified in the White Paper),⁵²³ which include assistance with forms, and plain language information and education.⁵²⁴ Hybrid processes may include simplified application processes, clear tribunal rules, and tribunal suggestions as to available claims and potential witnesses or other evidence. Finally, in administrative law systems hybrid processes are generally authorized under the principle that tribunals are “masters in their own house;”⁵²⁵ as noted earlier, they are empowered to design their own processes within the bounds of their enabling statute and regulations, the *SPPA*, if applicable, and rules of fairness and natural justice.

⁵²⁰ See *Chairperson’s Guidelines*, Guideline 7, Immigration and Refugee Board of Canada, website: irb-cisr.gc.ca., issued pursuant to subsection 159(1)(h) of the *Immigration and Refugee Protection Act*.

⁵²¹ *Supra*, footnote 491 at page 7. [Blake - *Administrative Law*]

⁵²² *Thamotharem v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 16, [2006] 3 F.C.R. 168, See also *Charkaoui v. Canada*, [2007] 1 S.C.R. 350 at para. 50.

⁵²³ *Supra*, footnote 91 at page 17. [Farrow et al., White Paper]

⁵²⁴ *Ibid.*, at page 17. [Farrow et al., White Paper]

⁵²⁵ *Prasad v. Canada* [1989] 1 S.C.R. 560.

(b) Active Adjudication

*I'd like to thank you for losing this case for me.
Any other questions, your Honour?*

Active adjudication is controversial, despite that it is not newly invented, nor exclusive to tribunals. Indeed, before a deluge of self-represented litigants expanded the rationale for active adjudication processes, Owen Fiss described the role of judges in court processes as follows:

Of course, imbalances of power can distort judgment as well: Resources influence the quality of presentation, which in turn has an important bearing on who wins and the terms of victory. We count, however, “on the guiding presence of the judge, who can employ a number of measures to lessen the impact of distributional inequalities.” He can, for example, supplement the parties' presentations by asking questions, calling his own witnesses, and inviting other persons and institutions to participate as amici.⁵²⁶

The decision-making environment described by Fiss is not an uncontested vision; the *level of assistance* considered appropriate to assist self-represented (or under-represented) parties varies from merely providing information about basic procedure to substantial assistance to “lessen the impact of distributional inequalities” as Fiss suggests, that is, levelling the playing field.

Michelle Flaherty defines active adjudication as a component of adversarial proceedings whereby the adjudicator may provide guidance and direction as to how the hearing will be conducted, and may assist the parties by explaining procedural steps, raising jurisdictional issues adopting a flexible approach to the rules of evidence and procedure, but may not provide legal advice or take on the role of representative.⁵²⁷ The issue in active adjudication is *how active*, and the obvious concern is apprehension of bias, which as noted above, appears to require re-examination in the self-represented litigant era.

⁵²⁶ *Supra*, footnote 280 at page 1077. [Fiss]

⁵²⁷ Michelle Flaherty, “Best Practices in Active Adjudication” (2015), 28 Can. J. Admin. L. & Prac. 291 at page 2. (Westlaw).

According to administrative law scholars, administrative proceedings are generally more flexible, expeditious and informal than court proceedings, and relatively intense engagement with the parties is generally more acceptable in tribunals than in non-inquisitorial courts; indeed, it has been asserted that the flexibility of administrative law under a *Baker* analysis supports “adjudicator activism” in some contexts.⁵²⁸ Conference materials prepared by the Society of Ontario Adjudicators (SOAR)⁵²⁹ list the benefits of active adjudication processes as including: shortening hearings, improving understanding of the issues, improving decision-making, enhancing efficiency by allowing adjudicators to exercise greater control over proceedings, improving access to justice; improving proportionality by enabling processes to be tailored to the nature of the parties and the dispute, and facilitating decision writing. These materials further cite the need to balance these benefits with “fairness and avoiding any appearance of bias, pre-judgment, or descent into the arena and... the dust of conflict.”⁵³⁰ Indeed, the most controversial active adjudication technique is direct questioning of witnesses, or interfering in questioning, especially on cross-examination. The SOAR conference materials assert that it is permissible for an adjudicator to put questions to a witness that should have been asked by counsel, in order to bring out some relevant matter, or to explore an area that a witness’ answers have left vague, or to clear up ambiguities; they also assert that cross-examination, usurping the role of counsel, “excessive questioning,” and “not believing witnesses” must be avoided.⁵³¹ The space for

⁵²⁸ Freya Kristjanson and Sharon Naipul, “Active Adjudication or Entering the Arena – How Much is Too Much?” (2011), 24 Can. J. Admin. L. & Prac. 201 at page 5. (Westlaw)

⁵²⁹ Jeff Cowan and Jill Doherty, “Active Adjudication and Civility” (November 7, 2013), Society of Ontario Adjudicators Annual Conference Materials online: <https://soar.on.ca/node/262>

⁵³⁰ *Ibid.* [Cowan and Doherty]

⁵³¹ *Ibid.* [Cowan and Doherty]

confusion is vast, given that the *permitted* scope of questioning could serve as a partial definition of cross-examination.

(c) Apprehension of Bias

The natural tension between active adjudication and traditional notions of impartiality illustrates the obvious fact that active adjudication techniques are incompatible with adversarial norms, upon which court-system conceptions of bias are naturally based.⁵³² As noted above, increased use of active adjudication has occurred in step with burgeoning numbers of self-represented litigants, who also do not have a natural place in the adversarial paradigm. Indeed, active adjudication is seemingly the essence of a moderate inquisitorial model, and according to *inquisitorial* ideology and norms it enhances fairness and natural justice.⁵³³

The adoption of active adjudication as an element of otherwise adversarial systems engenders debate as to how this authority can be utilized so as not to breach adversarial norms – a difficult line to draw because, as noted, active adjudication *by definition* contradicts adversarial norms. Suggested limitations on the use of active adjudication, to reconcile it with an adversarial framework, include: a general principle that judges and adjudicators are permitted to intervene by clarifying evidence, curtailing the evidence on matters at issue, avoiding irrelevant or repetitive evidence, dispensing with proof of obvious or agreed matters, and ensuring that witnesses answer questions in a way that does not unduly hamper progress of the matter;⁵³⁴ and defining “over-intervention” as undue interference in the presentation of a case, particularly in

⁵³² See: *Supra*, footnote 608. [*Children’s Aid Society of the United Counties of Stormont, Dundas and Glengarry v. S.V.D.*]

⁵³³ *Supra*, footnote 453. [Mullan, *Tribunals Imitating Courts*]

⁵³⁴ *Supra*, footnote 528 at page 202. [Kristjanson and Naipul]

questioning witnesses, commenting on evidence, or appearing to have pre-judged issues of fact and credibility,⁵³⁵ including, more specifically: “sarcasm, discourtesy, disparaging remarks, being confrontational, making procedural or other rulings without receiving submissions or evidence from one of the parties, and making findings credibility (or making comments that suggest a finding of credibility has been made) mid-hearing.”⁵³⁶ In administrative adjudication that is built on an adversarial foundation, these limitations apply to ensure that proceedings are not conducted in a manner that suggests impartiality, gauged in accordance with the same test applied to judges in court systems, and derived from the same jurisprudence,⁵³⁷ but with the proviso that the interpretation of bias depends upon a *Baker* analysis of the requirements of procedural fairness in the context of each case.

The connection between adversarial norms and the interpretation of bias can be seen in the following passage, recently quoted in a judicial review case in which it was successfully argued that the limits upon active adjudication had been exceeded:

A judge who observes the demeanor of the witnesses while they are being examined by counsel has from his detached position a much more favorable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation.⁵³⁸

The struggle to reconcile adversarial norms and adjudicator activism is also occurring in *courts*, and is demonstrated by the following passage from a recent Supreme Court of Canada decision:

Judges are no longer required to be as passive as they once were; to be what I call sphinx judges. We now not only accept that a judge may intervene in the adversarial debate, but

⁵³⁵ *Ibid.* [Kristjanson and Naipul]

⁵³⁶ *Supra*, footnote 527 at page 298. [Flaherty, Best Practices]

⁵³⁷ *Supra*, footnote 528 at page 208. [Kristjanson and Naipul]

⁵³⁸ *Yuill v. Yuill* [1945] 1 All E.R. 183 (C.A.) at p. 189.

also believe that it is sometimes essential for him to do so for justice in fact to be done...⁵³⁹

The need to re-consider the boundaries of impartiality in administrative decision-making has attracted discussion in the literature, including a recent suggestion that a standard of “substantive impartiality” is emerging.⁵⁴⁰ As I have argued in another paper,⁵⁴¹ there are a number of foundations upon which the development of a more nuanced standard for impartiality in tribunal proceedings might rest.

First, the existing test for reasonable apprehension of bias, derived from the dissenting opinion of de Grandpre, J. in *Committee for Justice and Liberty v. Canada (National Energy Board)*,⁵⁴² is contextual, and therefore adaptable to hybrid models of adjudication. The apprehension of bias test was articulated in *Liberty* as follows:

...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal the test is “what would and informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly.”⁵⁴³

Second, the case law, beginning with *Baker v. Canada (Minister of Citizenship and Immigration)*,⁵⁴⁴ has reinforced that the *Liberty* test for apprehension of bias it is flexible, variable and *contextual*. What is more, the court in *Baker* held that the duty of fairness requires

⁵³⁹ *Yukon Francophone School Board, Education Area Number 23 v. Yukon Attorney General* [2015] 2 S.C.R. 282 at para. 27 at para. 27 quoting Lamer, J. in *Brouillard v. The Queen* [1985] 1 S.C.R. 39.

⁵⁴⁰ Michelle Flaherty, “Self-Represented Litigants: A Sea Change in Adjudication” (2013) Ottawa Faculty of Law Working Paper No. 2013-07 online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2348708

⁵⁴¹ Patricia L. Robinson, “Uneven Treatment of Fairness: *Children's Aid Society of the United Counties of Stormont, Dundas and Glengarry v. S.V.D.*” (2017), 47Advoc. Q. (2) 210.

⁵⁴² *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369.

⁵⁴³ *Ibid.*, at page at 394. [*Liberty v. Canada*]

⁵⁴⁴ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

administrative decisions to be made “using a fair, impartial, and open process, appropriate to the statutory, *institutional and social context* of the decision,”⁵⁴⁵ and the content of the duty of fairness is to be determined “in the specific context of each case.”⁵⁴⁶ [my emphasis] The Supreme Court of Canada in *Wewaykum Indian Band v. Canada*⁵⁴⁷ again emphasized the importance of context, writing: “[t]his is a corner of the law in which the context, *and the particular circumstances*, are of supreme importance ... There are no shortcuts,”⁵⁴⁸ and the same point was literally underlined by the Court in *Yukon Francophone School Board, Education Area Number 23 v. Yukon Attorney General*.⁵⁴⁹

...allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather, it must be considered in the context of the circumstances, and in light of the whole proceeding.⁵⁵⁰ [underlining in the original]

The connection between the context of decision-making and the requirements of procedural fairness is evidenced by yet another continuum, in this instance between the different types of tribunal and their attendant procedural requirements. In broad terms, “quasi-judicial” decision-

⁵⁴⁵ *Ibid.*, at para. 28. [*Baker*]

⁵⁴⁶ *Ibid.*, at para. 21 [*Baker*] referring to the court’s prior decision in *Knight v. Indian Head School Division No. 19* [1990] 1 S.C.R. 653 at p. 682. This requirement has repeatedly been confirmed. See, for example: *Beaverford v. Thorhild* (County No. 7), 2013 ABCA 6 at para. 21. See also *Canada (Attorney General) v. Mavi*, 2011 SCC 30 at paras. 41-42.

⁵⁴⁷ *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259.

⁵⁴⁸ *Ibid.*, at para. 77. [*Wewaykum*]

⁵⁴⁹ *Supra*, footnote 311. [*Yukon*]

⁵⁵⁰ *Ibid.*, at para. 26. [*Yukon*]

makers must more “court-like” procedural protections,⁵⁵¹ whereas investigative⁵⁵² and Ministerial⁵⁵³ decisions are subject to a relatively low standard of impartiality, as are policy or polycentric decisions.⁵⁵⁴ As the Supreme Court put it in *Canada (Attorney General) v. Mavi*,⁵⁵⁵ fairness is not a “one-size-fits-all” doctrine.⁵⁵⁶ To mix metaphors, “fairness” is also not a blunt instrument. There are nuances and refinements within decision-making categories, so that mere categorization of a decision-making function as “quasi-judicial” or a decision-making body as “adjudicative” does not, in itself, give practical meaning to the requirements of procedural fairness *in the specific context of each case*. Indeed, a nuanced contextual analysis of bias has been applied upon judicial review of administrative “quasi-judicial” decision-making. For example, in *DeMaria v. Law Society of Saskatchewan*⁵⁵⁷ allegations of bias stemmed from the apparently friendly relationship between Law Society counsel and certain Benchers. The court considered a number of social and institutional factors (such as the projected mental/emotional

⁵⁵¹ See: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at para. 27. The court noted: “It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standards applicable to courts...Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias test might undermine the very role which has been entrusted to them by the legislature.”

⁵⁵² See: *Beier v. Vermilion River (County) Subdivision and Development Appeal Board*, 2009 ABCA 338 (CanLII) at para. 9.

⁵⁵³ See: *Imperial Oil Ltd v. Quebec (Minister of the Environment)*, [2003] 2 SCR 624 at para. 31 in which the court distinguished a Minister from a member of the judiciary in terms of the appearance of bias and noted that an analysis of the content of the duty of fairness requires an examination of the statutory context as well as the “framework within which his or her duties are carried on.” See also *Beaverford v. Thorhild (County No. 7)*, 2013 ABCA 6 at para 22, in which the court stated: “a Minister of the Crown authorized to exercise a discretion is not necessarily bound to proceed “like a member of the judiciary” without the interest in the case that “would make [a judge] apparently biased in the eyes of an objective and properly informed third party.”

⁵⁵⁴ See: *McFadyen v. Mining and Lands Commissioner*, 2007 CanLII 54672 (ON SCDC) at para. 23; also *Kowalczyk v. Peel Access to Housing*, 2005 CanLII 1082 (ON SCDC) at para. 7.

⁵⁵⁵ *Supra*, footnote 318. [*Mavi*]

⁵⁵⁶ *Ibid.*, at para. 42.

⁵⁵⁷ *DeMaria v. Law Society of Saskatchewan*, [2015] SKCA 106.

capabilities of Benchers) and held there was no “*reasonable* apprehension of bias.”⁵⁵⁸ [italics in the original]

Third, the apprehension of bias test is objective: not only must the perception of bias be “reasonable” in the circumstances, it must be interpreted through a “reasonable person” construct, and this construct has often been interpreted by appellate courts in nuanced ways that effectively expand the boundaries of impartiality. Examples include: *Wewaykum Indian Band v. Canada*,⁵⁵⁹ in which the Court imputed to the reasonable person knowledge of such social and institutional factors as the dynamics of judicial decision-making and the nature of legal practice in the Department of Justice, and found no reasonable perception of bias; and, *R. v. S.(R.D.)*⁵⁶⁰ in which Justices McLaughlin and L’Heureux Dube imputed to the reasonable person an understanding of such social “realities” as the local relationship between police and racialized communities, and again found no reasonable apprehension of bias.

Finally, as a matter of doctrine, the essence of bias is *prejudgement*, although there is often no discussion in the case law as to whether the conduct in question has created *an appearance of pre-judgment*. Rather, the appearance of bias appears to be treated as *equivalent* to the appearance of pre-judgment. In my view, there is a meaningful distinction between these concepts: an adjudicator who questions witnesses closely or aggressively elicits evidence may be perceived in some contexts (and by some observers) as assisting a favoured party. In a different context (for example, in a tribunal in which there are consistent power imbalances) another,

⁵⁵⁸ *Ibid.*, at para. 45. [*DeMaria*]

⁵⁵⁹ *Supra*, footnote 319. [*Wewaykum*]

⁵⁶⁰ *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484.

differently informed observer may regard the same conduct as simply a skilled attempt at obtaining information.

In sum, the argument here is that the assessment of allegations of reasonable apprehension of bias in the context of modified adversarial proceedings *invites* an analysis of the nature of the proceedings and the roles and characteristics of participants in each case, which *itself* can result in a nuanced approach to impartiality, that is, the enabling of active adjudication, although such an analysis is not always undertaken.⁵⁶¹ As discussed in detail below, the assessment of bias allegations in modified inquisitorial proceedings is unrelated to the *appearance* neutrality, and rests upon the more quantifiable notion of thoroughness. Moreover, active adjudication processes are *consistent with* inquisitorial norms.

4.5 Multi-Disciplinary Decision-Making

The 2001 Leggatt Report,⁵⁶² which emerged out of a series of tribunal studies conducted in the United Kingdom, noted an important advantage of tribunals is that decisions are often made jointly by panels comprising lawyers and experts able to bring a broad range of skills to bear on decision-making, and in Canadian administrative law a multi-disciplinary, consultative decision-making process is considered appropriate for adjudicative tribunals.⁵⁶³

⁵⁶¹ See: *Supra*, footnote 608. [*Children's Aid Society of the United Counties of Stormont, Dundas and Glengarry v. S.V.D.*]

⁵⁶² Andrew Leggatt, "Tribunals for Users One System, One Service, Report of The Review of Tribunals" at page 5, online: <http://webarchive.nationalarchives.gov.uk/20060725091640/http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm>

⁵⁶³ R.E. Hawkins, "Behind Closed Doors I: The Substantive Problem – Full Boards, Consensus Tables and Caucus Cabals" (1995), 9 Can. J. Admin. L. & Prac. 267.

Recent research suggests “collegial decision-making” (defined as a common interest in getting the law right, and a willingness to listen, to persuade, and to be persuaded) generally leads to “more principled” decisions,⁵⁶⁴ and multiple perspectives have been demonstrated to improve decision-making in some contexts, particularly where panel members have *more diverse backgrounds*. These general conclusions reportedly depend upon a number of variables, including: how deeply information is shared, the extent to which group members elaborate upon shared information, whether different perspectives are integrated into a final decision, leadership styles that may affect interpretation of the group task,⁵⁶⁵ and “panel effects,” which refer to the positive and negative potential for the ideologies or personal characteristics of some panel members to influence others.⁵⁶⁶ It has been noted in other jurisdictions that decision-making in child welfare is increasingly seen as benefitting from a collaborative process, and the effectiveness of team decision-making in this context depends upon “shared mental models” and the absence of over-deference to more “senior” panel members.⁵⁶⁷ In the context of Ontario labour arbitration, one panel member represents workers, the other represents management and the third is “neutral,” allowing the representative members to adjudicate from the informed perspective of each side and act as a “sounding board.”⁵⁶⁸ This, in my view, is suggestive of the potential role of clinicians in the application of the best-interests-of-the-child test (in cases where they are consulted, not empaneled); their perspective could be focussed upon the parties’ “derivative dependents,” and would be informed by knowledge of child development, best-

⁵⁶⁴ Daphna Kapeliuk, “Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Arbitration” (2012), 31 Rev. Litig. 267 at page 267.

⁵⁶⁵ *Supra*, footnote 213. [van Ginkel et al., Group Leadership]

⁵⁶⁶ Kevin Quinn, “The Academic Study of Decision-Making on Multimember Courts” (2012), 100 Cal. L. Rev. 1493 at pages 1498-1499. See also: Kristina Klykova, “Bias in Arbitral Decision-Making” 31(2) J. Int. Arb. 289.

⁵⁶⁷ Eva Nouwen, Stephan Decuyper, Johan Put, “Team Decision-Making in Child Welfare” (2012) Children and Youth Services Review 01972 (Belgium).

⁵⁶⁸ *Supra*, footnote 47 at page 148. [Arthurs, Three Faces]

interests-of-the-child studies and literature, and their (assumed) ability “thin-slice” family dynamics.⁵⁶⁹ Finally, it has been reported that panel decisions may be seen as more “accurate,” that is, “correct” in the view of the affected community.⁵⁷⁰

It is not suggested here that judicial decision-making in the court system is not collegial, only that it is not *based on* collegiality, that is, upon a *common interest* in getting the law right in each case. Having said this, I note that while the research here cannot be generalized to the tribunals as a whole, among the members interviewed, the extent of permissible informal collaboration with other members appeared, for some, members interviewed, to be unclear. Despite that *Consolidated Bathurst*⁵⁷¹ signalled support for plenary meetings,⁵⁷² other recent studies and commentary confirm uneven use of multi-disciplinary expertise in tribunal adjudication, noting that despite the legitimizing function of expertise at the *creation* stage of tribunals, expertise is sometimes isolated from decision-making in order to avoid over-stepping the limits of permissible internal interactions and thereby compromising the independence of decision-makers.⁵⁷³

4.6 Evidence

Depending upon the issue in dispute, the standard for admissibility of evidence in a tribunal may simply be relevance, although other rules of evidence may be applied to determine weight.⁵⁷⁴

⁵⁶⁹ Malcolm Gladwell, *Blink* (Little Brown and Company, 2005)

⁵⁷⁰ *Supra*, footnote 566 at page 1501. [Quinn]

⁵⁷¹ *Supra*, footnote 472. [*Consolidated Bathurst*]

⁵⁷² *Supra*, footnote 463. [Sossin and Houle]

⁵⁷³ Laverne Jacobs, “Reconciling Tribunal Independence and Expertise - Empirical Observations, The Future of Administrative Justice” (January 17-18, 2008), University of Toronto, Faculty of Law Symposium at page 2.

⁵⁷⁴ *Supra*, footnote 491 at pages 57-61. [Blake - Administrative Law]

This approach obviously simplifies hearings as it takes a highly technical aspect of the law out of the scope of the parties' concern. Again, depending upon the issue, relevant studies and reports may be used as evidence in tribunal proceedings without the support of an expert witness, and accepted facts within a tribunal's specialized knowledge may be used to inform decision-making without the restrictions associated with "judicial notice."⁵⁷⁵ For administrative bodies with specialized expertise, the concept of judicial notice has been expanded to a concept of "official notice," which permits reliance upon opinions and assumptions generated by the administrative body that have not been introduced in evidence, as long as they are not inconsistent with the evidence presented.⁵⁷⁶

The potential in tribunals for innovative approaches to the problem of competing experts is illustrated by the Australian Administrative Appeals Tribunal ("AAT"), which hears expert evidence presented by panels comprised of more than one expert. Instead of using cross-examination to challenge the credibility of conflicting opinions, experts for each side testify together and discuss their different approaches and conclusions, and the tribunal asks questions of both experts with the goal of obtaining the best possible evidence.⁵⁷⁷

4.7 Appointment Process and Term Limits

The reforms introduced by the *Adjudicative Tribunals Accountability, Governance and Appointments Act*⁵⁷⁸ ("*Accountability Act*") have not silenced critics of tribunal appointment and

⁵⁷⁵ *Supra*, footnote 491 at page 61. [Blake - Administrative Law]

⁵⁷⁶ R. A. Macdonald and M. Paskell-Mede, "Administrative Law," (1981) 13 Ottawa L. Rev. 671 at page 737.

⁵⁷⁷ *Supra*, footnote 75 at page 197. [King, Freiberg, et al.] This process is authorized for Ontario tribunal adjudication in the *SPPA*, *supra*, footnote 452.

⁵⁷⁸ *Adjudicative Tribunals Accountability, Governance and Appointments Act*, 2009, S.O. 2009, c. 33, Sched. 5.

retention practices. Term limits, discretionary re-appointments, lingering concerns about patronage despite a merit-based appointment process, and large numbers of part-time members are continuing concerns.⁵⁷⁹

4.8 Informality

Informality is sometimes equated to a “less adversarial” process, but as discussed above, informality relates to the physical decision-making environment and its atmosphere as well as the decision-making process. Despite that tribunals are generally considered to be less formal than courts, tribunals are neither *inherently* nor uniformly informal, but they can be *designed* to be informal. Among the tribunals in which I observed hearings, some hearing rooms felt very informal while others resembled courtrooms. The most consistently informal aspects of administrative adjudication appear to be the ordinary business attire of adjudicators, the modesty (even shabbiness) of some hearing rooms, and the absence of court-like customs, such as bowing before the decision-maker.

4.9 Electronic Hearings

A number of alternatives to in-person proceedings are commonly available in administrative adjudication. Among the tribunals studied here, the HRTO is currently conducting a pilot project for telephone mediation in cases where both parties are represented by a lawyer or paralegal (representation was reportedly considered essential to ensure “easy access to fax machine and/or email and scanner”); the benefits of telephone mediation cited in the most recently published HRTO Annual Report include “reduced travel time, convenience and potentially lower legal

⁵⁷⁹ *Supra*, footnote 469. [Ellis, *Unjust by Design*]

costs, because of time saved.”⁵⁸⁰ It was noted in interviews for this project that both the LTB and SBT conduct telephone or videoconference hearings, and the CFSRB conducts some pre-hearings by telephone.

The availability of e-hearings is subject to a tribunal’s determination that unfairness to a party will not ensue.⁵⁸¹ Some fairness concerns are technology-based, and may fade over time as technology improves,⁵⁸² but the problems identified in a 2006 study remains noteworthy, and include: inability to maintain eye contact or talk privately; camera angles that make it difficult to read facial expressions and body language; audio that muffles nuances of speech and emotion; and the extreme informality of remote settings (such as public school classrooms) which may undermine tribunal authority and credibility.⁵⁸³ On the positive side, some judges have reported that viewing an electronically transmitted full-face close-up view of witnesses, rather than seeing them at an angle from the bench, enhances the ability to assess credibility, and e-hearings reportedly can save twenty-five to forty percent of hearing time, and further contribute to efficiency by eliminating travel expenses and security costs.⁵⁸⁴

Finally, “virtual tribunals” operate primarily or entirely on online.⁵⁸⁵ In 2012, British Columbia enacted the *Civil Resolution Tribunal Act*,⁵⁸⁶ under which it has established a “Civil Resolution

⁵⁸⁰ SJTO Annual Report (2015-2016) online: <http://www.sjto.gov.on.ca/documents/sjto/2015-16%20Annual%20Report.html>

⁵⁸¹ Rule 5.2(2), *SPPA*, *supra* footnote 452.

⁵⁸² Lorne Sossin and Zimra Yetnikoff, “I Can See Clearly Now: Videoconference Hearings and the Legal Limit on How Tribunals Allocate Resources” (2007), 25 Windsor Y.B. Access Just. 247 at page 267.

⁵⁸³ *Ibid.*, at page 253. [Sossin and Yetnikoff]

⁵⁸⁴ Justice A.W. Germain, “Judicial Comments about the Electronic (Digital) Trial Format” Schedule 1 to 1159465 *Alberta Ltd. v. Adwood Manufacturing Ltd.*, 2010 ABQB 133.

⁵⁸⁵ *Supra*, footnote 450. [Sossin, Access to Administrative Justice]

⁵⁸⁶ *Civil Resolution Tribunal Act*, Bill 44 - 2012.

Tribunal” for specified small claims⁵⁸⁷ and cases governed by the *Strata Property Act*.⁵⁸⁸ The Tribunal website describes it as Canada’s first online tribunal,⁵⁸⁹ and its process begins with individual online information gathering and problem diagnosis, moves to online monitored negotiation, followed by two stages of case management; first, facilitative mediation and second, preparation for adjudication. The final stage is adjudication, either online, by telephone, mail or in person.

4.10 Summary

This chapter reviews common aspects of tribunal adjudication systems which, in my view, are relevant to decision-making needs in custody and access cases. The discussion of the components of adversarial and inquisitorial models illustrates that neither model in its pure form is as desirable as a blend of both; I argue that inquisitorial processes seem more responsive to unmet needs in family law dispute resolution than adversarial processes.

Active adjudication is a common feature of hybrid adversarial models with inquisitorial elements. Despite that the “battle of wits and wiles”⁵⁹⁰ premise adversarial systems is undone when one or both parties is self-represented, the apprehension of bias standard has not yet been modified to fully enable the use of active processes. Some may regard this as a healthy tension that keeps adjudicators in check; that is, appropriately conscious of the potential for judicial

⁵⁸⁷ See: *Schedule to Civil Resolution Tribunal Act*, Bill 44 – 2012. Matters within the tribunal’s jurisdiction are listed as claims for debt or damages, recovery of personal property, specific performance of an agreement relating to personal property or services and relief from opposing claims to personal property.

⁵⁸⁸ *Strata Property Act*, SBC Ch. 43 (1998).

⁵⁸⁹ Civil Resolution Tribunal, online: <https://civilresolutionbc.ca>

⁵⁹⁰ *Supra*, footnote 174 at page 85. [Frank, *Courts on Trial*]

review. I later argue, based upon my empirical research, that the effects can be more far-ranging, and include unpredictable hearing styles and a corresponding lack of tribunal process identity.

Finally, the appropriate role of guidelines and internal informal consultation are discussed, including the need to clarify the boundary between expertise-sharing and fettering discretion.

5. EMPIRICAL RESEARCH

The tribunals studied, the Child and Family Services Review Board (“CFSRB”), Landlord and Tenant Board (“LTB”), Social Benefits Tribunal (“SBT”) and Human Rights Tribunal of Ontario (“HRTO”) are, as noted above, part of a cluster known as Social Justice Tribunals of Ontario (“SJTO”).

5.1 Research Strategy and Method

(a) Case Study Strategy

A case study is not a research method; it is a qualitative research *strategy* in which a range of methods may be utilized to accumulate data and investigate phenomena in the particular context of the case.⁵⁹¹

Case studies are especially well-suited to the study of social, organizational and institutional processes and they often examine groups and individuals within, or affected by, organizations.⁵⁹² They are useful for understanding how processes are influenced by their context and identifying the meaning for institutional actors of key concepts and everyday institutional practices; they can help to explain behavior which can only be fully understood by probing the broader forces that operate within and upon an institutional entity.⁵⁹³

⁵⁹¹ Jean Hartley, “Case Study Research” in Catherine Cassell and Gillian Symon, eds. *Essential Guide to Qualitative Methods in Organizational Research* (2004) (Sage Publications Limited: London) at page 323.

⁵⁹² *Ibid.* [Hartley]

⁵⁹³ *Ibid.*, at page 325. [Hartley]

The “case” in a case study refers to the system or phenomenon under study; case study research may be based upon a single case or multiple cases, and it may focus upon an entire organization, cases which exist within the organization, or some combination of both.⁵⁹⁴ The empirical research conducted for this project consists of a single case study in which the “case” is adjudication within carefully selected tribunals.

The purpose of a case study does not typically include generalization of study findings.⁵⁹⁵ The central goal is to gain an in-depth understanding of the specific system or phenomenon under study through the gathering of rich and detailed information.⁵⁹⁶ The methods adopted here (participant observation, ethnography and semi-structured interviews) are commonly used in case studies,⁵⁹⁷ and can be described as “information-oriented sampling,” a case study research method that maximizes extensive and detailed information from a small group of subjects.⁵⁹⁸ The methods used in this study are based upon “sympathetic engagement”⁵⁹⁹ and are inherently subjective. This quality, considered problematic in quantitative research, is an essential source of depth in qualitative research.⁶⁰⁰

Case studies can be descriptive, explorative and/or explanatory,⁶⁰¹ and research methods utilized in a case study may be qualitative or quantitative, but are typically qualitative. The research

⁵⁹⁴ Enjung Lee, Faye Mishna and Sarah Brennenstuhl, “How to Critically Evaluate Case Studies in Social Work” (2010) 20(6) *Research on Social Work Practice* 682, at page 685.

⁵⁹⁵ Lawrence Leung, “Validity, Reliability and Generalizability in Qualitative Research” (2015) 4(3) *Journal of Family Medicine and Primary Care* 324. Generalization of study findings occurs only at the level of theory, which is referred to as “analytic generalization.”

⁵⁹⁶ *Supra*, footnote 591 at page 323. [Hartley]

⁵⁹⁷ *Ibid.*, at page 324. [Hartley]

⁵⁹⁸ *Supra*, footnote 594 at page 685. [Lee et al.]

⁵⁹⁹ *Supra*, footnote 57 at page 79. [Nourse and Shaffer]

⁶⁰⁰ *Supra*, footnote 595. [Leung].

⁶⁰¹ *Supra*, footnote 594 at page 683. [Lee et al.]

methods adopted for this project are qualitative. The debate over the relative merits of these approaches is not re-visited here; I simply note that while quantitative methods may be more acceptable to academics,⁶⁰² there is a level of nuance in qualitative research that has been said to inspire more complex solutions, and is unquestionably suitable for exploratory purposes,⁶⁰³ that is, to enhance understanding as a preliminary step toward prescribing solutions.

Methods used for qualitative research may be deductive or inductive.⁶⁰⁴ The method used here is inductive. Deductive methods more closely resemble quantitative research; previous research is used to develop a specific theory or set of hypotheses which are then tested. In inductive case studies, theory and hypotheses may be rudimentary at the start and developed as the researcher makes sense of fine-grained data and identifies what is of more general relevance and interest.⁶⁰⁵

The initial theoretical framework for inductive research often simply consists of a research question (for this project: whether there is positive potential for the use of tribunal processes in family law), interview questions and definitions of key concepts.⁶⁰⁶ Inductive methods are not constrained by fixed methodological rules or a particular analytic approach; they allow researchers to “follow their phenomena.”⁶⁰⁷ For example, in this project I did not initially expect

⁶⁰² Catherine Cassell and Gillian Symon, “Assessing Good Quality Research in the Work Psychology Field: A Response to the Commentaries” (2011) 84 *Journal of Occupational and Organizational Psychology* 666 at page 667.

⁶⁰³ *Ibid.*, at page 667. [Cassell and Symon]

⁶⁰⁴ *Supra*, footnote 594 at page 684. [Lee et al]

⁶⁰⁵ *Supra*, footnote 591 at page 324. [Hartley]

⁶⁰⁶ *Ibid.*, at page 324. [Hartley]

⁶⁰⁷ Karen Locke, “Narratives of quality in qualitative research: putting them in context” (2011) 84 *Journal of Occupational and Organizational Psychology* 656 at page 659.

that active adjudication would be a central theme; it became so because its use was contested in a hearing I observed, and later became the subject of a judicial review decision.⁶⁰⁸

“Sampling” refers to the selection of subjects or units of study.⁶⁰⁹ Qualitative sampling is not based upon principles associated with statistical methods, and selection criteria for units or samples are not usually pre-specified and may be both planned and “opportunistic,”⁶¹⁰ that is, expanded on a “rolling basis” through referrals or the requirements of evolving theories derived from the data.⁶¹¹ This was the process used for this project, as detailed below.

The essential task of the methodology type adopted for this study is “to make sense of and recognize patterns among words in order to build up a meaningful picture without compromising its richness and dimensionality.”⁶¹² More prosaically, this sort of analysis has been compared to detective work: it involves piecing together collected data to generate or support theories of broader interest.⁶¹³ The narrative portion of a such analysis is unlikely to be compelling reading among those outside the organization studied, although the broader implications of the analysis may be of wider interest.⁶¹⁴

⁶⁰⁸ *Children’s Aid Society of the United Counties of Stormont, Dundas and Glengarry v. S.V.D.*, 2016 ONSC 350 (Div. Ct.).

⁶⁰⁹ Sarah Curtis, Wil Gesler, Glen Smith, and Sarah Washburn, “Approaches to Sampling and Case Selection in Qualitative Research: Examples in the Geography of Health” (2000) *Social Sciences and Medicine* 1001 at page 1002.

⁶¹⁰ *Supra*, footnote 591 at page 324. [Hartley]

⁶¹¹ *Supra*, footnote 609 at page 1002. [Curtis]

⁶¹² *Supra*, footnote 595. [Leung].

⁶¹³ *Supra*, footnote 591 at page 324. [Hartley]

⁶¹⁴ *Ibid.*, at page 330. [Hartley]

Standard experimental or survey design criteria are not relevant to assessing the validity of the kinds of qualitative research methods used in this case study; validity and credibility remain essential but are assessed differently.

The “internal *validity*” of a qualitative case study depends upon the research question and the suitability of the methodology for exploring the research question.⁶¹⁵ “External *validity*” depends upon whether the study provides sufficient in-depth “thick description” to enable the reader to sense that its findings are likely to be consistent in a similar context;⁶¹⁶ otherwise expressed as whether the research provides “a really convincing account of what is observed.”⁶¹⁷

There are several sources of *credibility* for qualitative case study research, including: rich and meaningful description (also relevant to validity),⁶¹⁸ a rigorous approach to data collection, the use of multiple sources of data; development of a transparent “case study database,” using charts and coding systems to organize raw data;⁶¹⁹ internal coherence in the data analysis, pointing out similarities and contrasts in the data,⁶²⁰ and a ratio between evidence and argument that suggests findings are well supported and logically drawn.⁶²¹

⁶¹⁵ *Supra*, footnote 595. [Leung].

⁶¹⁶ *Supra*, footnote 594 at page 684-686. [Lee et al]

⁶¹⁷ *Supra*, footnote 609 at page 1003. [Curtis]

⁶¹⁸ *Supra*, footnote 591 at page 323. [Hartley] See also: *supra*, footnote 594 at page 684. [Lee et al]

⁶¹⁹ *Ibid.*, at page 688. [Lee et al]

⁶²⁰ *Supra*, footnote 591 at page 324. [Hartley]

⁶²¹ Mark Hickson III, “Counting to One: The Qualitative Researcher’s “Magic”” (2011) 84 *Journal of Occupational and Organizational Psychology* 651 at page 654.

(b) Parallels Between Family Law and the Tribunals Studied

As noted earlier, in my view, the tribunals selected for study have similarities to family law courts. This claim is based upon several factors, beginning with the very high proportion of self-represented parties in these tribunals, comparable or exceeding that which is reported the Canadian family court systems.

I note that Noel Semple has used the term “personal plight sector” to describe a category of legal needs that arise out disputes (rather than transactions) between individuals (rather than legally created entities) which are caused by “an underlying life crisis.”⁶²² Semple notes that areas of law in which personal plight needs arise include family, criminal defense, employment and personal injury.⁶²³

While it may be argued that family law problems are more complicated and entail higher levels of conflict than the subject matter of the tribunals studied, or that substantive family law is more complex and less clear than the law applied in the studied tribunals, I point out that the CFSRB is charged with applying the best-interests-of-the-child test, and it deals with families engaged with child protection services, one of the most discretionary and emotionally fraught areas of the law. The HRTD deals with employment law and is charged with applying the discretionary “duty to accommodate” test. Its caseload includes disputes between individuals, which may have high emotional stakes due to loss of income and/or allegations of sexual assault, racism and other forms abuse. The LTB adjudicates eviction orders, sometimes for tenants who are highly marginalized and occupy subsidized housing. Lastly, SBT hearings concern claims for income

⁶²² *Supra*, footnote 306 at page 146. [Semple, Third Revolution]

⁶²³ *Ibid.*, at page 133. [Semple, Third Revolution]

support arising out of disability, which require adjudicators to independently assess medical evidence.

(c) Methodology

The research question for this project was addressed by exploring tribunal decision-making. I began this process with participant observation; I sat in on multiple LTB, CFRSB and HRTTO hearings, but have not observed SBT hearings. Participant observation is the main research method used in ethnography. It requires close observation of events and/or behavior in a specific context, and recording observations and experiences in extreme detail, usually in the form of meticulous notes. The collected data is reviewed and summarized, again in great detail, preferably immediately following the observation phase. Hypotheses may emerge from the data which determine the direction of future data collection. It is a reflexive process that does not rely upon standard protocols. Its credibility is assessed in the same way as described above with respect to the external validity of case studies in general: through the reader's sense of deep engagement with the observed events or behavior and sense of the reality of what has been described.⁶²⁴

I have had informal discussions with court-adjunct mediation personnel in Toronto, employees of The Human Rights Legal Support Centre, and Provincial Court duty counsel and advice counsel. I have conducted twenty-one interviews with members and Vice-Chairs of the tribunals

⁶²⁴ See: Alexandra Crampton, "Escape from the Laboratory: Ethnographic Methods in the Study of Elder and Family Court Mediation" (*President and Fellows of Harvard College Negotiation Journal*, July 2016) 191 at page 196.

studied, some of whom are cross-appointed to more than one tribunal and described their experiences accordingly.

I sought and received permission from the CFSRB to observe proceedings, as they are closed, and to interview its members. I later sought permission from the SJTO to interview members of the other tribunals studied and was provided with a list of recommended interview subjects. I drew from this list as well as my own list of potential interviewees, compiled based upon online member biographies, and added more interview subjects on a rolling basis, through recommendations of other interviewees based upon fellow members' areas of expertise. The members interviewed have a wide variety of backgrounds and levels of experience.

The depth of the reporting on each tribunal studied varies in accordance with the number of interview requests accepted in each tribunal. Eight interviews were conducted with members of the CFSRB; six with members of the HRTO, three with members of the LTB and four with members of the SBT. As noted above, some members were cross-appointed and commented upon more than one tribunal.

The same topics were canvassed in all interviews, although in some instances time constraints and/or an adjudicator's personal areas of interest or expertise led to more discussion of some topics and less of others. Broadly stated, interviews covered perceptions of tribunal mandate, the effects of self-representation on tribunal functioning, techniques adopted by adjudicators to deal with self-represented parties, attitudes toward active adjudication and common active adjudication techniques, the extent to which tribunals are adversarial (or not), perceptions about

informality, availability of mediation and other settlement strategies, settlement pressure, the development and utilization of institutional expertise, internal consultation and communication, and current policy issues. While the research was focussed upon the *actual experiences* of tribunal members, not their future policy or practice preferences, the latter were sometimes solicited or volunteered, and are included in this report to the extent they provide insight as to potential tribunal processes.

Interviews were semi-structured and conversational; a chart of questions was used to guide discussions but was not treated as a questionnaire, and notes were taken almost constantly. Following each interview, these notes were immediately reviewed and summarized, and as common and contrasting themes emerged, they were separately noted. Once all interviews were completed, the notes and summaries were again analysed to separate out common responses, responses supportive or contrary to common responses, outlier responses, and areas in which there was no common response. This data was compiled in the chart attached as Appendix B. In keeping with the research methodology, the results are also reported in narrative form in Chapter Six, and no statistical analysis has been attempted.

5.2 Tribunals Studied

(a) Child and Family Services Review Board

The CFSRB is of particular interest for this project because of its mandate to apply the best-interests-of-the-child test, and its use of multi-disciplinary decision-making panels in these cases.

The Board was constituted under the *Child and Family Services Act*,⁶²⁵ (“*CFSA*”), the stated purpose of which is “to promote the best interests, protection and well-being of children.”⁶²⁶ Its review powers cover a wide range of children's aid society decisions.⁶²⁷ It is also an appeal forum under the *Education Act*⁶²⁸ for school board expulsions of students.

The Board adjudicates disputes between individuals and institutions, such as school boards and children's aid societies, not between private parties. In Ontario, children's aid societies are independent non-government bodies, which are created under the authority of the Ministry of Children and Youth Services but have considerable autonomy.⁶²⁹ Applications to the CFSRB are not eligible for legal aid.

The strength of the CFSRB's remedial power varies. Under sections 68 and 68.1 of the *CFSA* the Board was granted an apparent oversight role with respect to complaints regarding children's aid society services and decisions, after they have been through an internal children's aid society review process. The role of the Board in these cases is to ensure that society decisions have

⁶²⁵ *Child and Family Services Act*, RSO 1990, c. C.11, recently replaced with the *Child, Youth and Family Services Act*, Child, Youth and Family Services Act, 2017, S.O. 2017, c. 14, Sched. 1. The new legislation greatly expands the cultural background and personal characteristics of the child to be considered in the application of the best-interests-of-the-child test.

⁶²⁶ *Ibid.*, s.1(1). [*Child, Youth and Family Services Act*]

⁶²⁷ *Supra*, footnote 580. [SJTO Annual Report]

The CFSRB reviews, under the *CFSA*, *supra*. footnote 363: children's aid society decisions to remove a Crown ward from a foster home under section 61; complaints about children's aid society services under sections 68 and 68.1; residential placements of children under section 36; emergency admissions to secure treatment programs under section 124; decisions to refuse an adoption, remove a child from an adoption placement, or place conditions on adoption under sections 141, 142.3 and 144.

⁶²⁸ *Education Act*, R.S.O. 1990, c. E.2, section 311.7.

⁶²⁹ Children's aid societies are not, strictly speaking, “government actors;” they are non-government organizations funded by government. In addition to acting pursuant to the *CFSA*, *supra* note 8, the Board operates under the *Education Act*, R.S.O. 1990, c. E.2., and the *Intercounty Adoption Act*, 1998, S.O. 1998, c. 29.

been accompanied by adequate reasons and it may require a society to further explain its decisions. Its role in these hearings is to ensure that complainants “feel heard,” and in appropriate cases, to work toward improving the ongoing relationship between a society and the complainant. This work forms the bulk of the CFSRB’s caseload. By way of contrast, the Board has much greater remedial authority under sections 61 and 144 of the *CFSA*, pursuant to which it is required to make best-interests-of-the-child determinations and confirm or rescind children’s aid society decisions.⁶³⁰ This project focuses upon the self-represented population in all CRSRB cases, and in dispute resolution in section 61 and section 144 cases, despite that the latter constitute a small fraction of the Board’s caseload, as they involve the application of the best-interests-of-the-child test.

The SJTO Annual Report for 2015-2016⁶³¹ indicates that Regulation 70 under the *CFSA* has recently been amended to reduce the minimum number of members required to hear an application for review from three to one. It reports that the new practice is for one member to hear section 68 applications and *two-member panels* to hear “other application types.” The Annual Report describes the motivation for this change as “more effective use of resources and a significant reduction in part-time member per diem costs and travel expenses.” The research for this project was conducted prior to this change, and all discussion of panel decision-making is based upon three-member panels.

⁶³⁰ *Ibid.*, s.144(11); s. 136(2) specifies the potentially relevant criteria.

⁶³¹ *Supra*, footnote 580. [SJTO Annual Report]

CFSRB membership currently includes two senior SJTO executives, one Associate Chair, one Vice-Chair, and nineteen part-time members.⁶³² The CFSRB completed 196 section 68 applications in the 2016-2017 reporting period, of which 123 were resolved by settlement and twenty-two by adjudication;⁶³³ it completed eight section 61 applications, of which seven were resolved by settlement and none by adjudication, and ten section 144 applications, of which four were resolved by settlement and three by adjudication.

(b) Human Rights Tribunal of Ontario

The HRTO exercises statutory powers of decision over claims of discrimination and harassment made under the *Ontario Human Rights Code*.⁶³⁴ The HRTO adjudicates disputes between private individuals or between individuals and corporate or government entities.

The HRTO is the only tribunal within the SJTO authorized to use a mediation/adjudication model known as “med/adj,” an optional process added to the HRTO *Rules* in 2010.⁶³⁵

The HRTO is the also the only tribunal within the SJTO to have express *statutory* authority to employ active adjudication techniques, although members of all SJTO tribunals reportedly receive training in active adjudication. In 2008, the HRTO shifted from a commission model to a

⁶³² Public Appointments Secretarial website:
<https://www.pas.gov.on.ca/scripts/en/BoardDetails.asp?boardID=715>

⁶³³ *Supra*, footnote 580. [SJTO Annual Report]

⁶³⁴ *Human Rights Code*, R.S.O. 1990, c.H.19.

⁶³⁵ David E. Wright, “Implementing the New Ontario *Human Rights Code*: A Tribunal Perspective” (2014), 18 Canadian Lab. & Emp. L.J. 101 at page 113.

“direct access” model.⁶³⁶ It was correctly anticipated that the new model would attract a large number of self-represented parties and create a significant backlog of cases. For these reasons, inquisitorial powers were granted to the new Tribunal under the *Human Rights Code*, including authority to:

... provide for and require the use of hearings or of practices and procedures that are provided for under the *Statutory Powers Procedure Act* or that are *alternatives to traditional adjudicative or adversarial procedures*; *define or narrow the issues* required to dispose of an application and *limit the evidence and submissions* of the parties on such issues; *determine the order in which the issues and evidence* in a proceeding will be presented; authorize the Tribunal to *conduct examinations in chief or cross-examinations* of a witness; *prescribe the stages of its processes* at which preliminary, procedural or interlocutory matters will be determined; authorize the Tribunal to make or cause to be made such *examinations of records* and such other inquiries as it considers necessary in the circumstances; authorize the Tribunal to *require a party to a proceeding or another person to, produce any document, information or thing* and provide such assistance as is reasonably necessary, including using any data storage, processing or retrieval device or system, to produce the information in any form, provide a statement or oral or affidavit evidence, or in the case of a party to the proceeding, *adduce evidence or produce witnesses* who are reasonably within the party’s control.⁶³⁷[emphasis added]

These powers were initially mirrored in the *Tribunal Rules*; however, authority on the part of adjudicators to *cross-examine* witnesses has since been deleted from the *Rules*.⁶³⁸ The HRTO’s direct access model was the subject of Andrew Pinto’s 2012 Report of the Human Rights Review (“Pinto Report”) which recommended more robust use of active adjudication.⁶³⁹ Finally, a further innovation that occurred as a result of the concern over large numbers of self-represented parties in the direct access model was the establishment of the Human Rights Legal Support Centre (“HRLSC”), a specialized adjunct legal advice service. It reportedly provides full

⁶³⁶ The Ontario Human Rights Commission still exists, and functions to promote research, education, policy development and “targeted legal action” with respect to human rights issues. See online: ohrc.on.ca

⁶³⁷ Ontario Human Rights Code, 2006, c. 30, s. 5, section 43(3).

⁶³⁸ *Rules of Procedure for Applications under the Human Rights Code*, Part IV, R.S.O. 1990, c.H.19, as amended, Rule 1.7 m.

⁶³⁹ Andrew Pinto, “Report of the Human Rights Review” (2012), online: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/

representation in about twenty percent of cases for which representation is sought, although it performs a “coaching” role in many others.⁶⁴⁰

HRTO membership currently includes two senior SJTO executives, one Associate Chair, twenty-one full-time Vice-Chairs and thirty-three part-time members.⁶⁴¹ The HRTO “closed” 3,234 cases the 2016-2017 reporting period, and held mediation in 1,584 cases, of which fifty-eight percent settled.⁶⁴²

(c) Landlord and Tenant Board

The Landlord and Tenant Board has the largest caseload of any tribunal in Ontario. It adjudicates disputes under the *Residential Tenancies Act*,⁶⁴³ between private individuals, or between individuals and corporate or government entities. The focus of the LTB was described in some interviews for this project as “high-volume, repetitive work.” Its powers of decision appear to be less discretionary than those of the other tribunals studied, although members interviewed noted sites of discretion within their mandate.

The LTB has undertaken a Case Management Hearings Pilot Project (“CMH Pilot Project”) in some locations, pursuant to which a Case Management Hearing (“CMH”) is mandatory for all tenant applications, reportedly because tenants tend to be the least organized Board participants, and their applications are the easiest to settle. A CMH may be conducted in person or by

⁶⁴⁰ *Supra*, footnote 375. [*Human Rights Code*]

⁶⁴¹ Public Appointments Secretariat, online: <https://www.pas.gov.on.ca/scripts/en/BoardDetails.asp?boardID=112312>

⁶⁴² *Supra*, footnote 580. [*SJTO Annual Report*]

⁶⁴³ *Residential Tenancies Act*, 2006, S.O. 2006, c. 17.

telephone and is presided over by a dispute resolution officer (“DRO”) who may be either a mediator or a case administrator, depending upon location. It was reported that mediation at the Board was previously unstructured, with mediators “wandering around” encouraging parties to mediate; the CMH Pilot Project was described as an attempt to improve upon this approach. There are various consequences for failure to attend, and CMH hearings may only be adjourned in narrowly defined “exceptional circumstances.”

Member estimates as to settlement rates for CMH mediation varied; some reported them as higher than ordinary mediation, and some as lower on the basis that CMH is involuntary and engages parties who are not necessarily committed to a settlement solution. Despite these differing perceptions the program was consistently described as successful.

LTB membership currently includes two senior SJTO executives, one Associate Chair, seven full-time Vice-Chairs, thirty-six full-time members, and ten part-time members.⁶⁴⁴ The LTB resolved 78,135 cases the 2016-2017 reporting period, of which 11,541 were settled in mediation and 48,533 were resolved through adjudication.

(d) Social Benefits Tribunal

The Social Benefits Tribunal was established under the *Ontario Works Act*,⁶⁴⁵ and adjudicates appeals from government decisions made under this statute and the *Ontario Disability Support*

⁶⁴⁴ Public Appointments Secretariat, online:
<https://www.pas.gov.on.ca/scripts/en/BoardDetails.asp?boardID=112312>

⁶⁴⁵ *Ontario Works Act*, 1997, S.O. 1997, c. 25, Sched. A

Program Act.⁶⁴⁶ It was reported in interviews that the vast majority of cases concern claims for income support which have been refused, or in which the quantum of benefits is disputed.

SBT appellants face a government respondent in the form of a Case Presenting Officer (“CPO”), who may or may not be a lawyer, or through written submissions. The SBT operates an Early Resolution Opportunity program (“ERO”), that consists of a telephone mediation session presided over by an Appeal Resolution Officer. SBT proceedings are eligible for legal aid.

SBT membership currently includes two senior SJTO executives, one Associate Chair, four full-time Vice-Chairs, seventeen full-time members, and sixteen part-time members.⁶⁴⁷ The SBT completed 13,038 cases the 2016-2017 reporting period, of which 8,087 were resolved through adjudication, and held 1,508 ERO sessions, with a settlement rate of thirty-four percent.⁶⁴⁸

⁶⁴⁶ *Ontario Disability Support Program Act*, 1997, S.O. 1997, c. 25, Sched. B

⁶⁴⁷ <https://www.pas.gov.on.ca/scripts/en/BoardDetails.asp?boardID=120959>

⁶⁴⁸ *Supra*, footnote 580. [SJTO Annual Report]

6. REPORT ON EMPIRICAL RESEARCH

I'm seated in a worn hotel conference room just large enough to accommodate its furnishings. Faux-traditional wallpaper and cornice mouldings are at odds with black office chairs and fluorescent lights. I'm here to observe a hearing to determine which of two families will be permitted to adopt a child. Both families have cared for him for long, almost equal periods of time, and both claim deep attachments.

I have been directed to an upholstered armchair near the room's entrance, next to a small round table. I'm self-conscious about taking the most comfortable chair in the room. I avoid eye contact for the most part, making notes and striving to be inconspicuous.

The children's aid society is represented by a lawyer. He sits a couple of chairs away from one of the foster parents. Between them sits the instructing member of the CAS, who occasionally glances at the other foster parents, not supported by the society, who are seated at the opposite branch of a U-shaped table covered in white tablecloths. They are self-represented.

The middle section of the U-shaped table is occupied by the adjudicators, a panel of three members of the Child and Family Services Review Board, selected for this hearing. The Chair of the panel, seated at the centre, is a lawyer. She is flanked by professionals with mental-health credentials, on her right a psychiatrist and on her left a PhD in psychology. All three are women.

It is the morning of day one, and the room holds a sense of fresh anticipation. Polite nods are exchanged as materials are unpacked and organized. One of the self-represented foster parents sets out, among piles of papers and files, a small tea set, a basket of healthy looking snacks and a large framed photograph of the child who is the subject of the hearing. She gently asks the panel if she may display the photo, so everyone can be reminded of "why we are here." The Chair replies with a smile that the photos in the file are sufficient. The foster mother nods and adjusts the angle of the photo so it is visible only to her.

The Chair explains rudimentary procedural rules to the self-represented foster parents, the witness list is reviewed, and a few witnesses are eliminated. The Chair pauses briefly and begins to speak in a quiet and concerned tone about the importance of "civility." Acknowledging the emotional nature of the proceedings, she urges all participants to focus on the best interests of the child, stressing that the Board is not interested in assigning blame. She concludes by saying, "it doesn't get any harder than this."

The Chair asks CAS counsel to call his first witness. The self-represented foster mother raises her hand and quietly asks to make an opening statement. The Chair asks CAS counsel and the foster parent seated beside him if they have prepared openings; they have not. CAS counsel offers to improvise, and the foster father gestures toward CAS counsel, shrugging and smiling. I realize that he and his wife, who is absent, are indirectly represented by the Society.

The self-represented foster mother, who will turn out to be the primary spokesperson for she and her husband, begins to give evidence; she recites a detailed account of the ways in which she has been misrepresented by the society. She sounds unconsciously self-righteous and defensive. CAS counsel counters with a chronology of incidents of conflict between the CAS and this foster mother, characterizing her as lofty and uncooperative.

The first witness, a society worker, enters the room and sits at a small square table also draped in hotel white, at the mouth of the U. She is asked by the Chair to swear a plain oath, simply promising to tell the truth. CAS counsel remains seated as he delivers his questions to the witness, and as he addresses the panel.

Throughout the first witness' testimony the Chair occasionally interjects to request that the witness testify only to facts, not what others may have been thinking or feeling, and a few times she restrains CAS counsel from excessively leading the witness. The psychiatrist interjects, asking the witness a question about her testimony. The witness says she needs access to her case note. It emerges that the CAS has not brought its entire file as requested by the Board. The Chair states that the Board requires the missing note. In what will become a recurring source of frustration for all concerned, the proceedings are interrupted to search for missing material.

A second witness is called, who is also a CAS worker. Her testimony suggests she dislikes the self-represented foster mother and regards her as grandiose. She bristles as she recounts the self-represented foster mother's assertions of her own competence. She speaks with stubborn-sounding insistence as she describes the inadequate care the child received in care of the self-represented foster parents, and in glowing terms of the care provided by the foster family represented by society counsel.

As CAS counsel takes the second witness through examination in chief, there are several long delays as she, too, shuffles through her file looking for case notes. Once a note is located the proceedings are further delayed as panel members

repeatedly leave the room to make copies. The foster father seated with the CAS is animated, exchanging papers with counsel, whispering to the CAS representative and writing notes.

Throughout all testimony the Chair almost incessantly takes notes. The psychologist is a slightly less dedicated note-taker and has yet to ask any questions or offer any comments. The psychiatrist watches the witnesses carefully, seldom writing anything.

At this point, the hearing feels informal and business-like.

This chapter summarizes research interview responses in narrative form. Common responses are identified, as are responses that contradict them; where there was no common response, this too is indicated. Many responses include short quotes to give a sense of their tone, but there is no lengthy direct quotation. The format of this chapter is intended to illustrate the variations and similarities among the responses of the tribunal members interviewed, with respect to the subjects explored, and is not intended to draw a portrait of each tribunal. While the views of individual members interviewed suggest common and contrary responses *among the members interviewed*, they are not presented as representative of the tribunal *as a whole*. Ethnographic reports are interspersed, and findings are summarized at the end of the chapter.

6.1 Self-Represented Parties

CFSRB adjudicators interviewed commonly reported that applicants are almost always self-represented, with the percentage generally estimated at ninety-five to ninety-eight percent in proceedings involving children's aid societies, whereas children's aid societies are invariably represented, usually by in-house counsel. Several adjudicators mentioned that applicants are

more likely to be represented in school expulsion proceedings than in children's aid society cases, although this is not the norm.

As noted, the bulk of the CFSRB caseload consists of section 68 applications. Among members interviewed, parties in section 68 proceedings were frequently described as having low levels of income and education, being "needy" and unsophisticated, and sometimes having mental health problems. One member described them as "victimized groups over-exposed to the judicial system." Another member remarked with some admiration that these applicants are often single mothers who may be poorly educated but are "street smart and gutsy."

In section 144 proceedings, which engage the foster parent community, and in school expulsion proceedings under section 311.7 of the *Education Act*, self-represented parties were portrayed as a diverse group, more likely to include seeming members of the middle-class. One member observed, "the Board sees a whole range of human experience," and another described self-represented parties in section 144 proceedings as ranging from low-functioning to relatively sophisticated, noting that adjudicators must adjust their process and approach depending upon the individual characteristics and needs. It was commonly observed that despite Board efforts to assist self-represented parties in managing Board processes, they remain a "vulnerable population" that is "hugely disadvantaged." Most adjudicators interviewed attributed self-representation to the cost of legal services; as one member remarked, "Even people with good salaries don't want to pay \$400 an hour."

With respect to the apparent effects of Board processes on self-represented parties, it was commonly reported that they are very often visibly stressed and overwhelmed in all types of proceedings. One member described “a wall” between society professionals and self-represented applicants, created not just by the nature of the proceedings but also by the contrast between self-represented parties and the experience, confidence and competence of society representatives and their counsel.

Among CFSRB adjudicators interviewed, typical responses to the question, “Is the tribunal comfortable dealing with self-represented parties?” included: “Of course, it’s all we do”; “It’s just our reality”; and, “Any adjudicator who is not comfortable with self-represented parties should not work at this Board.” One member described the Board as having developed a culture of “respect, support, and patience” with respect to self-represented parties, and said they are not “brushed off” at the Board.

Consistent with this, participating CFSRB adjudicators overwhelmingly reported that representation, or the lack of it, is a neutral factor in performing their roles; that is, while adjudication is *different* in the absence of a lawyer performing certain tasks, it is not more difficult. A very small minority reported that self-represented parties with mental health issues require constant accommodation, making these cases feel “risky and taxing.” While almost all interviewees claimed to experience no additional sense of pressure due to self-representation, this response varied by type of proceeding. In section 68 proceedings members reported no disadvantages in terms of their experience of adjudication, but for best-interests-of-the-child cases some characterized lack of representation as problematic due to the combination of

relatively “high stakes” and systemic power imbalances. One member reported that self-represented parties initially believe the Board is accessible without a lawyer, but once they see that children’s aid society representatives are accompanied by counsel, they are sometimes taken aback, saying some version of “I didn’t know I had to have a lawyer.”

Unsurprisingly, participating CFSRB adjudicators reported the greatest specific challenge for self-represented parties as “the acting like a lawyer stuff.” Uncertainty about how to question witnesses, especially on cross-examination, what to say and when to say it, and trying to speak, but being stopped or interrupted by the adjudicator or opposing counsel, were all mentioned.

As noted above, applications to the CFSRB are not eligible for legal aid. It was reported that as a result, not many lawyers do “applicant work” and no onsite legal advice services, such as duty counsel, are available. Although this was reported as problematic by several adjudicators, there was no common thread about the value of legal advice services. Some considered legal advice irrelevant to 68 applications because of the Board’s limited remedial authority. Others remarked that duty counsel would be appropriate for some section 68 cases, but best-interests-of-the-child cases are too complex and “high stakes” for legal advice *alone* to be meaningful; only full legal representation would make a difference. A significant number responded that applicant lawyers, when they do appear, tend to unnecessarily complicate Board proceedings.

It was consistently reported that a great deal of effort is made by the Board to assist self-represented parties in advance of hearings. It is apparently not uncommon for applicants, at the outset of a CFSRB process, to have little or no understanding of potential claims, available

remedies or Board procedures, all of which is addressed in Board pre-hearing processes. The Board's "institutional competence" in making its processes manageable was often noted; the role of case coordinators, described by one interviewee as "hand holders," reportedly includes informing applicants that the Board will determine whether they have a claim that falls within the Board mandate. In other words, the Board does not leave it to self-represented parties to define their problem in legal terms. It was reported that people who approach the Board are often "in crisis," and the role of case coordinators is to make them aware of their options, and once an application is filed, to become a contact person at the Board for the purpose of scheduling appearances and answering questions. It was noted by one adjudicator that self-represented litigants sometimes rely too heavily upon case coordinators, expecting them to give legal advice and actively prepare a case.

After an application has been filed, the next step is a pre-hearing. It was reported that the Board has developed a document that explains pre-hearings, and self-represented parties have since tended to be better prepared. If the parties consent, a pre-hearing can be converted to a mediation session. If it remains a pre-hearing, or if settlement is attempted but not achieved, disclosure orders are often made. It was reported that whether or not pre-hearings have been converted to mediation, members interviewed "put remedies on the table" and inform self-represented parties of available claims of which they seem unaware. It was remarked that a lot of "heavy lifting" is done by adjudicators in pre-hearings; as one member put it, the adjudicator must figure out what a self-represented litigant *could claim* but is "at sea about," explain disclosure and filing requirements, and generally assist parties onto a path toward a productive hearing. It was observed that there is a general tendency to assume that self-represented parties understand more

than they do about how to prepare a case; while they have a story to tell, translating it into evidence does not often come naturally, and some are initially unaware that evidence is even required. One member remarked that pre-hearings would be more effective if there were a more intense focus on the evidence needed and how it might be obtained.

It was generally considered among CFSRB adjudicators interviewed that self-represented parties are becoming better informed at the hearing stage. This was mostly attributed to improved Board strategies to educate and prepare parties at the intake and pre-hearing stages, as noted and, less often, to the use of online information. A few members reported that it is no longer surprising for self-represented parties to attend hearings with printed materials in hand, such as case law obtained through CanLII, or information obtained from the SJTO website or other online sources, but others reported, “Web-based information is not especially helpful to Board clientele.”

The HRTO is similar to the CFSRB in that the percentage of self-represented litigants is much higher for applicants than for respondents; it was commonly estimated among participating members that sixty to seventy percent of applicants are self-represented in Tribunal hearings, whereas the percentage of respondents *who are represented* was pegged at eighty to ninety percent. These estimates are consistent with SJTO Annual Report⁶⁴⁹ statistics as to rates of representation.

⁶⁴⁹ *Supra*, footnote 580. [SJTO Annual Report] The Report does not include this information for the other tribunals studied.

Applicants are reportedly a diverse group at the HRTO, sometimes including people who exhibit obvious stress or emotional problems or “what one would expect to see in a vulnerable population.” One member described the high rate of self-representation as surprising in view of the “complexity of the legal issues and the formality of proceedings.”

The “flexibility and relationship-building skills” of case processing officers was cited among members interviewed as helpful in allowing the tribunal deal effectively with self-represented parties. The use of “case management directives” in advance of the hearing stage was reported as uneven, although some adjudicators reported using directives to convey pre-hearing determinations (such as direct a case to summary hearing), give instructions (for example, to reduce a lengthy and non-comprehensible claim to a limited number of pages), or provide information (such as a pending or missed deadline).

Reports on the extent to which self-represented parties seem able to manage Tribunal proceedings were highly varied. For example, responses included: the ability to function well depends upon the level of analysis required in each case; some applicants do not get the basic idea that there are legal tests and evidence is needed; some self-represented parties do an “amazing job, as well or better than a lawyer would;” and, “lots of people do just fine.”

HRTO members interviewed commonly reported being comfortable dealing with self-represented parties although, unlike their CFSRB counterparts, many reported a sense of relief when both parties appear with counsel. It was remarked that some self-represented parties need much more help than others, but most adjudicators are “savvy enough” to get the information

needed. Several reported that hearings involving self-represented litigants are more strenuous because it becomes the adjudicator's job to ensure that every aspect of a claim has been considered, in part to position for potential judicial review.

Several participating adjudicators remarked that the HRTO was designed to facilitate self-representation, but a small minority disagreed, noting instead that the public perception of the tribunal as "applicant-friendly" is inaccurate because the Tribunal is very much based upon a traditional litigation model. There was no common thread in responses as to whether there has been a change in the level of sophistication of self-represented parties through self-informing. Some reported no change, others saw a "big change." A member in the latter group remarked that while self-represented parties may obtain case law from CanLII they often do not understand that one case is not enough. Another member remarked that the availability of these resources may further marginalize those who do not have the ability or means to utilize them.

It was often reported by HRTO interview subjects that respondent lawyers tend to be highly competent, often from specialized firms. The typical quality of *applicant* lawyers was described variously: they were often characterized as ill-informed, having not "bothered to" learn about the Tribunal process or even the relevant substantive law (on the apparent assumption that tribunals processes are "easy") or having wholly unrelated skills and training (a criminal law background was mentioned most often) and being a "net negative," that is, worse than no lawyer. Several adjudicators were unflattering in their assessments of paralegals, as well. The term "under-represented" was used to describe the effect of representation by paralegals (and lawyers) who assemble "low quality evidence" and demonstrate a shallow understanding of the relevant legal

framework. One member noted that some paralegals (like some lawyers) are unaware of entire sections of legislation that might assist their clients; another reported that the “vast majority” of paralegals are a hindrance. Conversely, a minority of members interviewed described “some paralegals” as “very, very good,” and as a group, getting better over time. Power imbalances were commented upon by some, due to the quality differential in representation as between applicants and respondents, or the lack of applicant representation, but concern was muted among HRTTO interviewees in comparison to CFSRB interview subjects.

The most consistent description of the HRLSC among interviewed members was some variant of “hugely oversubscribed.” Instead of an income test, the HRLSC reportedly uses a two-pronged triage approach in which the level of representation provided depends upon both the nature of the claim and the applicant’s ability to self-represent. In my discussion with a HRLSC staff member it was indicated that full representation is provided in approximately twenty percent of cases for which representation is sought, and a “coaching” role is performed in many others. Some adjudicators remarked that they can often tell from the quality of materials that the HRLSC has provided assistance, but others reported the opposite.

As to whether the HRTTO is accessible without representation, HRTTO members interviewed commonly responded that it is part of the job of an adjudicator to make it possible to appear without counsel. It was said that the tribunal is manageable at the mediation and hearing stages due to the skill of members, but the preparation stage (drafting and filing witness statements, seeking appropriate remedies) remains challenging for self-represented parties. Nonetheless, it was reported as rare for self-represented parties to arrive at hearings without knowing the case

they need to make, and the evidence required. One member considered that accessibility varies with subject matter, saying “anyone can argue sexual harassment,” but legal tests such as “the duty to accommodate” are far more nuanced and challenging for self-represented parties.

In LTB proceedings, it was commonly reported that tenants are “almost always” self-represented, whereas a majority of landlords have some form of representation. Among the members interviewed, it was estimated that about seventy-five percent of landlords are represented by lawyers, paralegals or “landlord representatives,” the latter of which may be specialized paralegals or property managers with no legal accreditation.

In keeping with CFRRB responses, LTB interviewees consistently reported that the Board is very comfortable dealing with self-represented parties. They described the self-represented community as varied, but overall tending to be disadvantaged, economically or otherwise, and sometimes displaying obvious mental health issues. LTB hearings were described as often emotional. Several members remarked that frustration with personal problems can be manifested in the hearing room through behaviours such as interrupting other side, arguing with the adjudicator or otherwise failing to observe the expectations of a hearing process.

Among LTB members interviewed, it was reported that LTB onsite duty counsel services are underutilized. It was reported as a recurring problem for self-represented parties to decline to meet with duty counsel, then appear before the Board with no argument, evidence or proposal in support of their position. It was reported by some that duty counsel services are simply not very effective, for reasons including: self-represented parties are given fifteen to twenty minutes of

advice and little or no assistance with written submissions; advice may not be well understood and therefore not applied; it is reportedly rare for duty counsel lawyers to attend hearings, although some will reportedly sit in and become involved if the need is perceived; tenants who go to duty counsel often do not take notes, rendering the advice received ephemeral: a self-represented party may return from duty counsel and ask for adjournment without being able to articulate the basis for the request, leaving it to the adjudicator to “unpack that.”

In addition to duty counsel tenants may turn to outside community legal clinics. It was explained that clinics focus on “saving tenancies” and therefore mostly appear on behalf of tenants who face eviction or have been illegally locked out, and even in these cases full representation is provided only for those who exhibit a disability which limits the ability to self-represent, or in cases that present a legal issue in which the clinic is interested.

LTB member reports of paralegal representation were very mixed, but somewhat more positive than those of HRTO members interviewed. It was commonly noted that specialist paralegals sometimes do a good job but are a minority. The quality of paralegal representation was generally described as “poor” on the tenant side, but some “top notch” paralegals were reported on the landlord side. As in HRTO interviews, some LTB members interviewed described some parties as “under-represented” because, as one member said, “it is better to be uninformed than wrongly-informed.” A very small minority expressed a contrary view, remarking that paralegals who appear before the Board often have more expertise than tenant lawyers, and regulation of paralegals has enhanced performance and professionalism.

Among interview subjects, LTB members echoed CFSRB members in very often reporting that the Board is accessible without lawyers, essentially “because it has to be.” These members commonly linked accessibility to the simplicity of Board processes relative to the court system. As with HRTTO members interviewed, some connected accessibility to the specific characteristics of parties and their disputes, remarking that the Board is accessible for self-represented parties who are able to communicate clearly and to fully understand their disputes, but where there are comprehension or communication problems, or complex legal issues such as bankruptcy, representation is obviously helpful.

Similar to reports among HRTTO members interviewed, concern was expressed by LTB interview subjects that the public perception of Board accessibility is overblown, leading some applicants to have unrealistic expectations as to the level of help they will receive from intake staff and adjudicators. One LTB member reported that tenants sometimes expect members to tell them how to “get the most out of the landlord.” Another perceived problem was that tenants sometimes refuse to consult with duty counsel based upon an apparent assumption that enough advice, assistance (or even just sympathy) can be elicited from the adjudicator to render legal assistance unnecessary. Participating LTB members generally reported no significant changes in the way parties self-represent as a result of online resources.

In reports that echo the dynamics of some family law disputes, it was reported that some parties appear to crave the formal disapprobation an adjudicated outcome can convey. Indeed, one member noted that both landlords and tenants use the Board to punish one another. Another member volunteered that the LTB clientele has much in common with parties in high conflict

family law cases they start off in a mutually beneficial relationship, things go wrong, and they end up in a destructive and interdependent relationship which they may nonetheless want or need to continue.

More than participating members of any other tribunal, SBT members emphasized the fragility of the Tribunal clientele. Hearings were described as often stressful and emotional due to the subject-matter of income support due to physical or mental disability, and related depression or other emotional problems. It was reported that members generally strive to ease the emotional impact of hearings, although much depends upon individual adjudicators.

The percentage of self-represented parties in SBT hearings who have *not* received some form of legal assistance was estimated among interview subjects at only five to ten percent. Although full representation is not reportedly the norm, in contrast with the other tribunals studied, SBT interviewees emphasized the *availability* of legal assistance for Tribunal applicants. At the outset of SBT proceedings, appellants are reportedly informed by letter from the Tribunal that legal assistance is available, and if the appellant is an Ontario Works (“OW”) recipient, the same information is provided by an OW worker. If an appellant arrives at a hearing without a representative, or without having received advance legal assistance, eligibility for free legal assistance is reportedly discussed at the hearing stage, and proceedings are adjourned upon request to allow time to obtain it; an estimated fifty percent of cases in which self-represented appellants appear without having received legal advice are reportedly adjourned for this purpose.

There are no onsite duty counsel services at the SBT; and as with LTB and HRT0 proceedings, the level of assistance provided by legal clinics varies. It was reported that the SBT has worked with clinics to determine the best triage practices for SBT claims, and similar to the HRLSC and the LTB clinics, full representation depends upon individual needs, such as language or other communication barriers that affect the ability to self-represent, and the complexity of each case. Although one member remarked, “Low income is a proxy for complex needs,” another asserted that impoverished people with simple cases do not get full representation solely based upon low income.

Similar to participating HRT0 and LTB members, SBT interview subjects characterized partial representation, or the “self-help” stream, as “lawyers adopting a coaching role.” Unlike duty counsel, in this model lawyers are able to meet with parties repeatedly and assist in compiling evidence. The extent of the assistance given within the self-help stream varies depending upon the policies and practices of each legal clinic; some supply written submissions for every case, but others do not. The coaching approach was consistently described as very helpful for adjudicators, not only because of the improved quality of materials, but also because appellants are made aware of weaknesses in the case before the hearing stage, are less likely to see the adjudicator as the “bad guy,” and more accepting of the hearing process and result.

Full representation was reported as divided between specialist clinic lawyers and paralegals and, in both categories, was described as “very, very good.” It was reported that among the small minority of parties who appear without having had any prior legal assistance, some are highly

competent, but it is rare for them to appear with case law or other indicia of having self-informed through online resources, consistent with the reported characteristics of tribunal clientele.

As for the respondent government, submissions are made in writing through Case Processing Officers (“CPOs”), and a CPO will attend in person in an estimated thirty percent of hearings, although this percentage was reported as increasing.

In common with participating members of the other tribunals studied, SBT adjudicators generally reported being comfortable dealing with self-represented parties, although one member added that self-represented parties are not a problem because “there aren’t that many.” Echoing some HRTTO members’ comments with respect to active adjudication, one SBT member remarked that self-represented parties require more preparation and are “more work.”

In response to the question of how the Tribunal prepares self-represented parties for hearings, the focus among SBT members interviewed was less upon Tribunal processes designed to assist (such as “hand-holding” at the intake stage) and more upon urging self-represented parties to seek full or partial representation. Nonetheless, the ability of self-represented parties to navigate SBT processes without a lawyer was reported as a goal that has been met through the skill of adjudicators in dealing with a vulnerable population, and alternatively, as a phenomenon that “just happens to be leaning that way.”

6.2 Informality

SJTO tribunals reportedly hold hearings in numerous venues, from well-appointed permanent

facilities to temporary forums – often hotel conference rooms, but reportedly, on at least one occasion, a room located in a hockey arena complex. Needless to say, the level of formality conveyed by the hearing setting is variable.

There were a range of responses in all tribunals studied as to the formality of the tribunal itself, and the value of informality as a component of tribunal identity. Participating HRTO adjudicators gave the most diverse range of responses as to the questions of both whether their processes are formal, and whether informality is a positive value.

The CFSRB has hearing and mediation rooms at its Toronto offices, but it also uses HRTO hearing rooms, located nearby, which have a slightly more formal air. The proceedings I observed in Hamilton, Kitchener and Cornwall were held in hotel conference rooms, at U-shaped or square conference tables with no architecture to suggest rank or territory. Several CFSRB adjudicators interviewed remarked that it is beneficial for the decision-maker to be on the same physical level as the parties, to facilitate eye contact and encourage interaction. In the course of interviews, CFSRB members often remarked that it is a goal of the Board to be a “comfortable place for self-represented parties.”

Informality was generally described by CFSRB members interviewed in terms of enhancing the ability of self-represented applicants to function in a hearing environment. This was especially emphasized by participating clinically trained members, who remarked that: anxiety significantly affects the ability to relate to questions and formulate answers; people with mental health issues “cannot live by rigid rules and processes;” the relative informality of Board processes allows

accommodations to be made, such as slowing proceedings down; and, many applicants lack “social capital,” often find themselves in situations where they feel unheard or overlooked, and informality is vital to creating the sense of inclusion needed for effective communication. It was commonly noted that Board processes are informal *relative to courts*; one CFSRB adjudicator with litigation experience remarked that in courtrooms “we are still bowing to judges,” whereas tribunal members sometimes debate whether it is appropriate for parties to arrive at hearings with coffee and snacks (as they reportedly often do).

Participating CFSRB members commonly reported that the formality of hearings varies depending upon the style of individual adjudicators and panel members. Several adjudicators identified it as a personal goal not to intimidate self-represented parties, to be perceived as “approachable” or “relatable;” several reports characterized Board hearings as “appropriately informal;” and, one member characterized Board processes as “flexible within boundaries.” A single member described Board hearings as *necessarily formal* (to establish authority) and suggested that *more formality* would enhance Board credibility.

Perceptions of informality were most highly varied among participating HRTO members. On one end of the spectrum, some characterized the Tribunal as “court-like” compared to other SJTO tribunals, with adjudicators having a “traditional judicial role” within a “traditional adversarial process,” and described the tribunal “essentially adversarial” and having “a certain gravitas.” At the other end of the spectrum, HRTO proceedings were characterized as “unique” in that members deeply engage with the parties through “trust-building” and extensive use of active adjudication techniques. For some HRTO members “informality” implied a departure

from adversarial processes, whereas for others it meant the freedom of adjudicators to run hearings in any manner they choose, and for still others it was associated with adjudicator willingness to perform menial tasks such as making copies of documents and setting up conference calls. Among members who saw the tribunal as informal, the reported benefits of informality included efficiency as well as those reported by CFSRB members: self-represented parties feel more comfortable and less defensive, and proceedings flow more easily. Among those who perceived the Tribunal as formal, some expressed awareness of less formal approaches within the Tribunal but considered them inappropriate for the Tribunal.

HRT0 hearings were described as sometimes “unpleasant, grueling, charged, or draining,” depending upon the parties and subject-matter, but not as “damaging” or an experience to be avoided at all costs. The stress of hearings was generally attributed to applicants having to re-tell their stories and listen to the other side, often in the context of an ongoing relationship such as employment, and applicants being subject to a system in which “others seem to be speaking a different language.”

LTB hearing rooms visited for this project varied in tone; some were very similar to courtrooms, with wood paneling and conspicuous territorial demarcations, while others had roughly court-like architecture but were comparatively simple, even bleak, with heavily worn carpets and furnishings.

There was relatively little diversity among interviewed LTB members as to perceptions of Board informality; most members reported that Board hearings are formal. The courtroom-style set-up

was noted, and hearing processes were described as traditional and adversarial. It was remarked that: it is not a priority at the Board to put self-represented parties at ease; hearings follow a direct/cross, direct/cross format with little departure except in accordance with personal adjudication *styles*; adjudicators do not have any contact with parties prior to hearings through case management or mediation, which was said to contribute to the formality of hearings. It was noted that formality is required to prevent a “free-for-all” atmosphere; indeed, the LTB members interviewed differed from members of other tribunals studied in that they did not report an institutional ethic in favour of informality (whether observed or not) in the sense of adjudicators being “approachable.” The personal style of adjudicators was cited as the *only* reason for this kind of informality – it was reported that some members are “naturally informal” whereas others are “diva-like.” It was remarked that a uniform style would not be desirable because people “think differently” and process control is “empowering” as it contributes the sense of authority needed to be an effective adjudicator.

Despite reporting relatively high rates of representation at some level, interviewed SBT adjudicators commonly described hearings as informal relative to courts. The Tribunal’s process was described as simpler and more relaxed than a court process, and manageable for people with physical and/or emotional challenges. However, similar to responses in other tribunals it was remarked that levels of informality vary depending upon the choices of individual adjudicators. The atmosphere of SBT hearings was described by one member as “collaborative,” which was attributed in part to CPOs not having a personal stake in proceedings, and rarely approaching hearings aggressively.

6.3 Active Adjudication

It is the beginning of day two. As seats are taken, coffee obtained and materials organized, there is friendly banter between the foster father supported by the children's aid society, society legal counsel, and the CAS representative. The empaneled Board members huddle and exchange materials. Across the table from the CAS group the self-represented foster parents fidget, seemingly conscious of their relative isolation.

The second witness is re-seated at the small witness table at the mouth of the U-shaped table for cross-examination by the self-represented foster parents. The foster mother begins her cross-examination by giving evidence, telling her own story to contradict the witness' testimony in chief. The Chair listens patiently for a while, then finally interrupts, saying, "okay, you have to ask a question."

The foster mother continuously struggles to elicit information rather than provide it. She seemingly intends to review the details of every contact she has had with the society, including with previous foster children. The Chair indicates several times that she is having difficulty understanding the point of a line of questioning or a series of assertions, and often suggests the phrasing and content of questions. The foster mother's lack of focus and apparent need for vindication dovetail badly with the witness' sometimes superior-sounding and off-the mark answers. The Chair advises the foster-mother to break questions into little pieces to make it easier to elicit a clear and specific answer and repeatedly admonishes the witness to "answer the question, just answer the question." The Chair often interjects to ask the witness if she has a case note to support her testimony, and the witness is often sure she does, but is unable to locate it.

As the cross-examination stumbles along, the Chair increasingly takes control. As the Chair asks more and more questions, CAS counsel begins to furiously take notes, to which he attaches little red flags.

(a) Attitudes and Source of Authority

A range of adjudication styles was observed in the hearings attended for this project, and interview subjects differed widely in their reports as to the purpose of active adjudication, how it should be used, and under what authority it is permitted.

Participating CFSRB members frequently described active adjudication as essential to addressing the vulnerability of applicants in the face of power imbalances. As one member put it, “one side knows it all and the other is totally disadvantaged,” and several adjudicators noted that a blend of inquisitorial and adversarial approaches is needed to enable self-represented parties to effectively participate in Board proceedings. It was almost universally reported by CFSRB the interviewed members that the role of an adjudicator is to attempt to “level the playing field.”

The purpose of active adjudication was also frequently described among CFSRB interview subjects as obtaining information needed to make a decision, which some referred to as “truth-finding” (although others were dismissive of this term). Some CFSRB adjudicators characterized active adjudication as a natural component of a “less formal” process, and it was overwhelmingly reported as an essential tool for the application of the best-interests-of-the-child test.

A majority of the CFSRB adjudicators who participated in this project reported that tribunals have more authority than courts to engage in active adjudication, but there was no consensus as to the basis for this authority. It was sometimes expressed as an assumption flowing from SJTO training in active adjudication techniques, or as a general characteristic of administrative adjudication. Some remarked that the authority of the Board relative to courts is unclear, given that the “entering the fray” test “is identical” for courts and tribunals. One member reported that engaging in active adjudication “makes you vulnerable” especially where respondent’s counsel is aggressive, and there is a need to “think defensively” in terms of the potential for complaint or judicial review. Others remarked: that any difference between active adjudication in courts and

tribunals may be eroding as judges in some courts are becoming very active; the Board's clinical expertise lends itself to active engagement with the parties and the evidence; and, unlike the HRTO, the Board has no specific legislated mandate to engage in active adjudication processes.

There was a consensus among CFSRB interview subjects that active adjudication is very important to the work of the tribunal. Members with backgrounds in mental health and other non-legal fields, referred to collectively here as "clinicians," were particularly supportive of active techniques, but generally described "entering the fray" as a legal concept upon which they defer to fellow members with legal training.

Despite the HRTO's express mandate to adopt active adjudication processes, not all HRTO members interviewed reported using active adjudication techniques. Indeed, the most diverse range of attitudes toward active adjudication was expressed by HRTO participants.

Among interviewed HRTO members who *reported engaging in active adjudication*, the purposes for doing so, apart from the express mandate, included: efficient hearings, ensuring a fair process for self-represented litigants, sympathetic concern over the cost of lawyers, obtaining necessary information, and, "getting to the truth." One member noted that unlike the court system where "lawyers put on plays," the job of adjudicators is to "get the facts needed to make a decision." Some of these members cited the specific mandate as a "safety net." Some also remarked that apart from the express mandate, tribunals have more latitude than courts to engage in active adjudication because of administrative law norms. Indeed, it was remarked that in the absence of an express mandate to cross-examine, the authority to question witnesses and the *lack of any*

prohibition against asking leading questions is sufficient to allow adjudicators to cross-examine. Some members described having had both applicants and respondents request an active process.

The minority of HRTO members interviewed who *did not support the use of active adjudication* generally indicated they lacked the mix of litigation skills and strong personality needed to use these techniques effectively or reported that active adjudication is inconsistent with their perception of the Tribunal as formal and adversarial. At the extreme end of the spectrum, active adjudication was described as “a confusing concept;” unfair to respondents who have hired a lawyer and “spent thousands” and, “the flavour of the month.” The essence of the division between active adjudication critics and enthusiasts is illustrated by one member describing a traditional court process as “useless” for dealing with self-represented litigants, and another describing HRTO proceedings as “just another kind of lawsuit.” Further explanations for avoiding the use of active adjudication included: HRTO disputes involve private parties (rather than government department or agency as respondent) and the Tribunal is therefore more like a court than other SJTO tribunals; respondents’ counsel are often senior and specialized lawyers, well capable of pushing back against active processes; and, as one adjudicator observed, “No one wants to write a decision that is overturned by the Divisional Court.” The fact that tribunal members may run hearings in a manner of their own choosing was seen as positive by many, on the basis that members should only use processes with which they are comfortable. Others, although a minority, expressed the view that Tribunal clientele should not have a completely different hearing experience depending upon the personality and preferences of the adjudicator.

HRTTO interview subjects widely acknowledged the uneven use of active techniques at the Tribunal; indeed, it was repeatedly remarked that the Tribunal does not have a “character” apart from the personal adjudication styles of individual members. The most commonly cited reason for this variance was, as noted, that active adjudication is “not something everyone can do,” but overall pattern of interview responses suggests that experience and assertiveness are not determinative – attitudes toward active adjudication were divided *among* both seasoned and assertive adjudicators and newer, more tentative-seeming tribunal members.

In response to the question of whether active adjudication is important to the work of the tribunal, the most common answer was (not surprising at this point): “It depends on the adjudicator.” The minority of members who reported that active techniques are inappropriate in the tribunal’s adversarial setting also reported that active techniques are *not* important to the work of the tribunal. One member noted there is no “truth at all costs imperative” at the Tribunal; another stated that the goal of respondents’ counsel is to win and factored into this goal the expectation that self-represented (or less well-represented) applicants will be inadequately prepared. At the other end of the spectrum, the importance of active adjudication to effective tribunal functioning was described in highly enthusiastic and committed terms.

When asked whether tribunals have more authority than courts to engage in active adjudication the common response among study participants was “yes,” based largely upon the Tribunal mandate. Some differed, however, noting that the same test for apprehension of bias is applied to both courts and tribunals, and active adjudication is therefore no more appropriate in tribunals than in courts until, as one member said, there is “a memo to the Divisional Court.”

There was no common thread in responses as to whether it is difficult to draw the line between acceptable and inappropriate active adjudication strategies. Some members supportive of active adjudication made it sound easy, saying “you just don’t descend into the arena,” whereas others emphasized the need to “bring people along,” “tread softly,” and avoid any opportunity for comparison between the Tribunal and a “Star Chamber.” Despite that the potential for judicial review was frequently noted, formal complaints about the use of active adjudication were consistently reported as infrequent.

Among LTB members interviewed, attitudes toward active adjudication were moderate and supportive; I encountered neither enthusiastic advocates nor strong opponents. Some members emphasized the limits of active adjudication, stressing that it is solely up to the applicant to “make a case,” or remarking that the balance of probabilities should not tilt because of anything said or done by an adjudicator. Others took a more expansive view, echoing the rationales described by members of the other tribunals studied: clarifying information, addressing power imbalances, moving things along, and, “Nobody who isn’t a lawyer is comfortable with cross-examination.”

Participating LTB members generally reported that active adjudication is important to the work of the Board, despite that most of those interviewed characterized the Board as formal and described hearing processes as traditional and adversarial. It was commonly considered that adjudicators have more latitude than judges to engage in active adjudication, but as in other tribunals studied, the basis for this authority and its extent were described as unclear.

As noted, SBT interview subjects reported a relatively small percentage of self-represented parties; nonetheless, hearings were described as informal and active adjudication was characterized as “natural” in the context of the Tribunal’s mandate to deal with a “vulnerable population,” and necessary to ensure that parties “feel heard.”

There was no common thread among the responses of SBT participants as to the source and extent of tribunal authority to engage in active processes. It was remarked that tribunals do not have more latitude than courts, but may, in general, “take active adjudication more seriously” because of an orientation toward self-represented parties, but it was conversely maintained that there is no difference between courts and tribunals in this regard.

(b) Active Adjudication Techniques

Mid-afternoon, day two, the self-represented foster mother’s cross-examination of the second CAS witness is suspended to allow the child’s pediatrician, who has limited availability, to testify. She is a witness for the self-represented foster family. The self-represented foster mother begins her examination in chief by asking the doctor some general questions. CAS counsel objects – the doctor has not been qualified as an expert witness and therefore can only speak to her direct experience with the child. The Chair assists the foster mother by suggesting more specific questions. With the help of the Chair, testimony is elicited to the effect that the doctor recommended feeding techniques for which the foster mother was reprimanded by the Society. The doctor completes her testimony at the end of day two. I leave the hearing room impressed with the Chair’s skill.

The following morning the self-represented foster mother is scheduled to resume her cross-examination of the second CAS witness. Before she begins, the Chair requests that she try to be more direct in asking questions “or we’ll be here in September.” Questioning begins, and soon the witness is, once again, unable to confirm her testimony in a case note. The Chair immediately intervenes, saying, “you remember telling me yesterday you write everything down”?

The Chair begins looking through her own notes from the previous day, which have been highlighted and marked with tabs and red arrows. She asks a long series of questions, frequently cutting off the witness and insisting “it’s a yes or no answer.” The Chair questions the witness’ use of the term “report,” asking “do you agree that “report” has a technical meaning?” She refers to the doctor’s testimony, asking “what would you say to the fact that the doctor says...?” “where are the doctor’s concerns reflected in your notes?” and “did you talk to the doctor about food logs? I would suggest to you that you didn’t.”

The proceedings no longer feel informal or business-like, and nor do they resemble an adversarial process.

After the Chair has completed her questioning a ten-minute break is called, after which the Chair indicates she has a few more questions for the witness. She looks through her notes for several minutes. The room is silent except for the sound of turning pages. The Chair again quotes the doctor’s testimony and asks the witness to comment. CAS counsel objects, saying he’s not sure the doctor actually said that. The Chair moves on, directing the witness to a case note which contradicts her oral evidence; when the witness suggests there must be another relevant case note, the Chair replies, “I suggest to you there was no other note.”

In addition to taking notes throughout the Chair’s questioning, CAS counsel has been throwing incredulous glances at others in the room, including me. I avoid meeting his eyes and aim for a blank expression. Upon the Chair’s suggestion to the witness that “there was no other note,” he stands, saying, “with all due respect,” he is increasingly concerned that the Chair has gone from being an impartial adjudicator to an advocate conducting a cross-examination. He claims she is displaying a “highly adversarial attitude” toward the witness, and that there is a “distinct air of lack of impartiality.” He concludes by saying he “doesn’t make these submissions lightly” and wishes to advise the Board that a motion to recuse is being considered.

The Chair, visibly unsettled, replies that administrative tribunals have evolved into the age of active adjudication, which is a legitimate exercise in the pursuit of administrative justice, particularly when a self-represented litigant lacks the skills needed to ask questions to which the Board needs answers. She notes that the Board is faced with the profound question of the best interest of a child and must be satisfied that it has the information required to assess the special needs of this child. Without pausing, the Chair requests that the self-represented foster mother resume her cross-examination. CAS counsel takes his seat.

The self-represented foster mother again delves into the minutiae of the child's treatment in her care. The witness begins looking at the CAS representative as she answers, seemingly seeking affirmation and reassurance. The self-represented family notices this and asks the Chair to exclude the CAS representative from the hearing room. The panel leaves the room to deliberate, returning shortly to rule that the CAS representative may remain, but the Board takes seriously any attempt by a witness to communicate with others in the hearing room. Eye contact between the witness and the CAS representative is to be avoided.

The self-represented foster mother again resumes her cross-examination, now attempting to discredit the witness' testimony about her own personality and demeanor, and soon is in tears. A break is called. When the cross-examination resumes the self-represented foster mother puts more direct questions to the witness, such as "did I ever cut a conversation short or refuse to talk to you?" and "if I disagreed did I explain?" CAS counsel objects that the questions should be yet more specific. The foster mother starts to defend her questioning, and CAS counsel abruptly cuts her off. The Chair tells CAS counsel, "I am the Chair," and indicates that she will hear the foster mother's submissions.

The Chair responds to the foster mother's submissions by reminding the self-represented foster mother to rephrase her questions to refer to specific occasions; questioning again resumes. The Chair, seemingly finding the witness' answers vague, impatiently and repeatedly tells the witness to "just answer the question." Counsel again objects and is abruptly cut off by the Chair, who says, insistently, that she is getting close to asking him to instruct his witness not to be evasive.

A ten-minute recess is called. The awkwardness that now enfolds the room can be seen in the faces of all, save the apparently unflappable witness, as participants file out of the hearing room in clusters.

Immediately after the break, CAS counsel addresses the panel. He stands, presumably to underline the seriousness of the situation, and says he has consulted with his client and wishes to put on the record the apparent bias of the Chair against the current witness. His tone is exceedingly formal. He claims the witness has been treated with condescension by the Chair; her answers have been repeatedly cut off, and the Chair has exhibited "exasperated facial expressions." He asserts that the Chair has trespassed the limits of active adjudication by conducting an aggressive cross-examination. Finally, he warns he may move for adjournment, followed by a motion for recusal.

The Chair, her manner now also stiff, asks whether he's making the motion or

not. CAS counsel responds that he is not making the motion “at this time,” but is “reserving the right to do so.” He is informed by the Chair that the right to make any motion he wants is always available, and there is no need to “reserve” it. She shuffles through the briefs and other materials on the table and in her briefcase and locates a copy of the Statutory Powers Procedure Act. She riffles through the Act for a few moments, then reads aloud section 13, which provides that where any person, without lawful excuse, acting as a witness, refuses to answer any question to which a Tribunal may legally require an answer, the Tribunal may request by way of the Divisional Court that the person be found guilty of contempt. The Chair reiterates that she told CAS Counsel this morning to instruct his witness to answer the questions. She explains that in the event of a motion to recuse, the panel will make its own ruling. Without inviting a response, she announces that the hearing will now resume.

The self-represented foster mother, now looking worried and confused, perhaps unsure if the foregoing exchange was helpful to her, or not, continues her cross-examination. She asks the witness whether she has ever been dismissive in her tone when dealing with her. After the witness has briefly answered this non-specific question, the witness asks the Chair, “can I add to that?” The Chair replies “No.” CAS counsel raises his eyebrows and shakes his head, keeps his eyes averted from the panel, and again begins to take notes.

The foster mother concludes her cross-examination and indicates that her husband would now like to ask a few questions of the witness. He holds up and refers to a medical report. CAS counsel immediately raises two objections: the witness is not the author of the report and it contains medical opinion evidence provided by a doctor who is not in attendance. The Chair rules that the report can be used for the purpose of questioning the witness; it will be decided later whether it will be admitted as evidence.

The self-represented foster father commences his cross-examination, and the Chair occasionally intervenes but is more restrained. CAS counsel appears to be lost in thought. The witness now frequently asks the Chair, “am I allowed to say this?” and “is it okay to say more?” After the self-represented foster father has concluded his cross-examination, the self-represented foster mother indicates she has a few more questions, which turn out to retread previously covered territory. The Chair points this out, saying that any further questions must be restricted to new matters. The foster mother refers to yet another e-mail, requiring yet another search to locate it. When cross-examination is finally over, the Chair remarks that the proceedings are taking longer than expected, and several more days should be scheduled. CAS counsel replies that he has court appearances scheduled, and limited availability.

A wide variety of adjudication styles and active techniques was displayed in the hearings observed, including within the same tribunal, consistent with reports of many interview subjects that there is no typical style of tribunal adjudication. Despite the reported and observed differences, some common techniques emerged. In several hearings, adjudicators adopted a style I would characterize as “managerial.” Irrelevant evidence was swiftly cut off, parties, whether represented or not, were questioned by the adjudicator, and when parties *were* represented, counsel had less control over questioning and the flow of evidence than did the adjudicator. Similarly, a common method for clarifying evidence was observed: following cross-examination by counsel, detailed and probing questions were asked by the adjudicator, covering the same material but allowing the witness to elaborate and give additional context to the evidence.

In a highly active hearing I observed, the adjudicator’s approach was obviously problematic in terms of the opportunity for judicial review, yet also refreshingly transparent. It seemed to convey to the parties: The Board needs to *understand this*, what you have to say about it? Can you be completely clear? Do you have any documentation? What about what you said earlier? What about what someone else said yesterday? It was bold, and it contained no trace of the mystery and gamesmanship that can hover over traditional courtroom litigation.

Among participating CFSRB members, active adjudication techniques were generally reported upon differently by clinician-members and those with legal training.

Lawyer-members interviewed_tended to emphasize using active adjudication to directly question witnesses and obtain better or more detailed information. While these members also noted the

relative disadvantage of self-represented parties and the need to ensure they “felt heard,” the emphasis among lawyer-members was commonly upon “truth-finding” and efficiency. As one such member said, “The goal is to obtain information needed to make a decision; the reality is that you find yourself asking the questions.” Others reported using active adjudication to “question and instruct, but not to cross-examine;” or compared active adjudication to a client interview in which questions are asked in a casual manner to elicit the salient facts, further remarking that judges in family law cases are “not even close” to using a similar approach. Specific active adjudication techniques described by lawyer-members included: taking more control over the evidence than would occur in court, for example, asking if there is an email or any other document to support an assertion, and if there is, allowing time to get it rather than insisting on adherence to filing timelines; requesting updated evidence; insisting on written statements from all witnesses in advance of hearings; and, conducting med/adj where it seems appropriate and parties agree, despite that the Board has no express mandate to engage in med/adj.

Clinician-members interviewed generally reported their role in hearings in therapeutic terms, including: being aware of an applicant’s disadvantage and helping to ensure that hearings are sufficiently accommodating; taking notice of body language and other cues that indicate a lack of understanding; recognizing apparent mental or emotional problems and discussing them with other panel members; noticing “wandering thinking” and trying to assist with focus and any necessary clarification; encouraging patience among panel members if learning difficulties, extreme stress or depression are observed; taking an active part in reducing unproductive levels of stress by using simple language; and, intervening to slow things down, or suggesting a break

in proceedings. As one member put it, the role is not to do a “clinical assessment,” but rather to have “clinical perspective.”

It was common for participating clinicians to comment upon power imbalances and express empathy for self-represented parties. Most reported feeling comfortable asking questions of witnesses in the course of hearings, including in new areas that a self-represented party “has failed to explore,” as well as questioning a witness about his or her background or qualifications. One such member commented that an adjudicator must ask questions of witnesses or is “failing to do the job.” A very small minority remarked that frequent interruption from any panel member *in the course of testimony* is problematic for self-represented parties, who, it was said, function best if allowed to tell their story with any necessary clarification sought at the end. It was remarked that clinicians tend to *engage* more with the parties, to “stretch out” the story, ask more personal questions, and do so in a “less legalistic” tone.

With respect to evidence, one clinician recounted requesting drug testing in one instance, and requiring an applicant to consult with a neurologist in another. While one member stated that the Board may order its own assessment of a child, another reported that the Board has this power, but it is not used.

Some participating CFSRB members mentioned the need to get both sides to “buy-in” to active adjudication at the outset, although this was not a common response. CFSRB members interviewed most commonly reported clarifying the issues at the start of hearings, telling parties, “This is what I need to hear about.”

Despite the Board’s express mandate to utilize active adjudication techniques, many HRTO members interviewed stressed the need to work toward a “buy-in” from both sides at the beginning of proceedings or spoke of the need to gain the trust of the respondent community with respect to the use of active processes by nurturing an understanding that they do not suggest a preference for the applicant side. Some members described consciously adopting a non-threatening tone and striving to establish a cooperative environment.

It was reported that self represented parties consistently give more information than is necessary or relevant, sometimes to the point of making it difficult to discern the *Code* violation claimed, and making it useful to ask questions such as: “Are you alleging X is a discrimination against you because of Y? OK so that's the issue;” “I don’t see anything about X, will you tell me about this later?” and “What box are you claiming to fit in?” The initial stages of a hearing were compared to a lawyer/client interview with the applicant (a comparison also made by a CFSRB member) at the end of which there is a clear list of issues, and *after which* submissions are invited from the respondent. If new issues are raised by either side in the course of this process, rulings are made as to whether they are relevant, and if so, consent is sought to include them. Some HRTO members reported dispensing with opening statements, described as unhelpful because self-represented litigants will “always start to give evidence.” Similarly, it was very frequently remarked by members of all tribunals studied that self-represented parties are almost universally incapable of effectively conducting a cross-examination, and instead tend to give evidence. Some participating HRTO members reported having occasionally cross-examined witnesses, “sometimes aggressively.” Specific cross-examination questions described as

acceptable, include leading questions, such as: “Am I correct in saying you said X?”; “Something you said doesn't make sense to me, how do you respond to that?” (instead of, “I put it to you that you are lying”); and, in the face of conflicting evidence saying, “I want you to know that when X was here he said Y, what do you have to say about that?” The rationale for strategies such as these was described as ensuring that “the questions that need to be asked are asked.” It was reported among HRTA members supportive of active adjudication that its effective use requires a firm and complete understanding of all available information about the case *before* the hearing or med/adj begins; all documents must have been filed, and all prehearing materials, case direction notes, witness statements, and other materials must be read in advance. Others simply described active adjudication as “more work.”

A more moderate approach to questioning witnesses was described by some members interviewed, who reported assisting self-represented parties to conduct a cross-examination by asking, “What are you driving at?” and then providing an appropriate question for the self-represented party to ask. Members who reported a lack of enthusiasm for active adjudication, unsurprisingly reported avoiding questioning witnesses, particularly during cross-examination, and posing “neutral questions” at the conclusion of testimony. Among this group it was noted that an adjudicator might “plug some holes” after cross-examination by a self-represented party, but that this can be done “within the traditional adversarial model of adjudication,” and there is no need for adjudicators to be “aggressive” in cross-examination as they are “not trying to build a case.”

Several participating members reported requiring written witness statements to enhance hearing efficiency. Further evidence-related strategies included: suggesting a certain order of witnesses; reducing the number of witnesses (for example, where a witness is being called to establish an element of the case that has already been established); dispensing with disputes over admissibility by accepting virtually all evidence and applying the rules of evidence to weight; and, requiring a missing witness statement to be written “on the spot” by calling a hearing break. In contrast to these assertions, other members reported that adjudicator control over evidence is exercised “tentatively,” departures from the rules of evidence are predominately made on consent, and restraining repetitive evidence risks judicial review.

It was commonly reported as unusual or inappropriate for HRTO adjudicators to request evidence. Members reportedly cannot summon witnesses on their own motion but may suggest to parties that certain witnesses would be of assistance, and may compel document production, although there is no obligation to do so. One member remarked that if applicants claim damages but provide no proof of loss, they are “out of luck.” Another remarked that many applicants fail in their claims because of insufficient evidence, not because their claims are not conducive to proof, but because the applicant does not understand how to prove the case or has failed to obtain evidence understood to be necessary. As one member put it: it is not the role of the Tribunal to “figure out what one side needs to make a case, and then allow time to go and get it.”

Several participating HRTO members volunteered that there is strong institutional bias against adjournment, which some adjudicators strictly enforce. Examples of reported accommodations to avoid adjournment or loss “on a technicality” include: allowing an applicant to amend pleadings on third day of a hearing, and persuading respondent’s counsel to accept documents that should

have been filed by a self-represented litigant, forty-five days prior. One member described granting an adjournment to allow a self-represented party to obtain missing evidence, explaining to the respondent that the evidence was needed for a “solid decision;” whereas another member recounted denying an adjournment to a self-represented party who arrived without having filed any materials, proceeding with the hearing request, and barring the self-represented party from calling witnesses or submitting documents.

LTB members interviewed generally described moderate but assertive use of active adjudication techniques. It was reported that members “try not to cross-examine,” but will directly question “and challenge” a witness, if necessary. Some strategies echoed those reported in other tribunals, such as asking a self-represented party, “You've claimed X, how do you plan to prove it?” Similarly, it was reported as “no problem” to interrupt testimony, not just to clarify the evidence given, but to focus the parties and exclude irrelevant material, for example, by asking, “How does that fit in here? This is what I need to know.” As in other tribunals, the unproductive combination of cross-examination and self-representation was noted; some LTB members reported suggesting that cross-examination be skipped altogether.

Similar to the responses of some HRTO members, the interests of *represented* parties were noted by some LTB members interviewed. One member remarked that if a witness is evasive, it is enough to notice the behavior and draw an appropriate inference, that is, “there is no need to insist upon clear answer.” Another commented that more inquisitorial powers would make adjudication easier but would “not be fair.” Another member remarked that if a tenant exhibits intrusive or inappropriate behaviour it is a very effective strategy to threaten a monetary fine.

As in other tribunals studied, LTB members interviews commonly mentioned a strong institutional bias against adjournment, and described allowing almost any evidence rather than “going through the fuss” of explaining rules of evidence and applying the rules to weight. It was reported that adjournments are sometimes granted for the sake of “fairness,” but not with comfort, and one member remarked that fairness should be more important than efficiency. If a new claim comes to light in in the course of a hearing, the potential claimant is reportedly advised to withdraw and file a new application. If a new defense is discovered of which a tenant was unaware, the tenant is reportedly referred to duty counsel. It was remarked that an adjournment might be granted to allow a self-represented party to obtain missing evidence but would never be granted simply because a party “was seeing the case unravel” and regretted not being better prepared. Similarly, another member reported that if a self-represented party asks for time to obtain important evidence, an adjudicator is as likely to say, “Your hearing is today,” and proceed, as to grant an adjournment, depending upon the circumstances and the individual adjudicator.

As noted, participating SBT adjudicators discussed active adjudication in terms of assisting self-represented parties to “feel heard.” SBT members also described the importance of explaining the role of a Case Processing Officer (“CPO”), so that self-represented parties “don’t feel attacked;” being patient because “people meander;” balancing efficiency with letting people say what they need to say (“up to a point”); and being aware of sub-cultural sensitivities, such as discomfort with eye contact. SBT members reported curtailing repetitive testimony by continually focusing the proceedings and doing away with closing submissions.

It was reported that it would be rare for a SBT member to request new evidence of any kind, and it would certainly “never happen” with respect to medical evidence, which was described as the “sole responsibility of the appellant.” One member gave a contrary account, stating that an obvious hole in an appellant’s case would be met with a suggestion that legal counsel be obtained, followed by an adjournment.

(c) Limits of Active Adjudication

Participating CFSRB members consistently reported that complaints about the use of active adjudication are infrequent. One CFRSB member recounted society counsel saying in the course of a hearing, “If this was a court no judge would allow this;” and another mentioned a society lawyer walking out of a hearing, but these were described as rare and isolated incidents. It was reported that complaints about Board processes are usually resolved by immediate discussion and mutually satisfactory process adjustments, not formal complaint or application for judicial review. It was remarked that the Board periodically consults with stakeholders, such as children's aid societies, and that this has helped the Board gain acceptance for its processes.

Clinicians more often than lawyers, reported it as difficult to restrain involvement in proceedings. One clinically trained member remarked that it is tempting to become an advocate for applicants, given that they often present as relatively powerless and isolated. Some Board adjudicators emphasized the importance of active processes to the work of the Board; as one member put it, “Adjudicators should not be afraid to do their jobs.”

Similar to CFSRB members interviewed, participating HRTO members consistently reported that complaints from parties and counsel about the use of active adjudication are infrequent. The HRTO has an internal review process through which it may consider any complaints in advance of the opportunity for judicial review. Despite the reported infrequency of complaints, it was often remarked that clarity must be achieved with respect the treatment of active adjudication by review courts.

Participating LTB adjudicators also reported that bias allegations stemming from the use of active adjudication are uncommon, and when they do arise, are dealt with through an internal review process that reportedly seldom leads to judicial review.

SBT members interviewed reported it as very rare for CPOs to object to active adjudication strategies; one member recalled once being cautioned, but another remarked that there is considerable room for the use of active processes because CPOs do not have a personal stake in outcomes and are interested in efficiency. Consistent with this, another adjudicator reported “not being very concerned about appearing to advocate for other side.”

Interviews with tribunal members were conducted shortly after the release of the Divisional Court decision in *Children’s Aid Society of the United Counties of Stormont, Dundas and Glengarry v. S.V.D.*⁶⁵⁰ (“*S.V.D.*”). The decision was highly critical of the conduct of the CFSRB

⁶⁵⁰ *Supra*, footnote 608. [*Children’s Aid Society of the United Counties of Stormont, Dundas and Glengarry v. S.V.D.*]

proceedings under review; the court held that the duty of procedural fairness had been breached in that the conduct of the Chair established a reasonable apprehension of bias.⁶⁵¹

The *S.V.D.* decision was discussed in most interviews, often raised by interview subjects in tribunals other than the CFRRB. Responses to the decision were fairly evenly divided. Some said the conduct of the Chair as reported in the decision was far too intrusive; one such member remarked, “You cannot ask questions that take up 44 pages of transcript;” another noted that in using active adjudication an adjudicator must “tread softly and slowly,” coaxing the parties along, rather than “conduct an inquiry.” Conversely, some tribunal members (including non-CRSRB members) said that the conduct complained of was *not* extreme, and questions of the kind asked by the Chair and set out in the decision were asked “every day of the week” by adjudicators in active proceedings. It was emphasized that there is a difference between questioning a witness to obtain the witness’ response to apparent conflicts or inconsistencies in the evidence or matters that require explanation, and “cross-examination” in a manner that a lawyer might adopt – such as suggesting a witness is not telling the truth. Concern was expressed that the former style of questioning may be perceived by a review court a form of “uneven treatment,” particularly given that an adjudicator must ensure that all the evidence required to make a fully informed decision has been obtained and *cannot rely upon self-represented parties to do so through effective cross-examination*. Among those who disagreed with the Divisional Court decision, some reported the decision as “shocking” on the basis that the court had “ignored” the administrative law context of the decision, and it was remarked (again, among

⁶⁵¹ *Ibid.* The court also held that the Board decision was unreasonable, at para. 131.

non-CFSRB members) that the Board does not require an express mandate to conduct highly active proceedings *in an administrative law context*.

In terms of future practice, many participating members reported concern about the *S.V.D.* decision. At the extreme end of this concern, one member described feeling “muzzled,” and another reported “pretty much giving up on the use active adjudication.” A more moderate response was that the CFSRB will have to “regroup in order not to feel too restrained.”

(d) Levelling the Playing Field

It is unsurprising, given the wide scope of active adjudication attitudes and practices reported in the tribunals studied, that some adjudicators reported “levelling the playing field” as a vital tribunal function, while others swiftly rejected this characterization. The term itself seemed charged; indeed, some members who described levelling the playing field as an *illegitimate* tribunal goal nonetheless reported using highly active adjudication strategies.

Among interview subjects in all tribunals studied, CFRSB adjudicators most often reported “levelling the playing field” as a legitimate tribunal function, consistent with frequent reports of significant power imbalances in CFSRB proceedings. It was reported that self-represented parties can be conspicuously “outmaneuvered” by children's aid society counsel, and that within the relative informality of Board proceedings, it is appropriate, even essential, for adjudicators to address power imbalances by deeply engaging in proceedings. It was further remarked that the everyday role of children's aid society counsel is to act in child protection proceedings in the

Provincial Courts, resulting in an adversarial orientation that is at odds with the Board's emphasis upon alternative processes.

There was no commonality among participating HRTO adjudicators as to whether it is the role of an adjudicator to level the playing field. Responses included: "We take parties as they come;" it is not the role of an adjudicator to educate self-represented litigants or to "help them" because "there is a lot of information out there;" "Imagine if you had paid thousands for a lawyer and the adjudicator rescues the other side," and, "We are not going to be rescuing the applicant."

Conversely, it was asserted by other members that the Tribunal "manages aggressive lawyers;" ensures that core issues are addressed, even if one side is self-represented or under-represented; and, "It's not about who puts on the best show."

LTB members interviewed did not emphasize power imbalances and, consistent with reports of moderate use of active adjudication techniques, did not discuss active adjudication in terms of leveling the playing field. SBT members commonly reported that in appropriate cases a conscious attempt is made to level the playing field, citing the power imbalances inherent in the client community.

(e) Active Adjudication Guidelines

There was generally support among participating HRTO and CFSRB members for active adjudication guidelines. Most CFSRB adjudicators interviewed opined that publicly available active adjudication guidelines would provide members with clarity and enhance the legitimacy of Board processes in the eyes of the public and children's aid societies. Some HRTO members

who reported discomfort with active processes nonetheless supported active adjudication guidelines on the basis that, as one member put it, “It would be nice to know what you’re allowed to do.” Other HRTO adjudicators who described themselves as *very comfortable* with active hearing process *also* supported guidelines on the basis that less comfortable members would “have something to hang onto,” and with which to “push back,” while still others opposed guidelines on the basis of not wanting “to be told what we’re not allowed to do.”

Participating members of the LTB were divided on the merits of active adjudication guidelines, and SBT members generally reported uncertainty as to whether active adjudication guidelines would be appropriate, mentioning the value of existing training in the use of active adjudication.

6.4 Multi-Disciplinary Panel Decision-Making

The CFRSB is unique among the tribunals studied in that it engages in multi-disciplinary panel decision-making. The other tribunals studied recruit adjudicators with a range of background training and experience, but reportedly use panel decision-making only in cases which have ramifications for the development of the law or are otherwise exceptional.

There was extremely strong support among CFRSB members interviewed for the use of panels in best-interests-of-the-child cases, and several members described it as “essential.” It was often remarked that panel members complement and balance one another. Lawyer-members in particular frequently reported a great deal of reliance upon, and comfort in, the knowledge and experience of clinically trained panelists.

At the hearing stage, lawyer-members remarked that the knowledge of clinicians is very helpful in emotionally charged cases and those affected in some way by mental health problems. It was noted that panels make it easier to avoid pitfalls like “reacting to personalities” and provide a good “reality check.” It was remarked by one lawyer-member that panel decision-making provides the Board with a more informed approach to best-interests-of-the-child determinations than is available to courts. Clinician-members, on the other hand, reported deferring to legally trained panel members with respect to process issues and the overall management of proceedings, but were less emphatic than lawyer members about the need for panels in best-interests-of-the-child decision-making. One clinician member, while noting there is “comfort in panels,” expressed no “absolute preference” for the panel model, and another remarked that if a single member were required to adjudicate a best-interests-of-the-child case, a clinician would be preferable to a lawyer.

In the CFSRB proceedings I observed, it was clear that panel members were performing distinct roles. The behavior of the lawyer-member was generally managerial and, in some instances dominant, while the conduct of other panel members varied from almost complete passivity to active engagement in questioning witnesses. In general, panel members gave the impression of being part of a fact-finding mission not directed by parties or counsel.

At the deliberation stage, participating CFSRB members of all backgrounds reported multi-disciplinary perspectives as valuable. Legally trained members generally reported deference toward clinicians regarding behavioural, mental health, and child-centred issues; some said they “absolutely deferred” while an equal number said they “somewhat deferred,” and as noted,

clinician-members reported deference to lawyer-members as to the limits of active adjudication. Despite reported areas of deference, the deliberation process was described as active, respectful and collaborative, with panel members having “equal voices” and typically engaging in extensive discussion. Both legally-trained members and clinicians reported “constructively challenging” one another and cultivating an atmosphere of “respectful trusting” in order to maximize the participation of all panel members. It was remarked that disagreements about outcomes are dealt with by efforts to persuade, and dissenting views are never dismissed out of hand.

The existence of “panel effects” which might undermine multi-disciplinary decision-making was explored, and there no reports of “over-deference” to other panel members, or “strong” members seeking to dominate deliberations, or more taciturn members too readily seeking consensus at the expense of thorough deliberations. Just one member reported having experienced a panel deliberation that was unpleasantly “conflictual,” and just one area of disagreement emerged: some members reported that if no consensus is reached following deliberations, majority rules, while others insisted that panels never operate on a majority-rule basis. Written dissents were reported as rare, but nonetheless an option.

6.5 Best Interests of the Child

All CFSRB members interviewed reported that the Board is very comfortable applying the best-interests-of-the-child test. It was specifically remarked that “the field is well understood” by the Board members, and one clinician-member noted that in addition to having experience in child

and youth work, some members have taught and/or applied the best-interests-of-the-child concept in other institutional settings.

When asked what an ideally constituted panel for best-interests-of-the-child determinations would look like, the common thread in responses of participating CFSRB members echoed the format currently in place at the Board: one lawyer to give the panel legal process credibility and authority, and two members with clinical backgrounds suited to the case. Preferences for the training of clinical members included training in social work or psychology, with expertise in special needs, parenting plans and mental health. One member remarked that social workers may have the best qualifications for panel adjudication and are often under-rated as professionals.

6.6 Expertise and Internal Consultation

As the foregoing indicates, CFSRB members interviewed reported a high regard for the knowledge and experience of fellow Board members. I was informed that members include, or have included, psychiatrists, psychologists, social workers, teachers, and lawyers familiar with court systems and/or child welfare systems, including the institutional dynamics of children's aid societies.

Although I did not set out to explore the effects of term limits on expertise, several CFSRB adjudicators volunteered that term limits are problematic for the development and retention of expertise, although one clinician, expressed the contrary view that term limits provide a good opportunity for Board membership to be "refreshed."

Participating CFRSB members commonly reported that, on an *informal* level, expertise is primarily built and shared simply by panels working together over a period of years. On a *formal* level it is enhanced by regular conference calls and cluster-wide “Institutes,” in which members of all SJTO tribunals receive professional development training. It was commonly remarked that Institutes are not sufficiently targeted to Board issues, and while some members considered conference calls a useful component of professional development, it was more often remarked that they fail to foster either expertise or collegiality. One member remarked that conference calls do not encourage the kind of dialogue that allows knowledge to be reinforced and broadened, stressing, “This is a really important piece.”

Reports of *informal communication* among CFRSB members outside the panel context were varied. Some members reported very frequent informal communications about problems and perspectives, saying that members regularly reach out to members with different strengths in the course of private deliberations, whereas others reported very little internal consultation, saying it would be inappropriate to “poke into other member’s files,” or that they “don’t want to make decisions for someone else,” and will only discuss “situations and experiences” in general terms, without discussing case details.

HRT0 membership is largely made up of lawyers, with training and experience in a variety of areas of the law; however, as noted above, the Tribunal does not normally utilize panel adjudication and is not “multidisciplinary” in the same sense as the CFRSB. Expertise is founded more upon familiarity with Tribunal subject-matter than the contributions to decision-making of diversely specialized members.

It was commonly reported by participating HRTO members that *formal* consultation in the form of quarterly mini-training sessions led by vice chairs are important and effective for building Tribunal expertise, and bi-weekly meetings/conference calls where draft decisions can be voluntarily shared were also described as helpful. In common with CFSRB members, it was frequently noted by HRTO members that Institutes are too general and wide-ranging to be effective, and that term limits inhibit the retention of institutional expertise; indeed, the very fact of term limits was described as inconsistent with the concept of an expert Tribunal with a merit-based appointments process. HRTO members generally described extensive *informal* consultation; members referred to an “open door” atmosphere and “tons of” interaction and exchange of ideas.

As with HRTO members, most LTB members are reportedly lawyers, and the Board is not built upon multi-disciplinary expertise.

LTB members interviewed reported a high level of internal consultation both in a general sense and regarding specific cases under consideration. Legal department circulations and quarterly half-day training sessions were described as useful for allowing members to drill down on their own legislation and discuss new issues, and Institutes were described as an effective “umbrella approach” to professional development. The background training and experience of SBT members seems especially diverse; membership reportedly includes many lawyers, but also teachers, police officers, paralegals, social workers, administrators, and business people. Term limits were not mentioned as problematic by SBT members.

It was reported by SBT members interviewed that expertise is built by monthly teleconferences and periodic circulation of Divisional Court decisions. The value of mentoring was noted, as well as performance monitoring and random internal review of member decisions by Vice-Chairs. Like LTB members, SBT members reported more positively upon Institutes as a professional development tool. Descriptions of internal consultation were varied; SBT members generally reported frequent internal consultation, but a minority maintained that internal consultation is restrained by a need to ensure that members do not offload responsibility for the central task of assessing the implications of medical evidence.

6.7 Soft Law and Structured Decision-Making

The tribunal members interviewed varied in the extent to which they described decision-making as discretionary. Participating LTB members were the least consistent in this regard; although several members noted specific and meaningful sites of discretion within their mandate, such as imposing a payment plan upon a landlord based on a tenant's circumstances, others described their role as straightforward application of a statutory code. This discrepancy perhaps is unsurprising, as an element of discretion is an inevitable part of decision-making⁶⁵² and may not be reported as a distinct power. HRTO members more consistently described their decision-making authority as discretionary, sometimes citing the need to interpret the "duty to accommodate." CFSRB and SBT members very consistently reported their decision-making as discretionary, consistent with commentary which suggests that in settings involving

⁶⁵² *Supra*, footnote 467 at page 302. [Pratt and Sossin]

conspicuously vulnerable populations, discretion is usually broad and the manner in which it is exercised is enormously significant.⁶⁵³

One of the questions for this project is whether a more structured “guidelines approach” to the best-interests-of-the-child test is desirable or feasible in the context of an adjudicative family law tribunal. For this reason, two potential sources of soft law were discussed with CFSRB members: 1) a publicly available digest-like record of significant tribunal decisions, appellate court decisions, and frequently updated clinical research on the application of the best-interests-of-the-child test, as a way of memorializing tribunal expertise and creating a tangible foundation upon which to build further expertise; and 2) publicly available, non-binding guidelines for the application of the best-interests-of-the-child test. Members of the other tribunals studied were similarly asked to comment upon the potential for a digest or guidelines approach to decision-making, but not in the context of a particular legal test.

A *digest* approach was met with approval by most CFSRB members interviewed. It was remarked that while relevant Divisional Court decisions and some Board decisions are summarized and distributed by the Board legal department, these cases often relate to process rather than substantive law, and obviously do not reflect the blend of law and other disciplines that is at the heart of the Board’s concept of its own expertise. Approving responses included: “there is not enough downloading of experience and perspective” to allow Board expertise to become “generalized to the Board;” a digest would be useful in non-panel adjudication; “excellent members come and go” and it would be worthwhile to preserve their contributions; a

⁶⁵³ *Supra*, footnote 482. [Sossin, Discretion unbound]

digest would demonstrate to outsiders the Board's commitment to informed and consistent decision-making, and would enhance the Board's public profile; and, it would be helpful for training new members. The minority of participating CFSRB members who were opposed to the concept of a Board digest indicated that it would fetter discretion. In the view of one such member, *any development* that could be interpreted as a "best practices" approach would be a problem, because "best practices are not best in every situation," and may too readily be used to override the importance of, for example, cultural factors.

The response to best-interests-of-the-child *guidelines* was mixed; some felt they would be helpful and appropriate, provided they were clearly non-binding, and others strongly emphasized the importance of unfettered discretion. Positive responses (some of which echo reactions to a Board digest), include: "Low-key guidance would be good, but it could never be a "ticks-in-boxes" approach; "I would be happy to see it, possibly to the point of non-binding presumptions;" guidelines would help to "even out" panels by extending the knowledge of more experienced members; greater transparency would improve Board credibility; the criteria in the *CFSA* are a "good list" but guidelines "could flesh them out from a conceptual and practical perspective;" guidelines informed by social science and psychological perspectives as to the impact upon child development of "surface conditions" such as cleanliness of the home, would be very useful; and, an express focus upon the best-interests-of-the-child test would allow it to be more thoroughly understood and consistently applied. Among those opposed to guidelines, again upon the basis of fettering discretion, one member asserted that all development of Board expertise regarding the best-interests-of-the-child test must occur as a consequence of the Board absorbing relevant court decisions, because otherwise the Board risks adopting a policy role.

Although one member volunteered that non-binding *presumptions* would be useful, there was little common ground among members as to the merit of non-binding presumptions. Some indicated support for attachment as the default primary factor, even to point of a presumption, absent risk of harm, whereas others remarked that while guidelines would be helpful they should not include presumptions.

Finally, participating members were asked whether unwritten “guidelines” currently exist in the form of *shared understandings* about best practices in the application of the best-interests test. Some legally trained members reported that such understandings exist with respect to “broad principles,” for example, emotional bonds and status quo parenting are always “front and centre,” and if this factor is very strong it will almost always overwhelm other components of the test. Others remarked that certain adjudicators, who have worked together for a period of years, have developed common approaches toward more refined aspects of the test, but this is not a significant phenomenon on a Board-wide scale. Still others rejected the notion that shared understandings exist, adding that any commonality in the approach to applying a discretionary legal test would be a fetter on discretion. Among these members it was emphasized that internal consultation concerning the best-interests-of-the-child test does not extend to discussion of how it should be applied in specific cases.

Participating HRTO members’ responses to an internal *digest* were fairly evenly divided. At the extremes, the concept of a digest-form institutional memory was described as “amazing” and,

conversely, as “unwieldy” if not impossible to produce because there are “too many divergent views at the Tribunal.”

HRTO members interviewed also responded unevenly to the potential for *guidelines*.

Enthusiastic members remarked that CanLII is a limited tool for searching procedural points; guidelines on substantive law would be especially helpful with respect to nuanced concepts such as the “duty to accommodate;” and, guidelines would help to compensate for the loss of key people due to expired term limits. On the skeptical side, the concern was again fettering discretion. Incidentally, the Ontario Human Rights Commission website, which contains information that elaborates upon the *Code* was not mentioned by members and seems intended only for public education purposes.⁶⁵⁴

Despite the mixed responses to a digest or guidelines approach, *shared understandings* or “institutional perspectives” on frequently encountered legal issues were reported to exist, and to be nurtured by Vice-Chairs in quarterly mini-training sessions, and through bi-weekly meetings/conference calls in which draft decisions can be voluntarily discussed, as described above.

Neither a *digest* nor a *guidelines* approach was generally well received by LTB members interviewed; just one member considered that an institutional memory or greater decision-making guidance would be useful.

⁶⁵⁴ See online: ohrc.on.ca

Some participating LTB members remarked that the “Practice Directions” posted on the Board website, which elaborate upon both process issues and substantive law, do *not function as guidelines*; they are meant to inform the public, not to guide decision-making. Adjudicators are reportedly expected to rely upon CanLII and legal department memoranda summarizing relevant appellate and review court decisions. Some members described *shared understandings* as to the circumstances in which members may depart from a strict application of the legislation; for example, a payment plan is reportedly more likely to be extended, or an eviction delayed, in cases where there is a long-standing tenancy or where children are affected.

Among SBT members interviewed there was no common thread in responses to a *digest* or *guidelines* approach to decision-making. It was remarked that a digest would be useful but impractical to maintain, as it would require frequent updating and refinement. It was further noted that the existing “Hearing Handbook” effectively canvasses all recurring issues, and that the Tribunal’s internal legal department effectively performs a guideline function.

6.8 Pre-Hearings and Mediation

The tribunals studied incorporate different mediation systems, and participating members reported various styles. The responses of members interviewed in all tribunals studied suggested that extending initial mediation to a further date was generally considered a negative outcome, an indicator that settlement had not been swiftly achieved, rather than a positive indicator of the depth of tribunal resources and mediator commitment.

Almost all CFSRB members interviewed reported acting as both adjudicators and mediators. Participating members described mediation as “built into” the Board process, in that pre-hearings may be converted to mediation if the parties agree. Mediation, or “settlement facilitation,” is reportedly strongly encouraged for section 68 claims, as there is often an ongoing relationship to preserve between a children's aid society and a complainant and the Board has limited remedial authority in any event. A very small minority described mediation as ineffective for section 68 applications because children’s aid societies are aware of the Board’s limited remedial authority and have little incentive to meaningfully engage in mediation. The use of mediation to resolve best-interests-of-the-child cases was reportedly strongly encouraged only for those in which common ground is apparent at the pre-hearing stage.

CFSRB pre-hearings/mediation are scheduled for a day-long session, and may, in appropriate cases, be conducted by telephone. It is reportedly possible to extend mediation by scheduling an additional pre-hearing, although one-day sessions were generally described as sufficient. One member remarked that the HRT0’s half-day approach would not be suited to the sensitive and personal issues dealt with by the Board, saying, “It takes half a day just to get parties settled, the issues agreed upon and understood, and productive discussions underway.” If settlement is not reached, a mediation report is generated, which serves as an agenda for the subsequent hearing, although new issues can be added even at the hearing stage.

CFSRB members who conduct a pre-hearing/mediation may preside over the hearing of the same matter, provided the parties consent. This differs from the med/adj format utilized by the HRT0, in which parties agree *in advance of mediation* that the member conducting mediation will act as

adjudicator if settlement is not reached. It was reported by participating CFSRB members that applicants “very rarely, if ever” obtain legal advice in advance of pre-hearings or mediation, and respondent children's aid societies are generally accompanied by counsel both in mediation and in hearings. One member remarked that Board mediation would be more successful at reaching settlement if children's aid societies “did not bring their lawyers.”

The Board reportedly uses the pre-hearing/mediation stage to “educate” self-represented parties as to the position of the party opposite, the applicant’s potential claims, information the Board will need to make a decision, and the hearing process. It was commonly remarked that self-represented litigants are increasingly well-informed *at the hearing stage*, which was attributed to pre-hearing practices, as well as to increasing use of the SJTO website, CanLII and other online resources.

Most CFSRB members interviewed described Board mediation as evaluative. Although one member maintained there is no typical style of mediation at the Board, it was generally reported that mediators do not hesitate to discuss options, remedies, likely outcomes of adjudication, and “things parties haven’t thought of,” despite recognition voiced by some members that children's aid society lawyers may see this as “giving advice.” One member stressed that mediators do not suggest arguments or strategies to self-represented parties, but rather, inform them of what the society needs to prove and what information the Board needs to make a decision. Another member described the Board approach to mediation as “getting to the centre of the dispute.” In section 68 matters, where, as noted, there is often an ongoing relationship to protect, the goal of mediation was described as “building trust,” trying to get applicants to understand the children's

aid society perspective, “bringing civility” to the relationship and working with both sides to reach an agreement that will benefit their long-term relationship. Some members remarked that evaluative mediation would not be appropriate for a med/adj process, and those who reported the occasional use of med/adj at the Board noted that a less evaluative, more facilitative approach was adopted in these cases to preserve the adjudication role.

Most participating CFSRB members reported that mediation is generally preferable to adjudication. Some members cited the standard virtues of settlement: mutual buy-in, win-win result, and better compliance. Others reported that a broader range of issues can be dealt with in more depth, and self-represented parties are more likely to “feel heard,” particularly if emotional problems suggest they will have difficulty “tolerating a hearing.” One member expressed the contrary view that Board mediation is unsatisfying because applicants tend to concede too much, leading the member to feel “complicit.”

In common with most CFSRB members, HRTO members reportedly act as both mediators and adjudicators. HRTO applicants are asked to consider mediation at the application stage, either independent of the hearing process or through a combined mediation and adjudication process known as “med/adj.” Mediation is scheduled for a single half-day and may be conducted in person or by telephone, pursuant to the telephone mediation pilot project referred to above. Some members reported that a half-day session is often not enough. If settlement is not reached at the conclusion of independent (non-med/adj) mediation, a hearing is scheduled before a different tribunal member; in a med/adj process a hearing is immediately scheduled before the same tribunal member if mediation proves to be unproductive.

The med/adj program was overwhelmingly described in positive and enthusiastic terms by participating HRTO members. It was said that med/adj is offered in virtually all cases, is strongly encouraged, and a hearing without med/adj is now unusual. One member's characterization of the program as "massively successful" was not atypical; indeed, settlement rates were reported to be as high as ninety-five percent, compared to about eighty percent for independent mediation. It was remarked that some parties agree to med/adj to favourably impress the adjudicator and are surprised to find themselves in a productive mediation process.

The high settlement rate for med-adj was attributed to mediators being more fully informed in the med-adj context. Others cited the greater impact of mediator comments to the parties in med/adj, due to the potential for a hearing before the same member. The most recently available SJTO Annual Report sets out statistics on rates of representation in mediation and adjudication. Although the Report does not separate med/adj and independent mediation, it indicates a higher rate of representation in mediation overall than in adjudication and a *much higher* rate of assistance from the HRLSC in mediation than in adjudication. No significant difference in rates of representation based upon process was reported for respondents.⁶⁵⁵

No institutional style of mediation was identified by HRTO members; as with active adjudication, mediation style was described as a matter of the individual preferences of

⁶⁵⁵ *Supra*, footnote 580. [SJTO Annual Report] The Report indicates:
For mediation: 36% of *applicants* were represented by a lawyer or paralegal, 22% received assistance from the Human Rights Legal Support Centre, and 40% were self-represented. Among *respondents* in mediation, 85% were represented by a lawyer or paralegal, and 13% were self-represented;
For adjudication: 28% of *applicants* were represented by a lawyer or paralegal, 7% received assistance from the Human Rights Legal Support Centre, and 53% were self-represented. Among *respondents* in adjudication, 86% were represented by a lawyer or paralegal, and nine percent were self-represented

members. The range of reported styles was broad; some described a “folksy” or conversational approach, others saw themselves as “swiftly evaluative.”

Adjudication and mediation are separate functions at the LTB; mediators are reportedly unionized, and it was noted that adjudicators must be careful not to adopt mediation-like methods in the course of adjudication. As noted above, the LTB has undertaken the CMH Pilot Project in some locations, under which attendance at a case management hearing, presided over by a dispute resolution officer who may be either a mediator or a case administrator, is mandatory for all tenant applications. An applicant’s failure to attend a CMH may result in the application being dismissed. A respondent’s failure to attend may result in deemed admission of all facts and allegations pled, and a hearing conducted in the respondent’s absence. A CMH may only be adjourned in “exceptional circumstances,” such as the need for accommodation under the *Human Rights Code*, or a family illness or death, and this standard applies even to adjournment requests made on consent. In cases where adjournment is allowed, the case may be rescheduled to a new CMH or proceed directly to a hearing, at the discretion of the DRO or mediator assigned to the hearing. Costs may awarded for failure to participate in a CMH if the result is a delay in the resolution of the application.

A CMH may be conducted in person or by telephone; one hour is scheduled, and if no agreement has been reached but settlement seems likely, a further CMH or “special mediation” may be scheduled. If settlement neither occurs nor seems imminent within the first hour, the mediator adopts the role of “case manager” and discusses the need to obtain evidence, file materials and notify witnesses. A case manager reportedly may suggest appropriate documents or witnesses,

“if asked.” One member stressed that once it becomes clear that a CMH will not result in settlement, strenuous efforts are made to ensure a “tangible take-away” in the form of an interim order (usually for disclosure), a statement of agreed facts, and/or a list of next steps.

Participating LTB members reported that parties are very often directed to duty counsel in advance of mediation, or alternatively, mediation may be interrupted to allow time to meet with duty counsel.

There was no common thread among LTB members interviewed as to the style of LTB mediation. Some reported that LTB mediators typically conduct “interest-based” (facilitative) mediation, the goal of which is “getting people talking,” and that mediators are generally not sufficiently familiar with cases to adopt a “rights-based” approach. In contrast, one member described interest-based mediation as, “a beautiful concept that mediators do not have time for,” and maintained that a “legalistic approach” is more efficient, better suited to addressing power imbalances, and appropriate for landlord/tenant disputes which at bottom involve “business relationships;” the role of mediator was said to include “educating self-represented about legal tests,” what to expect in a hearing, and how the Board has handled similar cases. Specific practices described for accomplishing this reportedly include using a paper copy of online practice directions as a manual for discussing rights and obligations, that is, to manage power imbalances through equal access to information and tread the line between providing information and giving legal advice.

It was further reported by some participating LTB members that mediation is encouraged at the Board for the sake of efficiency, not because it is a superior process or leads to better outcomes. One member reported that tenants may well “get less” through mediation than they would through adjudication; conversely, another maintained that most mediators would recommend a hearing rather than encourage agreement on terms too far removed from legal entitlements.

Discussions with SBT members were focussed more upon adjudication and the availability of legal advice and/or representation, than on mediation and settlement, although, as noted, the SBT reportedly offers an early resolution opportunity presided over by an appeal resolution officer, who is not an adjudicator, but rather an administrator trained in mediation. These sessions were said to function like case conferences in the court system: as an opportunity to clarify the issues and potentially settle. In the event that settlement does not ensue, the appeal resolution officer becomes the appellant’s contact person at Tribunal.

6.9 Settlement Pressure

It is 9:10 a.m. as I enter a Landlord and Tenant Board hearing room, and someone is speaking. I make my way along a sidewall and across the back of the room and sit at the edge of a row of chairs in the least populated part of the room.

The speaker is a woman who stands at the front of the room behind one of two rectangular tables. She is talking about the role of Duty Counsel. It soon becomes apparent that she is referring to herself. Her voice is authoritative, but without edge. She gives the impression she has given this talk many times before.

Duty Counsel moves on from explaining her role and begins to talk about the Board’s mediation services. She emphasizes that parties “Do Not, Not, Not,” lose the right to a hearing if they try mediation and fail to reach an agreement.

She says parties can “come right back” to the hearing room if mediation “is not working.” She uses a persuasive tone to inform the twenty-odd people assembled in the room that there are “lots of upsides” to mediation; specifically, mediators are not bound by the pleadings and parties can explore any issues they want in any manner, and “Mediation is a win-win.”

Duty Counsel then outlines the shortcomings of the hearing process: the Adjudicator will take a narrow view of the issues; parties can only talk about what is in the pleadings; there will be no opportunity for negotiation. Duty Counsel ends it there and leaves the room.

People clustered around the room in little groups begin to talk quietly. The chairs, of which there are about eighty, are arranged in rows facing the front, with an aisle down the centre. In the back row on the left side sit a couple with two children who look to be between seven and ten years of age. A bald man dressed in a suit sits in the front row near the door, flipping through a newspaper spread out on the chair beside him. A woman with her hair in a tidy series of long, thin black and blond braids sits behind him; next to her is a man wearing a Greek fisherman’s hat, holding in his lap a large metal briefcase. A tiny middle-aged woman with sharp features sits at the opposite end of my row looking tense and impatient, as if she is anxious for the day to be over. Another woman of a similar age sits a few rows ahead, wearing a lacy knit brown shawl that rearranges itself as she shuffles through papers on her lap. Some people fidget restlessly, others look bored. Several people stare intently at their cell phones. One man paces up and down the centre aisle. He is short in stature and his clothing is stained and drooping. He wears a smudged safari-style hat, out of which trails thin brownish hair. As he walks his fingers comb his thin goatee.

It is now 9:35 and the Adjudicator has not yet arrived. People continue to talk quietly in little groups, read, look at their phones or do nothing. The Security Guard, a reedy man who appears to be in his fifties, leaves his chair in the glass anteroom and begins to pace up and down the left side of the room.

A woman wearing a tailored suit and a badge with the word “Mediator” on it enters through the anteroom carrying a folded laptop and sheaf of papers. She approaches a small group in the front row, asking if they want to try mediation. They do not. She suggests they might want to just “give it five minutes.” They say they are “past that.” The Mediator moves on to approach others in the room with the same question. No one accepts her offer.

At 9:39 a.m. a woman enters the room through a secure door behind a long, elevated dais located squarely at the front of the room. She sits at the centre of

the dais, without looking up, and begins to look through the files she has brought with her. After a minute or two, she looks up and says she will explain a few things before hearings start.

The first topic is mediation. The Adjudicator repeats much of Duty Counsel's remarks on the availability of legal advice, and the Mediator's talk about the benefits of mediation, saying parties often find mediation more satisfying than a hearing. She describes the hearing process as adversarial and adds that it looks like it will be a long morning; many people on the list have shown up and several have brought witnesses. She again suggests that while people wait to be heard they investigate the other services offered by the Board.

Hearings commence with the Adjudicator calling an address. The Adjudicator indicates that the landlord is to sit at a table on the right immediately in front of the dais, and the tenant at an identical table on the left. The man wearing a Greek fisherman's hat moves to the tenant's table, alone, and gruffly states he wants advice from Duty Counsel. The Adjudicator asks if he has signed up for Duty Counsel yet; he says yes. She nods, makes a note, and says she will "hold the matter down a bit." He leaves the hearing room.

The Adjudicator calls another address. The woman with black and blond braids comes forward and sits at the tenant table. The woman in the lacy shawl sits at the landlord's table. Neither looks at the other.

The Adjudicator asks the tenant if she wants advice from Duty Counsel; she indicates she does not. The Adjudicator asks if the parties want to try mediation, again saying it is a useful process; they both decline. The hearing begins with the Adjudicator asking questions of the tenant. She recites events apparently referred to in the pleadings and asks, "Could you tell me about that?" She asks for information about the premises: How many bedrooms? Furnished? How much is the rent?

As the Adjudicator is inviting testimony from the landlord, the Mediator re-enters the hearing room. The Adjudicator notices her presence and interrupts herself to announce that the Mediator is available "and willing" to review the issues with anyone waiting to be heard. No one responds.

The Adjudicator goes back to looking through the file in front of her, as the landlord begins to talk about being a cancer survivor. The Adjudicator interrupts her to ask for copies of the lease and certain emails. "You have three copies, right?" the Adjudicator asks. She does not. The Mediator, still standing at by the dais, tentatively moves forward as if to offer to make copies. The

Adjudicator's manner abruptly changes; she turns to the landlord and says, emphatically, "Listen to what I'm saying. I'm not interested in wasting your time or my time. I'm not sending people out to make copies. We'll have a short recess. There is a copy place downstairs. Go get prepared."

The Adjudicator calls another address. This time only the landlord is present, through a "landlord's representative," a middle-aged woman who has just entered the room wearing a green leather jacket and large gold hoop earrings. She takes her place at the landlord's table and confidently recites the absent tenant's spotty payment history. The Adjudicator's demeanor is calm and business-like. She makes slow and deliberate notes, seemingly unaffected by the silence of a roomful of people watching and waiting. As the landlord's representative speaks the Adjudicator occasionally asks her to stop as she locates a document in her file or makes further notes. She nods every so often without looking up. She occasionally says "okay." She issues an order for payment of arrears in the form requested by the landlord's representative.

A new address is called. The tiny middle-aged woman who had seemed so impatient moves to the landlord's table. She indicates that she has a witness in attendance, who sits beside her. Again, the tenant is not present. The Adjudicator notes this is the second appearance. The Adjudicator asks the landlord if she wants to give evidence first or start with her witnesses. The landlord elects to testify first and is asked to swear to tell the truth, and she does.

The Adjudicator riffles through the file as the landlord talks about the difficulties created by the absent tenant: loud swearing, unprovoked outbursts of anger and bizarre behaviour. The Adjudicator interrupts to ask which unit is occupied by the absent tenant. The landlord answers that it is the basement. The Adjudicator says this information does not appear in the Notice. She says the Notice is defective, she cannot proceed under a defective Notice, and the absent tenant will have to be re-served and the process re-started. She explains that if she orders an eviction on the basis of the defective Notice the whole address will need to be evicted because the Sheriff will not know which unit is affected. The Adjudicator says it is a shame that this was not noticed at the first appearance, and she understands it is frustrating. The matter is adjourned. As the landlord and her witness prepare to leave the Adjudicator says: "I know it doesn't seem fair." No one replies.

The landlord and her witness walk toward the door, passing a man who recently entered the room and has been observing the proceedings. She shakes her head and grimaces as he mutters "this is utterly ridiculous."

The Adjudicator scans the room and asks if anyone is back from seeing Duty Counsel. No one speaks or steps forward. The Adjudicator says she'll take a short recess. It is 10:15.

Most people stay in the hearing room during the recess. The Security Guard sits at the end of a row and looks through the Toronto Star. The children in the back row begin playing a clapping game. A man in a blue-black suit and oxfords, with wavy graying hair and the air of a lawyer enters the hearing room and sits in an empty row near the front.

At 10:25 the Adjudicator returns. She calls several matters. The parties are absent or not ready. She quietly sighs and declares another recess.

People resume talking. I hear murmurs about wasted time coming from the front row. There is quiet laughter between the man in the oxfords and a middle-aged couple, who have just entered the room. The landlord in the lacy shawl returns from making copies. She asks someone in the front row where the "judge" is.

At 10:37 the Adjudicator re-enters the hearing room. As she sits down, the man in the Greek fisherman's hat returns from Duty Counsel. The Adjudicator calls his address, and he again sits at the tenant's table. The man in the safari-style hat resumes his place at the landlord's table, removing his hat to reveal a long Mohawk that falls from side to side as he moves his head. A younger man dressed in a suit sits beside him.

The tenant is invited to begin. He explains he is "looking for" an adjournment. He says he just received the landlord's Notice and has a lot of paperwork to review; he wants to raise an issue of his own; he is running out of money making three copies of everything; he spent nearly \$150 on the last hearing he attended; his witnesses couldn't come today. He asks, "I don't know if you recall my last visit?" The Adjudicator nods and ever so slightly raises her eyebrows. The tenant says the landlord has a "big force" representing him and has "unlimited money."

The Adjudicator asks why his witnesses could not attend; in reply he begins talking about photocopies. The Adjudicator says "We are talking about witnesses. That's all you're supposed to be talking about right now. Stop. Do you hear me?"

The Adjudicator then looks beyond the parties and addresses the room. She says, "This matter will take a while" and again suggests mediation is "a good alternative." She says she would hate to run out of time and be unable to hear everyone. She says, "the hearing room closes at 12:30 and if I run out of time I run out of time."

The Adjudicator turns to the man with the long Mohawk and says, "It's your turn." He explains that the tenant will not give him access to the premises for any purpose, even maintenance. He holds up a copy of a sign with the handwritten words "NO ENTRY," which he claims the tenant has posted on the door. The tenant starts to speak, but the Adjudicator immediately turns to him and says, "No. It's not your turn."

The landlord resumes talking. His testimony meanders. The Adjudicator says, "Please answer the question I'm asking" and, looking at the man in the suit, "I'm asking your representative to keep you on track." The Adjudicator asks the landlord to clarify when the NO ENTRY sign went up on the tenant's door. The landlord's response is vague and rambling. The Adjudicator tells him he must answer the question, or he will lose credibility. She tells him he isn't making sense. A woman seated among the spectators, several rows behind the landlord, starts to answer the question. The Adjudicator raises her voice and says "Excuse me, stop talking. You cannot speak when the witness is on the witness stand." She then addresses the landlord and his representative: "I'm going to give you a few minutes to get yourselves together. I'm going to deal with a matter on consent and come back to you later."

The Adjudicator calls a new address. A group of people who have just entered the hearing room approach the bench.

The man with the long Mohawk continues to talk to his representative at the landlord's table while the tenant in the fisherman's hat gets up, takes his metal briefcase and moves back to the first row of chairs. The Adjudicator talks to the group seeking a consent order, who stand in front of the dais, and smiles as the parties chuckle. The group leaves after a few minutes looking satisfied. The Adjudicator looks down at the landlord with the Mohawk and his representative, still at the landlord's table, and tells them they have to move so she can deal with another application.

The Adjudicator asks the landlord in the lacy shawl whether she has her copies. She says she does, and she and the woman with black and blond braids take their places at the appropriate tables. The photocopies are distributed. The

Adjudicator notices that only one side of the lease has been copied. The landlord explains that she asked the photocopy service downstairs to copy both sides. The tenant with the braids exclaims “She’s had two and a half weeks to prepare! She ought to have copies!” The Adjudicator, now more patient, replies, “These things happen. I’m not going to wait another half hour.” She hands the document to the security guard, who leaves the room, apparently to make copies of the back of the lease.

The Adjudicator asks the landlord to talk about the emails she has filed. She tells the parties she has to decide on a balance of probabilities whether a tenancy has been created. She asks questions of both parties. The landlord talks a great deal more about being a cancer patient. The Adjudicator nods sympathetically whenever the landlord mentions her illness and says that what she needs to understand is her living arrangements. The landlord is vague.

The Adjudicator reiterates that the first issue is whether or not the Act applies. She says she finds it “more likely than not” that it applies, and therefore she will hear the tenant’s application. The tenant with the braids lowers her head, says a theatrical “thank you,” and begins to testify. She says the landlord has repeatedly entered the rental premises without notice, and has on various occasions removed the thermostat, cut off the cable and internet, turned off the water, changed the locks and called the police to complain of noise in the apartment. She is articulate, soft-spoken and organized. The Adjudicator seems to appreciate the quality of the tenant’s presentation; she frequently nods and indicates her understanding by saying “okay.” She often looks up from her notes and watches the tenant closely.

The Adjudicator asks the tenant what remedies she is looking for. The tenant says she wants to be reimbursed for sixty dollars she spent on a new internet connection and requests a one-month rent rebate as compensation for the difficulty she has suffered.

The Adjudicator asks the landlord in the lacy shawl if she is ready to respond to any of the things the tenant has said. The landlord responds by talking about a broken towel rack, exorbitant internet bills, smoking in the unit, garbage everywhere and dirty dishes in the sink. When he has finished speaking, the Adjudicator looks hard at the landlord as she tells the parties they will have a decision within thirty days.

Others in the room have become restless. It is 11:35 a.m.

Settlement pressure was generally *not* reported as problematic by participating CFSRB members. It was said that pressure to mediate is applied in section 68 cases but is justified by the strong advantages of mediation in these cases. One member reported that settlement pressure is not a concern in any type of case, because even parties who have been pressured to mediate are often pleased with the process once they are in it (echoing an HRTO member, as noted above) and further because of the general superiority of consensual outcomes. Another member remarked that settlement pressure is not a problem because “people are often disappointed at the end of hearings.” It was stressed by some that although mediation is encouraged, members clearly signal that it is voluntary. It was reported that “shuttle mediation” is used to check in with parties during mediation to ensure comfort with the process and that any proposed settlement accurately reflects “where they are at.”

In HRTO interviews, a significant *minority* of members expressed concern over settlement pressure. Some of these concerns were related to its effects *on members* – it is reportedly seen as a “failure” if mediation does not result in settlement. Participating members of both the HRTO and LTB mentioned an institutional emphasis upon settlement statistics, some remarking that members are under “unfair pressure” to maintain or improve their “stats,” a pressure which is passed on to parties. One member characterized a practice whereby members are required to contact parties who have not checked the “mediation box” to persuade them to mediate as an awkward exercise in “pushing people.” Apart from the effects upon members, it was said that too much emphasis upon settlement may detract from the important message that the Tribunal, at its centre, is meant to provide principled adjudication. Conventional concerns associated with an

emphasis upon settlement were also noted; that is, the law does not evolve, and human rights become “privatized.”

As noted above, it was reported among LTB members interviewed that the Board is focused upon high-volume, repetitive work. One member explained that adjudicators typically start a hearing day with approximately sixty files; in about half of these cases a party does not show up (often because the parties have settled privately); in the remaining thirty or so cases, some parties are diverted to duty counsel, which can result in adjournment, and some take up the repeated offers of mediation, which is reportedly essential for getting through the docket. Participating SBT members reported no concern over settlement pressure. Hearings were described as highly accessible, with more emphasis placed upon obtaining representation than upon settlement.

6.10 Access to Justice

Among tribunals members interviewed, accessibility was defined in various ways centred upon providing assistance to self-represented parties, including: the relative ease with which processes can be invoked; assistance provided at the intake stage; ready availability of mediation services; for some members, active hearing processes; and, for a smaller number of members, the ability to level the playing field. While a very small minority expressed concern that tribunal accessibility may be over-estimated by the public, a strong majority of members across all tribunals studied reported that accessibility, in the sense of the ability of self-represented parties to manage tribunal processes, is a goal that has been achieved.

6.11 Summary

This chapter recounts the reported responses of interview subjects, broken down by subject matter and tribunal. Significant findings which suggest *promising tribunal approaches* to problems identified in family law court systems include: 1) consistent reports among all tribunal members interviewed of a high level of individual and institutional comfort in dealing with large numbers of self-represented parties, often characterized as a vulnerable population; 2) emphasis among participating CFSRB and HRTTO members upon the value of work done by the tribunal in advance of the hearing stage, including defining legal problems and identifying the evidence needed; 3) the success reported among members interviewed of mediation processes “built in” at the start of tribunal processes, with an adjudication fallback; 4) the reported use of *information-intensive* mediation; that is, redressing power imbalances by ensuring equal access to information using published best practices as a guide; 5) the use of blended mediation and adjudication through med/adj; 6) the availability in some tribunals of specialized legal clinics that provide different levels of assistance and/or representation based upon complexity and ability to represent, often through a “coaching” role; 7) reports of the value of multi-disciplinary decision-making, particularly by participating *lawyer-members* of the CFSRB; 8) common support among participating clinician-members of the CFSRB for best-interests-of-the-child test guidelines; 9) consistent reports among both lawyer and clinician CFSRB members interviewed that active adjudication is an essential tool in the application of the best-interests-of-the-child test; 10) common responses among participating members of all tribunals that the main purposes of active adjudication are “getting the facts needed to make a decision” and assisting self-represented parties; 11) the reported existence and nurturing of shared understandings or

“institutional perspectives” on frequently encountered legal issues; and 12) no reports that suggest hearing processes are “damaging” or to be avoided at all costs.

Further significant findings which suggest *problematic aspects of tribunal decision-making* that could be useful in the conception of a family law tribunal include: 1) lack of consensus among some participating tribunal members as to the fundamental character of the tribunal, whether it is hybrid or adversarial, formal or informal; 2) uneven attitudes among members interviewed in the same tribunal toward active adjudication, that is, uneven hearing styles – some members interviewed reported using traditional adversarial litigation format, while participating members invested in active adjudication reported dispensing with aspects of the adversarial model including opening statements, closing statements, rules of evidence, cross-examination and direct examination of witnesses; 3) lack of consensus among tribunal members interviewed as to the basis for their authority to engage in active adjudication and what strategies are appropriate; 4) reports of some participating HRTO members of a need to coax respondent lawyers to accept an active hearing process despite the Board’s express mandate; 5) emphasis by some members interviewed upon independence in the sense of adjudicators’ freedom to adopt processes with which they are most comfortable, and the related acceptance of highly varied hearing practices; 6) limited use of voluntary onsite mediation services offered at the start of hearing processes; 7) reports that self-informing is not particularly useful for vulnerable populations at the initial stage of a dispute when the nature of a claim and the evidence needed must be assessed; 8) acknowledgement of settlement pressure as potentially problematic due to pressure to maintain “stats;” 9) an apparent diffuse fear of judicial review; that is, fear coupled with uncertainty about

legitimate triggers for review; and, 10) the reported use of mediation styles based upon member preferences rather than client needs.

Finally, a significant finding regarding *potential tribunal processes* relevant to problems identified in family law court systems is that among participating members in all tribunals studied, there was generally a divided response as to both a digest and a guidelines approach to consolidating expertise and enhancing consistency, largely based upon concern about fettering discretion.

7. A TRIBUNAL FOR CUSTODY AND ACCESS?

The Family Justice Working Group Report begs the question: if the recommended reforms were fully implemented, would there be any reason to explore the potential for alternative institutional approaches to family law dispute resolution? American problem-solving courts, the LAT and the Toronto IDVC suggest the same question: why consider a tribunal model given that family courts already have been, in some jurisdictions and for some purposes, extensively reformed? Indeed, from a vulnerability theory perspective, the institution is immaterial; it is the institutional *effects* that count.

This chapter considers the potential for a tribunal system to meet assumed family law policy goals, and within the limits of this project, noted above, reports and commentary with respect to family court systems are interlaced with the discussion of tribunal potential.

For the purpose of this thesis, on the basis of the literature reviews and research reported above the assumed goals of a tribunal-based family justice system include: the creation of an administrative multi-disciplinary settlement system based upon a teamwork approach; a secondary adjudication component that operates as a secondary, ancillary function, and is identified as a modified inquisitorial model; the development and nurturing of institutional expertise in the assessment of children's interests and the application of the best-interests-of-the-child test; the development and nurturing of institutional expertise with respect to domestic violence; development of decision-making guidelines; and, exercising a policymaking role through the principles of collaborative governance. Implicit in all of these goals are the broader objectives of effectively dealing with large numbers of self-represented litigants through a

holistic dispute resolution system that does not inspire dread and does the utmost to protect children.

As others have suggested, tribunal design itself must be “a holistic enterprise, involving the expertise of policy-makers and lawyers, administrators and information-technology professionals, organizational and behavioral specialists, and communication experts.”⁶⁵⁶ This chapter makes no such attempt; it is the culmination of a thought experiment and the discussion is broad-brushed and hypothetical.

7.1 The Potential for Multi-Disciplinary Teamwork

It is noted in administrative law literature that an ideal tribunal design creates opportunities for teamwork, division of labour and a “spirit of collegiality and co-operation.”⁶⁵⁷ The rationale for a multi-disciplinary teamwork approach to custody decision-making is perhaps best illustrated by the knowledge and skills suggested as essential for family law judges, *in addition to adjudication skills and comprehensive knowledge of family law*:

Judges must understand the complexities of family dynamics, including: the causes and implications of family violence; other power imbalances within the family; and the causes of alienating parental conduct. They need to also know about the effects of these behaviors and attitudes on children and parents, and their ability to parent effectively. As we have noted, multiple causes can underlie continuing conflict families, including personality disorders, other mental health issues, substance-abuse, and patterns of controlling behavior, and judges should be familiar with these underlying causes and their implications.

Judges need to be familiar with child development theory and must understand how a child can be adversely affected by conflict between the parents. They need to know about the significance of hearing from children, as well as the short and long-term

⁶⁵⁶ Lorne Sossin, “Designing Administrative Justice” (2017) Windsor Y.B. Access Just. 87 at page 102.

⁶⁵⁷ S. Ronald Ellis, “Current Issues in Judicial Review of Administrative Action” Osgoode Professional Development LL.M. Materials, Fall 2010.

consequences of not hearing from them. Judges need to apply this knowledge to the particular family that the judges dealing with to determine what is happening within this family, and what is required in the future to make the best interests of the children; this identification of the real issues at stake is critical

Judges should have effective communication and management skills as well as other dispute resolution skills. While attempting to facilitate settlement is always important, the judge needs also needs to know when the decision is required and must be able to provide a decision in a timely way. The decision must be understood by the parents and children and rendered anyway that will facilitate compliance with the decision. Being able to identify the continuing conflict cases, determine the nature of the problems and devise the necessary solutions is not intuitive. Nor is the knowledge and expertise required learned from ordinary family living experience. Making wrong choices can be harmful to children. Judicial education, training, and experience in dealing with family cases are essential if these cases are to be dealt with effectively and efficiently.⁶⁵⁸

The foregoing is arguably too much to ask. Moreover, the overall approach is inconsistent with the realization in many fields, as noted above, that the complexity of modern decision-making benefits from an interdisciplinary approach.⁶⁵⁹

An alternative to expanding judicial qualifications to include other fields is to locate adjudicators within an interdisciplinary team. This approach is consistent with studies noted above that suggest: “collegial decision-making” leads to “more principled” decisions⁶⁶⁰ and panel members with diverse backgrounds improve decision-making when information is deeply shared.⁶⁶¹

Moreover, the benefits of collaborative decision-making are increasingly recognized in the child protection sphere.⁶⁶²

⁶⁵⁸ *Supra*. footnote 206 at page 445. [Bala, Birnbaum, and Martinson]

⁶⁵⁹ See: *supra* footnote 564. [Kapeliuk, Collegial Games]

⁶⁶⁰ *Ibid.*, at page 267. [Kapeliuk, Collegial Games]

⁶⁶¹ *Supra*, footnote 566 at page at pages 1498-1499. [Quinn] See also: Kristina Klykova, “Bias in Arbitral Decision-Making” 31(2) J. Int. Arb. 289.

⁶⁶² *Supra*, footnote 567. [Nouwen]

Although England and Wales reportedly have a long history of attaching social welfare services to family law systems,⁶⁶³ the Norgrove Report describes a lack of trust and shared objectives among component parts of the family justice system.⁶⁶⁴ Perhaps in a similar vein, the Australian Law Reform Commission Issues Report refers to submissions in which it is remarked that available family services are “siloeed” and navigating among them can be frustrating and overwhelming.⁶⁶⁵ While the OCL is recommended as a model for “an independent body tasked with representing children’s interests” in the Australian Law Reform Commission Discussion Paper,⁶⁶⁶ it accepts less than fifty percent of the cases referred to it, and despite the acknowledged value of its services, there is a tension, discussed in detail above, between reliance upon outside assessments and judicial independence. In the same vein, the proposed creation of a Family Justice Service within UK family courts “rang some judicial alarm bells;” the President of the Family Division reportedly remarked that it raised significant issues of constitutional validity.⁶⁶⁷ It has been suggested in related commentary that by characterizing the Family Justice Service as a “support for the judiciary” which can be “shaped” by senior family judges, the Norgrove Report understates the extent to which decision-making may become shared with non-judges in the new model, and glosses over the serious implications for judicial independence of close multi-disciplinary teamwork within a court setting.⁶⁶⁸

It has been remarked in the literature that a tribunal model offers the opportunity to utilize non-judicial decision-makers “with the specific skills needed to deal with modern family

⁶⁶³ *Supra*, footnote 340 at page 238. [Doughty, Identity Crisis]

⁶⁶⁴ *Supra*, footnote 246 at page 340. [Doughty and Merch]

⁶⁶⁵ *Supra*, footnote 7 at page 80. [Australian Law Reform Commission, Discussion Paper]

⁶⁶⁶ *Ibid.*, at page 174. [Australian Law Reform Commission, Discussion Paper]

⁶⁶⁷ *Supra*, footnote 246 at page 346. [Doughty and Merch]

⁶⁶⁸ *Ibid.*, at page 347. [Doughty and Merch]

problems.”⁶⁶⁹ The extent to which tribunal adjudication has potential to improve upon family court systems may depend upon the value to policymakers of collaborative, multi-disciplinary non-hierarchical decision-making in best-interests-of-the-child cases, and the capacity of tribunal systems to provide it.

The natural justice requirement of judicial independence in a tribunal model is a factor in both courts and tribunals; however, tribunals such as the CFSRB in Ontario and the PMH pilot project in Australia, appear capable of integrating decision-making and multi-disciplinary expertise through a skill-based division of labour and equal status among professionals. Although the data generated here cannot be generalized to other contexts, for the limited purpose of recommending further study I note that participating CFSRB members reported enthusiastically on panel decision-making in best-interests-of-the-child cases, and both legally trained and clinically trained members specifically remarked upon an atmosphere of mutual respect and appreciation for the expertise of others. Having said this, a significant minority of members interviewed in both the CFRRB and HRTTO reported that *informal* internal consultation among tribunal members is approached cautiously, out of a concern for fettering discretion. Recent commentary also suggests that expertise is not always fully utilized in tribunals; while it serves a legitimizing function at the *creation* stage of tribunals, it can be isolated from decision-making for fear of compromising adjudicator independence.⁶⁷⁰ In the result, a firm tribunal mandate could articulate the difference between internal consultation and abdication of the decision-making role, and validate the sharing of expertise among equals as a legitimate component of tribunal decision-making, that is, teamwork.

⁶⁶⁹ *Supra*, footnote 40 at page 20. [Semple and Bala, Reforming the Family Justice System]

⁶⁷⁰ *Supra*, footnote 588 at page 2. [Jacobs, Reconciling Tribunal Independence and Expertise]

Australia’s proposed PMH pilot project is described as an administrative tribunal “designed to provide a multi-disciplinary alternative to court proceedings for less complex children’s matters where parents are not legally represented.”⁶⁷¹ The Australian Law Reform Commission Discussion Paper reports a “mixed response” to the PMH concept among stakeholders; concerns include a proposal to require leave in order to attend hearings with legal counsel, and a need to ensure that at least one panel member has expertise in all forms of family violence and related trauma, that adequate processes exist to help children and young people participate in the hearing process and strong risk assessment processes are in place.⁶⁷² There is no apparent concern over integrated multi-disciplinary decision-making; indeed, the Discussion Paper notes that in light of the concerns noted above, stakeholder input is needed regarding ways of strengthening the capacity of the PMH process, or otherwise developing a less adversarial decision-making process, given strong support for a less adversarial approach to adjudication for families with “complex needs.”⁶⁷³

7.2 The Potential for a Settlement System

(a) Integrated Specialized Mediation

The HRTO med/adj process and the CMH Pilot Project suggest movement toward settlement systems in which adjudication is a secondary, but accessible component of the dispute resolution process. The CMH Pilot Project, as noted, requires mediation in the form of an information-

⁶⁷¹ *Supra*, footnote 7 at pages 142-143. [Australian Law Reform Commission, Discussion Paper]

⁶⁷² *Ibid.*, at page 140. [Australian Law Reform Commission, Discussion Paper]

⁶⁷³ *Ibid.*, at at page 144. [Australian Law Reform Commission, Discussion Paper]

intensive case management hearing run by a dispute resolution officer (who may be either a mediator or a case administrator) for all tenant applications, and if settlement is not achieved a report is filed; a similar approach is taken in the CFSRB; both mediation and pre-hearings are followed by reports that inform subsequent adjudication.

A custody and access tribunal conceived of as a settlement system could experiment with any number of variations on these programs. Their reported strengths, noted above, include: more informed mediation; a tendency toward facilitative mediation, high settlement rates; and the obvious efficiency of not starting over at the adjudication stage. Moreover, “mediation/arbitration” is effectively used in private family law dispute resolution,⁶⁷⁴ generally toward the high end of family law practice.

Family courts have adopted blended settlement and adjudication processes, such as the “one judge” approach in which a single judge mediates a pretrial settlement conference and also presides over any subsequent trial.⁶⁷⁵ The case conference process similarly provides multiple opportunities for judges to encourage and assist with settlement, but it is up to individual judges to determine the extent to which settlement is encouraged and how it is pursued, and what is more, these sessions are not necessarily equivalent to mediation as not all judges undertake mediation training. Others have noted that judges tend to be evaluative mediators and are not generally highly suited for the facilitative style of mediation thought to be effective for family law disputes involving children.⁶⁷⁶

⁶⁷⁴ *Supra*, footnote 339. [Grant]

⁶⁷⁵ *Supra*, footnote 150 at page 318. [Semple, Judicial Settlement Seeking]

⁶⁷⁶ *Ibid.*, at page 309. [Semple, Judicial Settlement Seeking]

A family court system could experiment with single-judge med/adj, provided it is presided over by a judge (and not, for instance, a mental health professional with mediation training) regardless of the requirements of the case. There is no constitutional barrier to judicial mediation in Canada but the qualifications for appointment to the bench are based upon legal training and experience according to statute, to say nothing of centuries of tradition. Again, it seems too much to ask of judges that they must have knowledge and skill in family law, the art of judging, child development and family dynamics (and particularly family violence) and *also mediation*.

As noted, in some Ontario courts, two hours of free onsite mediation is available to parties in family law cases who are referred by a judge or Dispute Resolution Officer, as well as eight hours of offsite subsidized private mediation. While these services are of course a positive development, they are time-limited and not integrated with the judicial function.⁶⁷⁷ Similarly, in Australia, England and Wales and British Columbia, while mediation is required in advance of filing a court application involving children (except in cases of family violence) the mediation and adjudication functions remain, in different ways and to varying degrees, separate from the adjudication process.

With respect to the potential for tribunal processes in family violence cases, I note that the Australian Law Reform Commission Discussion Paper reports stakeholder submissions which describe adversarial litigation in family courts as particularly inappropriate for people who have experienced family violence, with some noting that it can “reinforce the destructive and

⁶⁷⁷ *Supra*, footnote 305. [Madsen]

traumatic experience of family violence and enable perpetrators of violence to continue their abuse of the other party,” which, the paper notes, are consistent with findings of the Parliament of Australia’s Standing on Social Policy and Legal Affairs Committee that “the existing adversarial system for family law disputes is not appropriate to address matters involving family violence” and “must be restructured and redesigned so that safety and accessibility are central.”⁶⁷⁸

It has been noted in the literature that in mediation of any kind, whether or not it is connected to the courts, unrepresented parties may seek levels of advice or support that are inconsistent with mediator neutrality, and self-represented parties may feel the process is unfair if mediators do not assist them sufficiently, while represented parties may feel the process is unfair if they do.

However, in court-adjunct mediation *in particular*, parties may assume, *rightly or not*, that a mediator will provide sufficient legal information and guidance to protect against an improvident settlement.⁶⁷⁹ Further, court adjunct mediation which offers short mediation times and focuses upon disposing of cases quickly has been characterized as a “coercive” form of mediation that ought not to be court-sponsored.⁶⁸⁰

In a tribunal setting, mental health professionals and legally trained members could work independently, collaboratively or in formal panels, and in both mediation and adjudication, depending upon the needs of each case. The opportunities for process flexibility could allow for targeted use of expertise, enable the effective use of elaborate forms of triage, potentially

⁶⁷⁸ *Supra*, footnote 7 at page 140. [Australian Law Reform Commission, Discussion Paper]

⁶⁷⁹ *Supra*, footnote 276. [Boyarin]

⁶⁸⁰ *Supra*, footnote 162 at page 892. [Murphy]

decrease delay and stretch resources, both as a consequence of time-saving and through the use of a less expensively credentialed workforce.

(b) Interactive Information Services

While the parallel to family law is not exact, as noted above, among members interviewed in all tribunals studied, a portion of tribunal clientele was described as obviously stressed, sometimes with apparent mental health issues. It was reported that applicants in CFSRB processes are often “in crisis” and have little or no understanding of potential claims, remedies or Board procedures, all of which come to be understood through interaction with the Board. Within the HRTO med/adj process and the CMH Pilot Project, an *interactive information exchange* process was reported at the intake, pre-mediation and pre-hearing stages, and the manageability of tribunal processes for self-represented litigants was often attributed to “institutional competence,” including the “relationship-building skills” of intake workers. As pointed out in the literature, the most active intervention, in terms of assisting self-represented parties, appears to occur in the “subterranean elements” of tribunal processes.⁶⁸¹

While an interactive approach to distributing and gathering information contrasts with a traditional court process, it may not differ substantially from the innovative court systems briefly described in Chapter Two.

⁶⁸¹ *Supra*, footnote 497. [Creyke] See *supra*, footnote 245. [Lillian Ma, et al. The National Survey]

(c) Legal Advice

The line between legal advice and legal information is easier to state than it is to apply,⁶⁸² and along with this recognition, some distinctions have been suggested. For example: legal information can answer questions such as “can I?” or “how do I?” whereas advice can answer questions such as “should I?” Another formulation: legal information “outlines options and what often happens,” whereas legal advice lays out “what will likely happen.”⁶⁸³ It seems self-evident that legal advice is preferable to legal information, to say nothing of full representation.

Family law scholars have described numerous potential ways of making legal services more affordable, including appointing state-funded counsel, expanding legal aid, creating legal fee insurance plans and encouraging “unbundling,” whereby legal services are retained for only some aspects of a case.⁶⁸⁴ Noel Semple has recently suggested the need for a “third revolution” in family law (the first two being the development of comprehensive substantive law and the widespread use of alternative dispute resolution), in which family law firms utilize innovative fee structures, labour-division strategies and new service delivery models to make legal services more affordable.⁶⁸⁵ He writes that the progress made in substantive family law reform and the expansion of alternative dispute resolution processes will not fully benefit all Canadians until legal services become more accessible, as “most separating people will continue to want and need partisan legal professionals to at least advise and often to represent them.”⁶⁸⁶

⁶⁸² *Supra*, footnote 2. [Macfarlane]

⁶⁸³ *Supra*, footnote 278. [Thompson, Judge as Counsel]

⁶⁸⁴ *Supra*, footnote 133. [Thompson, No Lawyer: Institutional Coping]

⁶⁸⁵ *Supra*, footnote 306 at page 131. [Semple, Third Revolution]

⁶⁸⁶ *Ibid.*, at page 146. [Semple, Third Revolution]

Accepting that legal advice is a necessary component of access to justice,⁶⁸⁷ vulnerability theory (the lens chosen here) would suggest that responsibility for its provision lies with a “responsive state,” and not with private industry (although changes in legal fee structures would be enormously helpful in any event). The relationship between legal advice and access to justice, and the boundary between private and state responsibility for legal services, has been addressed by others in various contexts,⁶⁸⁸ including in recent research that suggests “re-thinking what *non-lawyers* can do.”⁶⁸⁹

As noted above, duty counsel and advice counsel are available for twenty-minute sessions in the Ontario family courts, and it is arguable that duty counsel services in particular are too last-minute and perfunctory. A tribunal which has developed publicly available decision-making guidelines, discussed in detail below, could use these materials as a foundation for interactive explanation of the legal framework for decision-making, both at the intake stage and in mediation. This work could be done by non-lawyers, as reported in the research here with respect to the use of published practice directions in some CMH mediation. I suggest there may be greater potential to expand the *depth* of legal information in a tribunal system, by virtue of its greater distance, relative to courts, from traditional legal power structures. The information provided could not, of course, answer the question, “should I?” but with the help of guidelines it could effectively communicate “what often happens,” from which parties may be capable of deducing “what will likely happen.”

⁶⁸⁷ *Ibid.*, at page 138. [Semple, Third Revolution] The author writes “the premise of this article is that “Canada’s family law firms (including sole practitioners) also have an essential role to play in the pursuit of access to justice.”

⁶⁸⁸ See: *supra*, footnote 133. [Thompson, No Lawyer: Institutional Coping]

⁶⁸⁹ *Supra*, footnote 2. [Macfarlane]

(d) Legal Representation

Others have argued with respect to *mediation* that legal representation limits the parties' direct participation and makes the process more contentious, thereby reducing opportunities for problem-solving and relationship repair; and conversely, that lawyers ensure parties understand how mediation operates and are properly informed of facts, through appropriate disclosure, and legal entitlements, and protect against unfair agreements, improve the tone of mediation, and assist parties to effectively communicate and keep emotions in check. Finally, it has been argued that the effect of representation on mediation outcomes is actually fairly neutral.⁶⁹⁰

There is research which suggests that legal representation is advantageous in tribunal *adjudication*, but the use of active adjudication reduces the “added value” of representation.⁶⁹¹ The various ways in which legal advice and complete or partial representation could be made available in a custody and access tribunal is a complex problem outside the scope of this thesis. Again, the data reported here cannot be generalized; I simply note that: providing different levels of advice and representation based upon the combined factors of complexity and ability to self-represent was reported upon with approval among tribunal members interviewed, consistent with an enabling approach to self-representation; and, moreover, legal coaching was reported upon more positively by HRTO and SBT members interviewed than was duty counsel by LTB members interviewed, which is perhaps unsurprising given that even minimal assistance in the form of “coaching” allows, in at least some cases, for more than a single meeting, as well as assistance in compiling evidence and drafting written submissions. In interviews for this project,

⁶⁹⁰ Roselle L. Wissler, “Representation in Mediation: What We Know from Empirical Research” (2010), 37 *Fordham Urb. L.J.* 419.

⁶⁹¹ *Supra*, footnote 508 at page 63. [R. Thomas]

mixed reports of paralegal representation were given, as described above, but it should be noted that permitting paralegal practice in family law cases was urged in a recent study which examined the views of law societies across Canada as to paralegal practice and regulation.⁶⁹²

7.3 The Potential for Fallback Inquisitorial Adjudication

(a) Inquisitorial Processes

It seems likely that an inquisitorial adjudicator could effectively and legitimately level the playing field by exposing improper motivations, obtaining hidden evidence, interviewing witnesses and restricting the number of expert witnesses. As noted above, I find it credible that “truth-finding” is more closely associated with inquisitorial models, and that inquisitorial processes practiced in a tribunal format do not equate to *less fairness*. Moreover, as noted throughout this paper, the Family Justice Working Group Report recommends experimenting with a *modified inquisitorial model*,⁶⁹³ although this suggestion was presumably made with reference to the family court system.

The relative capacities of courts and tribunals to carry out a mandate based upon inquisitorial adjudication would likely depend, in part, upon the extent to which individual judges and adjudicators enthusiastically adopt a new and seemingly more demanding judicial role. As noted above, recent research has described judicial attitudes toward assisting self-represented litigants in Canadian family court systems as variable,⁶⁹⁴ and Canadian scholars have observed that

⁶⁹² *Supra*, footnote 145. [Trabucco]

⁶⁹³ *Supra*, footnote 23 at page 9. [Family Justice Working Group Report]

⁶⁹⁴ *Supra*, footnote 133. [Thompson, No Lawyer: Institutional Coping]

“inquisitorial justice is not necessarily embraced by the judiciary.”⁶⁹⁵ Despite that tribunals are often designed with the needs of self-represented parties in mind, the research reported in this project contains a similar finding; that is, some participating adjudicators described active adjudication as something not everyone is capable of doing, or even wants to do, and others simply stated that it is “more work.” In other jurisdictions, the Norgrove Report states that some judges have expressed concern that a new Family Justice Service (which, as noted, places judges at the head of interdisciplinary teams) would put “undue pressure on the judiciary”⁶⁹⁶ Perhaps in the same vein, as noted above, the Issues Report of the Australian Law Reform Commission states that use of the LAT case management approach has “waned over time,” and further notes that these processes may “consume too much judicial time,” given the persistent problem of hearing delays.⁶⁹⁷ In short, whether located in a court or tribunal system, inquisitorial-based adjudication would have implications for training and recruitment, as discussed above with respect to active adjudication. The advantage in a tribunal model may be that targeted recruitment opportunities present themselves when institutions are re-built “from the ground up.”

Determining the ideal blend of new and existing processes for an optimally designed family law tribunal is not attempted here; it may, however, be instructive in a general sense that, as noted above, the LAT model was inspired by the German family court system, an inquisitorial system that was designed to only dispense with “the worst aspects of adversarialism,”⁶⁹⁸ and the recent

⁶⁹⁵ *Supra*, footnote 40 at page 15. [Semple and Bala, Reforming the Family Justice System] The authors report that a group of Ontario family judges opposed a 2010 amendment to the *Children’s Law Reform Act*, on the basis that it was inconsistent with “basic rules of procedural justice,” and recommended expansion of legal aid or OCL services instead.

⁶⁹⁶ Family Justice Review, *Final Report* (the Norgrove Report) at page 52, online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217343/family-justice-review-final-report.pdf

⁶⁹⁷ *Supra*, footnote 309 at page 65. [Australian Law Reform Commission, Issues Paper]

⁶⁹⁸ *Supra*, footnote 178 at page 842. [Langbein]

Australian Law Reform Commission, charged with redeveloping the Australian family court system, repeatedly questions the continued use of adversarial processes in proceedings involving children.

(b) Inquisitorial Identity

Within the context of the research reported here, an ambiguous institutional identity appeared to affect the confidence with which inquisitorial processes, such as active adjudication and managerial judging, are utilized, even among tribunal members who support them, and to create a diffuse fear of judicial review. I reiterate that some HRTO members interviewed for this project reported that the tribunal has *no process identity* apart from the preferences of individual adjudicators, and despite that only a minority of members considered consistent hearing styles a worthwhile goal,⁶⁹⁹ lack of consensus as to fundamental tribunal identity seems sub-optimal. Fairness is primarily a procedural value in administrative law, and often associated with the *predictability of legal systems*.⁷⁰⁰ Indeed, the tendency of hybrid systems to fail to live up to the expectations of *either* adversarial or inquisitorial models has been noted,⁷⁰¹ and has been attributed, at least in part, to the lack of an *articulated, principled vision* of tribunal identity, as a foundation for hybrid systems.⁷⁰²

A firm mandate to conduct inquisitorial proceedings seems to be an obvious starting point for the credible use of inquisitorial processes, both to enable active hearing processes and signal a clear departure from adversarial norms, that is, the natural tendency in non-Continental hybrid systems

⁶⁹⁹ *Supra*, footnote 373 at page 114. [Wright] and the literature suggests that a variety of hearing styles is institutionally accepted

⁷⁰⁰ *Supra*, footnote 463 at page 294. [Sossin and Houle]

⁷⁰¹ *Supra*, footnote 497. [Creyke]

⁷⁰² *Supra*, footnote 290 at page 61. [R. Thomas]

for the adversarial paradigm to operate as a default framework against which the legitimacy of inquisitorial elements are assessed, not only in judicial review, but in the day-to-day operation of tribunals.

(c) Impartiality

Judicial neutrality is important in inquisitorial systems, but it is not assessed through party control or judicial passivity; that is, by the appearance of judicial neutrality. Instead, allegations of bias are assessed in terms of whether or not the decision-maker has complied with a “duty of care,” or “duty to inquire,” pursuant to which adjudicators must obtain and scrutinize the evidence “with all due care” at every stage of a proceeding, and failure to do so is a ground for review.⁷⁰³ The duty of care standard exists, in part, to convey the professionalism and integrity of the decision-making body. Its emphasis upon thorough *review* of the evidence is not unique to inquisitorial systems (although *obtaining* evidence is); it is similarly a ground of review to overlook important evidence provided to the court in adversarial systems.⁷⁰⁴ While the duty of care is relatively straightforward in that it does not entail the projection of perceptions of fairness upon a notional “reasonable person” and it does not equate a high level of engagement with parties and evidence to impartiality, it is complicated by the need for the applicable duty of care to be proportionate to the depth of inquiry.⁷⁰⁵ For example, in some tribunals the duty of care

⁷⁰³ Jula Hughes, “Home Truths about Truth Commission Processes: How Victim-Centred Truth and Perpetrator-Focused Adversarial Processes Mutually Challenge Assumptions of Justice and Truth” in *The Nature of Inquisitorial Processes in Adversarial Regimes*, *supra*, footnote 281 at page 288.

⁷⁰⁴ *R. v. Gray*, 2012 ONCA 17; see also: *supra*, footnote 608. [*Children’s Aid Society of the United Counties of Stormont, Dundas and Glengarry v. S.V.D.*]

⁷⁰⁵ Laverne Jacobs, Sasha Baglay, Melissa Kwok, Marla Mavrikkou, Ki Lin Tay, (2011) “The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives Research Workshop Report” 24 *Can. J. Admin. Law & Prac.* 261 at page 262.

requires that decisions be “taken in the light of the best scientific information available and based on the most recent results of international research,”⁷⁰⁶ which clearly requires a high level of commitment to tribunal funding, that is, state responsibility. For the purpose of discussion, contrast this with the family court system, in which it is up to parties, the majority of whom are self-represented, to provide all relevant information to the court; disclosure may be deliberately incomplete or tactically delayed; the availability of assessments, their integrity and the ability of judges to critique them are all potentially problematic, depending upon the circumstances of each case; and, the constraints of “judicial notice” limit the literature a judge may consider apart from what the parties (again, often self-represented) provide to the court.

It is a legitimate question whether judges, with their greater status, could exercise an inquisitorial mandate more confidently than tribunal members, and attract less resistance based upon perceptions of bias. Indeed, it has been noted that the effective use by administrative decision-makers of active adjudication processes is hampered by a lack of conviction on the part of the courts that active adjudication processes do not compromise the role of adjudicator as neutral arbiter.⁷⁰⁷ To the extent that courts may have more latitude to use active adjudication processes, it does not, in my view, result from the application of legal principles. According to administrative law scholars, intense engagement with the parties is considered, in general, to be more acceptable in tribunals than in courts, due to the relatively flexible, expeditious and informal nature of administrative adjudication; indeed, it has been credibly asserted that the flexibility of administrative law under a *Baker* analysis supports “adjudicator activism” in some

⁷⁰⁶ *Supra*, footnote 703. [Jula Hughes, Home Truths]

⁷⁰⁷ See: *Supra*, footnote 705. [Jacobs and Baglay, eds., *The Nature of Inquisitorial Processes*]

contexts.⁷⁰⁸ The foregoing assumes an adversarial foundation; that is, a need to reconcile active adjudication with adversarial norms. In an inquisitorial *model*, the assessment of bias allegations would not depend upon a review court's determination as to the apparent mindset of the decision-maker, for which the greater status of judges may be an advantage. A test for bias based upon inquisitorial norms, that is, thoroughness of the evidence and analysis, seems less likely to confer an advantage.

The optimal duty of care in inquisitorial systems varies with the depth of a tribunal's investigative function, which in turn depends upon social, political and economic considerations as to *how much* of the dispute resolution process should become the responsibility of the state, and in precisely which ways this shift should occur. These are fundamental questions which require broad-based consultation, political engagement, and further study.

7.4 The Potential for Institutional Expertise

Adjudicators are relatively free from the restrictions associated with "judicial notice."⁷⁰⁹ Tribunal members may deepen their expertise on matters before the tribunal through relevant literature, *on their own initiative*, without the support of an expert witness.⁷¹⁰

Identifying the precise ways in which the expertise of mental health professionals could be integrated in a tribunal model would require extensive consultation with the mental health and family law communities. In general terms, there may be potential to reduce the need for outside

⁷⁰⁸ *Supra*, footnote 528 at page 5 (Westlaw). [Kristjanson and Naipul]

⁷⁰⁹ *Supra*, footnote 215. [Bala and Saunders]

⁷¹⁰ *Supra*, footnote 576. [Macdonald]

assessments by applying the expertise of non-lawyer members to the evaluation of the parties' evidence, enabling the "voice of the child" to be heard and, in appropriate cases, conducting investigations. In cases for which outside assessment is required, in an inquisitorial system an expert may be chosen and retained by the tribunal or court.⁷¹¹ As noted above, the *Family Law Rules*⁷¹² have been amended to allow judges to appoint a single expert,⁷¹³ but in an adversarial system this power cannot prevent a "battle of the experts" as parties may still hire their own expert witnesses.

The potential for a multi-disciplinary tribunal to apply expertise to the best-interests-of-the-child test has been discussed in this thesis in general terms, without analysis of this potential with respect to specific factors, such as domestic violence. Janet Mosher has argued that a nuanced understanding of domestic violence is required to improve access for justice for women.⁷¹⁴ She writes that a pervasive "incident-based" approach does not consider patterns of coercive and controlling behavior,⁷¹⁵ and results in a limited concept of "safety," and failure to recognize that abusers may strategically manipulate legal systems as part of a pattern of dominance and control, through meritless applications for sole or joint custody, or tactics that engage criminal or immigration law.⁷¹⁶ The need for decision-makers to grasp the full dimensions of domestic violence is reflected in the proposed *Bill C-78*, referred to above; there may be more potential in

⁷¹¹ *Supra*, footnote 178 at page 835. [Langbein]

⁷¹² *Supra*, footnote 28. [*Family Law Rules*]

⁷¹³ *Ibid.*, Rule 20.1(3) [*Family Law Rules*] See also Nicholas Bala, "Single Court-Appointed Experts for Family Cases" *Lawyers Weekly*, January 21, 2012, Seventh Annual FL Summit Materials, Osgoode Library.

⁷¹⁴ Janet E. Mosher, "Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by Their Intimate Partners" (2015) 32 *Windsor Y.B. Access Just.* 149 at pages 150-151.

⁷¹⁵ *Infra*, footnote 722. [*Bill C-78*]

⁷¹⁶ *Ibid.*, footnote 714 at page 157. [Mosher]

an expert multi-disciplinary tribunal model to achieve a deep and clinically informed perspective and to apply it consistently.

7.5 The Potential for Guidelines

(a) Structure and Best-Interests-of-the-Child Test

The insights of Fiss, Mnookin and Kornhauser discussed earlier suggest a fair settlement environment requires that parties be uniformly aware of legal entitlements, which must be specific enough to predict likely outcomes, and parties must not be deterred from pursuing these entitlements by institutional factors. In other words, clear law and minimal risk associated with *not settling*.

Criteria for the application of the best-interests-of-the-child test are currently contained in the *Divorce Act*,⁷¹⁷ the *Children's Law Reform Act*,⁷¹⁸ the *Child, Youth and Family Services Act*,⁷¹⁹ and in a limited manner in the matrimonial home provisions of the Ontario *Family Law Act*,⁷²⁰ but it has been widely observed that these criteria lend little certainty to the application of the test; they are neither prioritized, exhaustive, nor annotated, and as others have observed, they create almost as much uncertainty as a simple statement of principle. Until the recent passage of the revised British Columbia *Family Law Act*,⁷²¹ and the very recent proposed amendments to the *Divorce Act* contained in *Bill C-78*,⁷²² which create presumptions only in mobility cases,

⁷¹⁷ *Supra*, footnote 14. [*Divorce Act*]

⁷¹⁸ *Supra*, footnote 155. [*Children's Law Reform Act*]

⁷¹⁹ *Supra*, footnote 363. [*Child, Youth and Family Services Act*]

⁷²⁰ R.S.O. 1990, c. F 3. [*Ontario Family Law Act*]

⁷²¹ *Supra*, footnote 13. [*B.C. Family Law Act*]

⁷²² *Bill C-78, An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistant Assistance and the Garnishment Act, Attachment and Pension Division Act.*

there have been no legislated or informal guidelines or presumptions in Canadian custody and access decision-making.⁷²³

The theoretical potential for a multi-disciplinary tribunal to coalesce available data into decision-making guidelines is suggested here but given that “reality has a surprising amount of detail,”⁷²⁴ whether this potential could actually be realized in a tribunal system is a question for further research as to their social, political and legal feasibility. Having said this, I note that the Australian Law Reform Commission Discussion Paper contains the following proposal for “improved guidelines material:”

The Attorney-General’s Department (Cth) should commission a body with relevant expertise, including in psychology, social science and family violence, to develop, in consultation with key stakeholders, evidence-based information resources to assist families in formulating care arrangements for children after separation that support children’s wellbeing. This resource should be publicly available and easily accessible, and regularly updated.⁷²⁵

The best-interests-of-the-child test has always been treated as a special aspect of family law for which structure is inappropriate, and it would be reckless to extend increasing calls for more

⁷²³ *Ibid.* [Bill C-78] The proposed amendments contains a list of factors that must be considered in the application of best-interests-of-the-child test. *Bill C-78* requires consideration, with respect to family violence, of impact, seriousness and frequency, and whether there is a pattern of controlling behavior; any civil protection orders, child protection orders or related criminal matters; it also requires consideration of the child’s views and preference, if obtainable (consistent with existing statutes, caselaw and practice); and the prior history of parental childcare. It requires parents to exercise parenting time and responsibility in a manner consistent with the child’s best interests, extending the best-interests concept to a behavioral requirement on the part of parents (section 7.1) and specifically requires that parents protect any child of the marriage from conflict arising from divorce proceedings. It places a duty upon legal advisors to encourage the use of alternative dispute resolution processes (section 7.7(2)) and provides that parties *shall* attempt to resolve any matter that could be the subject of a court order through a “family dispute resolution process” (section 7.3). It defines “family justice services” as public or private services intended to help persons deal with issues arising from separation or divorce, seemingly creating a foundation for further court-related family services. Finally, it revises family law terminology: “custody” and “access” are replaced with “decision-making responsibility” and “parenting time;” “custody and access order” is replaced with “parenting order.”

⁷²⁴ John Salvatier, “Reality has a surprising amount of detail” (2017) blogpost, <http://johnsalvatier.org/blog/2017/reality-has-a-surprising-amount-of-detail>

⁷²⁵ *Supra*, footnote 7 at page 55. [Australian Law Reform Commission, Discussion Paper]

structure in family law to this tangled area of the law, but for the Family Justice Working Group Report recommendation that substantive family law be simplified, with “more guidance by way of rules and presumptions, where appropriate.”⁷²⁶ Given that legislated presumptions are politically fraught, and the Supreme Court of Canada has a record of repeatedly declining to engage with presumptions by refusing relevant applications for appeal,⁷²⁷ the routine development of decision-making guidelines as part of ordinary tribunal functioning suggests a potentially practical avenue for providing “more guidance by way of rules and presumptions.”

In view of the long history of debate as to the relative merits of presumptions and relative importance of various aspects of the best-interests-of-the-child test,⁷²⁸ the suggestion to develop guidelines and presumptions is not meant to imply they are an *easy* answer, or that any of the presumptions discussed earlier is ideal, or that a collective orientation among mental health professionals would naturally emerge. It is acknowledged that there is insufficient social science data on many aspects the best-interests test, and controversy about the data which does exist. For example, concepts such as “attachment,” “psychological parent” and “primary caregiver” are not consistently defined or understood, and perceptions as to their respective significance differs within the clinical community.⁷²⁹ As noted above, no consistent approach seems to have developed among family service providers in UK family courts.⁷³⁰

⁷²⁶ *Supra*, footnote 23 at page 9. [Family Justice Working Group Report]

⁷²⁷ *Infra*, footnote 732 at page 1 (Westlaw). [Thompson, Where Is B.C. Law Going?].

⁷²⁸ *Supra*, footnote 154 at page 85. [Warschak, Parenting by the Clock]

⁷²⁹ Pamela S. Ludolph and Mildred D. Dale, “Attachment in Child Custody: An Additive Factor, Not a Determinate One” (2012-2013), 46 *Fam. L.Q.* 1 at page 3.

⁷³⁰ *Supra*, footnote 340 at page 237. [Doughty, Identity Crisis] The author attributes the lack of consistency, in part, to fathers’ rights activists, who reportedly became a highly vocal client group, usurped time and resources, and “distracted from a child-centered approach.” She reports that the same phenomenon has occurred in Australia.

I note that tribunal members who participated in this project were asked to gauge the potential for more structured decision-making in their own fields, and while responses were mixed, the most consistent support for guidelines was located among clinically trained CFSRB members, expressed with regard to the best-interests-of-the-child test. I do not suggest that this finding can be generalized to all of family law; further study is needed to determine whether there is broad-based support in the mental health professional community for a more structured approach to the best-interests-of-the-child test.

The need for guidance in “mobility cases” was urgently argued long before presumptions were included in British Columbia’s family law legislation and the proposed amendments to the *Divorce Act*,⁷³¹ as was the difficulty of legislating in this area.⁷³² It was pointed out in support of guidelines and presumptions that decision-making patterns could be deciphered in the case law,⁷³³ and indeed they were.⁷³⁴ Decision-making patterns obviously exist in other areas of best-interests decision-making; for example, the literature reports some consensus among mental health professionals as to certain aspects of the best-interests-of-the-child test, such as the age at which overnight stays with an access parent are likely to be seen as appropriate, depending upon certain variables. Locating this sort of information in guidelines does not detract from individualized justice; that is, clearly communicating “what often happens” does not prevent

⁷³¹ See: Nicholas Bala and Andrea Wheeler, “Canadian Relocation Cases: Heading Towards Guidelines” (2012), 30 Can. Fam. L. Q. 271; and Philip Epstein, “Case Comment on Karpodonis v. Karpodonis” (2006), 27 RR. F. L. (6th) 276.

⁷³² D.A. Rollie Thompson, “Where Is B.C. Law Going? The New Mobility” (2012), 30 Can. Fam. L. Q. 235. See also Nicholas Bala, Parental Relocation: Applying the Best-Interests-of-the-Child Test in Ontario” (2006), 22 Can. Fam. L. Q. 127.

⁷³³ *Supra*, footnote 731 at page 424. [Bala and Wheeler]

⁷³⁴ D.A. Rollie Thompson, (2011), “Heading for the Light: International Relocation From Canada” (2011), 30 Can. Fam. L. Q. 1 at pages 4-13. See also Nicholas Bala, “Canadian Relocation Cases: Heading Towards Guidelines” *Ibid.*

parties and decision-makers from recognizing situations in which the usual outcome is not appropriate.

In a court system rules and presumptions arrive by way of legislation or regulation, generated in the legislative and executive branches. Tribunal-generated guidelines could function as a less “blunt instrument” than legislation or regulation for refining and improving understanding of the best-interests-of-the-child test, and a multi-disciplinary expert tribunal may have more potential than the legislative branch or the ministerial level of the executive branch, to credibly and apolitically develop a comprehensible framework for reasoning about custody and access.

(b) Guidelines and Discretion

It has been observed that the injection of “more rules” into discretionary areas of the law is often intended to *increase* “individualized justice”⁷³⁵ by decreasing the potential for arbitrary decision-making. As noted above, this thinking has traditionally been reversed with respect to the best-interests-of-the-child test, for which more structure in the form of presumptions or prioritized criteria has been resisted, in part on the basis that it would *detract* from the “individualized justice” enabled by broad discretion. Guidelines are not suggested here as a “more law” strategy for limiting discretion with more rules;⁷³⁶ in other words, it is not suggested that guidelines should *displace* discretion, but rather, that clear law should *accompany* the exercise of discretion.

⁷³⁵ *Supra*, footnote 467 at page 307. [Pratt and Sossin]

⁷³⁶ *Supra*, footnote 467 at page 302. [Pratt and Sossin]

The values reflected in the demand for rule-based law are consistency and coherence;⁷³⁷ the resulting predictability is thought to enhance fairness, promote settlement and reduce costs and conflict. As noted, *Consolidated Bathurst*⁷³⁸ reinforced the importance of coherence in administrative adjudication and has been interpreted as endorsing tribunal-generated guidelines and other means of enhancing consistency of decision making.⁷³⁹ It is disturbing that best-interests-of-the-child should defy prediction, as the implications exceed mere consistency, as discussed above. If the goal of family dispute resolution systems is not merely to *press for* settlement, but, rather, to *facilitate fair* settlement, enabling public understanding of the central test for decision-making seems essential.

From a vulnerability theory perspective, a guidelines approach could address the needs of the “vulnerable subject;” to the extent that guidelines could effectively communicate “what often happens,” the more risk averse party would be empowered in negotiations and mediation. In cases that “cannot or should not settle,” the suggestion is not that discretion be constrained, only that it be *relocated*. It seems obviously sub-optimal, if not irrational, to entrust a discretionary power to determine outcomes for children to any professional reluctant or ill-equipped to exercise it. Indeed, it seems uncontested that:

Being able to identify the continuing conflict cases, determine the nature of the problems and devise the necessary solutions is not intuitive. Nor is the knowledge and expertise required learned from ordinary family living experience. Making wrong choices can be harmful to children.⁷⁴⁰

⁷³⁷ *Supra*, footnote 68. [Rogerson, After *Moge*]

⁷³⁸ *Supra*, footnote 472. [*Consolidated Bathurst*]

⁷³⁹ *Supra*, footnote 463 at page 294. [Houle and Sossin]

⁷⁴⁰ *Supra*, footnote 206 at page 445. [Bala, Birnbaum, and Martinson]

The question of whether guidelines should be binding, or non-binding, requires expert input. For the purpose of this paper, the potential for *non-binding* guidelines is considered. At the adjudication stage, even non-binding guidelines could curtail the potential for discretion to be used improperly, for example, as a vehicle for the external ideologies and class-based assumptions of individual decision-makers,⁷⁴¹ as is claimed to occur with respect to the idealization of the traditional nuclear family.⁷⁴²

I urge further research as to the feasibility of a guidelines approach to the best-interests-of-the-child test as they may have potential to clarify *general expectations* as to the application of the test at the negotiation and mediation stages while *retaining* the discretion necessary to tailor the application of the test to individual needs at the adjudication stage.

It must be acknowledged that not all family law scholars support placing custody decision-making in the hands of mental-health professionals. It has been argued that *neither* judges nor “mental health experts” are better able than presumptions to predict the future best interests of a child,⁷⁴³ that training in psychology is not simply not helpful in most cases, and that the best-interests-of-the-child standard is based upon a misplaced faith in the ability of mental health professionals to evaluate families and advise courts.⁷⁴⁴ Martha Fineman has argued that divorce has been redefined from a “legal problem” to an “emotional crisis,” which has allowed mental health professionals to “hijack” custody decision-making.⁷⁴⁵ As noted, these arguments are

⁷⁴¹ *Supra*, footnote 467 at page 310. [Pratt and Sossin]

⁷⁴² See: *Supra*, footnote 166. [Hughes, Mother’s Vicarious Hand]

⁷⁴³ *Supra*, footnote 156 at page 71. [Scott and Emery, Gender Politics]

⁷⁴⁴ *Ibid.* [Scott and Emery, Gender Politics]

⁷⁴⁵ *Supra*, footnote 230. [Fineman, Dominant Discourse]

paired with recommendations for presumptions, on the basis that they obviate the need for psychological evidence, are a verifiable proxy for best interests, and can be applied by judges without training in other fields.

7.6 The Potential for Collaborative Governance

A family law tribunal could be granted a policy-making role based upon “collaborative governance,” pursuant to which the tribunal absorbs input on an ongoing basis, not only from tribunal members, but also from the public, family law and mental health professional communities and interested organizations, such as feminist and fathers’ rights groups.

Collaborative governance entails a multi-level policy process in which norms and practices are continually reconsidered and revised in the light of broad-based knowledge and experience.⁷⁴⁶

Opportunities have obviously expanded for diverse input through blogs and other tech-driven formats. A broader base of policy input may have the potential to dilute the divisions between identity-based groups by giving voice to wider range of perspectives, and in turn render guidelines and presumptions more politically neutral. Moreover, transparency at this level could provide a credible foundation for norm identification, norm reproduction, political accountability, and public acceptance.

⁷⁴⁶ *Supra*, footnote 57 at page 88. [Nourse and Shaffer]

7.7 The Potential for Informality

Again, without suggesting broad application of the research reported here, I note there was more consistency among tribunal members interviewed as to the value of informal processes (compared to informal settings), and the value of informality in hearings was most emphasized by clinically trained members of the CFSRB, who consistently noted a connection between informality and the ability of a vulnerable population to function. With respect to the value of informal *settings*, there was no common thread among interview subjects. Some participating CFSRB remarked that being on the same physical level as the parties is useful for encouraging interaction, whereas others preferred a more formal setting. It is perhaps instructive that the initial, 1975, version of Australia's "helping court" stressed informality; lawyers did not wear formal robes, and "court registries" were set up to resemble storefronts.⁷⁴⁷ The reported result was disrespect for the court, including incidents of violence, which led to abandonment of this approach and a return to formality, described as "proper court syndrome."⁷⁴⁸

I have argued above that consistent hearing style is an access to justice component and have noted the potential for a settlement system, would naturally be relatively informal up to the point of adjudication. The extent to which the adjudication component of a settlement system could or should be informal relative to courts is a question for further research.

⁷⁴⁷ *Supra*, footnote 340 at page 232. [Doughty, Identity Crisis]

⁷⁴⁸ *Ibid.* [Doughty, Identity Crisis]

7.8 Potential Jurisdiction

The number of self-represented litigants in family law cases and their range of complexity⁷⁴⁹ suggests, in my view, that an administrative settlement system might have benefits for a *significant proportion* of cases. Its jurisdiction could begin with custody and access disputes; however, once established, a tribunal could prove to be a preferable forum for the resolution of a broader range of “ordinary cases;” that is, those which do not involve complex, non-child-related facts.

Administrative processes seem well-suited to areas of family law other than custody and access. To cite a few examples, child support could be dealt with administratively, indeed, movement in this direction can be seen in the proposed *Bill C-78*, which provides that a provincial agency may be established to calculate child support and require that it be paid, with disagreements resolved by the courts. In a tribunal, a similar agency could operate as a department, and an inquisitorial adjudication component could resolve disagreements. Support cases, both child and spousal, often involve problems of income determination and financial disclosure that may be better dealt with in a forum with an inquisitorial adjudication mechanism.

The threshold issue of entitlement to spousal support seems a suitable subject for information-intensive mediation; calculations under the *SSAG* could be run at the intake and mediation stages, based upon different assumptions if facts are in dispute. Simple property issues, involving a matrimonial home and ordinary assets, could be dealt with by legally trained adjudicators up to

⁷⁴⁹ *Supra*, footnote 72 at page 343. [Payne, Recent Developments]

a designated maximum amount. Uncontested divorce applications, often processed by law clerks, could be managed through an administrative arm and the perfunctory court process of reviewing separation agreements could easily be accomplished in an administrative setting.

Barbara Babb, a long-time advocate of therapeutic family law processes, has written that family functioning is of such critical importance to society that family law must be dealt with “at the same level as courts of general jurisdiction.”⁷⁵⁰ I would counter that the critical importance to society of family functioning supports an alternative to courts, and that the Ontario Securities Commission alone is sufficient evidence that complex cases can be decided in a tribunal format. Having said this, intricate financial claims, for example, involving multiple properties and investments, family-owned businesses, pre-nuptial agreements, diverse sources of income, offshore assets, family trusts, bankruptcy claims, and so on, are far more suited to court jurisdiction than the best-interests-of-the-child test. One possibility is to permit parties to elect a tribunal process or a court process, except for custody and access disputes, for which a tribunal would have exclusive jurisdiction; another is to set a limit on tribunal jurisdiction for non-custody disputes based upon the value or complexity of claims. A third option is to equip a tribunal to deal with intricate high-value claims; the potential drawback to this approach is that the burden of these cases might overwhelm the essential mandate to provide swift and therapeutic dispute resolution to a largely self-represented client population. In any event, the only parties subjected to the prospect of dual proceedings would be those with significant assets, and they would be inconvenienced only to the extent that custody and access issues must be dealt with first through a multi-disciplinary tribunal process.

⁷⁵⁰ Barbara a Babb, “Fashioning an Interdisciplinary Framework for Court Reform in Family Law: Blueprint to Construct a Unified Family Court” (1998), 71 S. Cal. L. Rev. 469 at page 516.

7.8 The Need for Further Research

The need for further research has been suggested throughout this paper; on a modest scale this would include empirical research as to the experiences of Ontario tribunal users and family court litigants, and the views of Ontario family court judges, lawyers and mental health professionals as to the potential for tribunal system.

On a larger scale, a full comparative institutional analysis of the relative potential for courts and tribunals to implement a therapeutic and holistic family law policy agenda could engage a wide range of further research initiatives, including, but not limited to:

- analysis of resources that may be saved that might be realized in a tribunal system, including a behavioural law and economics analysis;
- therapeutic justice analysis of the merits of panel decision making and non-judicial single-member decision-making in best-interests-of-the-child cases;
- empirical research as to the level of support among mental health professionals for a more structured approach to the best-interests-of-the-child test, up to and including the development of guidelines and presumptions;
- empirical research as to the potential for a tribunal process to effectively deal with domestic violence cases;
- analysis of whether and to what extent family services, such as counselling, can or should be integrated or, conversely, located in a network of “hubs” as suggested in the Australian Law Reform Commission reports and in the literature;⁷⁵¹

⁷⁵¹ *Supra*, footnote 207. [Jacobs]

- analysis of family dispute resolution as a state responsibility, including the ways in which governments in various jurisdictions deal with this responsibility, the extent to which greater use of private mediation and arbitration save public resources and how these are or could be reallocated;
- empirical research as to public attitudes toward inquisitorial adjudication in family law, among research subjects informed of the how a modified inquisitorial adjudication system could function;
- empirical research as to the views of family law lawyers and judges as to the optimal blend of blend of adversarial and inquisitorial processes;
- feasibility study as to the ways in which legal advice and complete or partial representation could be made available;
- feasibility study as to the development of best-interests-of-the-child decision-making guidelines;
- study of the substantive law changes that might accompany a tribunal transition;
- expert analysis of the constitutional implications of tribunal jurisdiction in some or all areas of family law;
- further analysis of the extent to which tribunals can issue contempt orders and swiftly enforce tribunal orders;
- study of recent existing family court reforms in Ontario which have not yet generated research findings;
- study of the benefits of the planned expansion of UFCs in Ontario; and
- study of the potential for electronic intake, mediation and hearing processes in remote locations, for both courts and tribunals.

7.9 Summary

The potential for multi-disciplinary teamwork in a settlement system with interactive information services, in which the legitimate boundary between legal information and advice is explored, has been discussed in this chapter, and the potential for integrated specialized mediation services with fallback inquisitorial adjudication has been explored. The potential to develop institutional expertise in a tribunal format, and to develop decision making guidelines with respect to the best-interests-of-the-child test have been considered. The potential jurisdiction of a family tribunal has been discussed, and further research needs have been summarized.

8. FORCES AND OBSTACLES

*There may be more room in family law than in other areas of litigation for the use of the legal process to harm others, to serve less rational, more emotional, more conflictual ends.*⁷⁵²

This chapter addresses some of the social forces and legal and political obstacles relevant to the potential for a family law tribunal for custody and access. It reviews factors that informed the transfer of jurisdiction over residential disputes from courts to the Landlord and Tenant Board, and the progress of “therapeutic justice” as a goal of decision-making processes. Potential obstacles in the form of a constitutional challenge and tribunal capacity to exercise authority are considered.

8.1 Legal Thought and Paradigm Shifts

American legal philosopher Roscoe Pound long ago observed the “the inevitable difference in the rate of progress between law and public opinion,”⁷⁵³ which he described as a cause of dissatisfaction with legal systems. A gap between law and public opinion is inevitable, of course, given that changes in law require social consensus, the existence of which is not always obvious and often contested.⁷⁵⁴ Nonetheless, a durable gap invites analysis.

At the outset of this thesis a number of social and legal developments are noted which appear to be indicative of a paradigm shift away from adversarialism. According to principles articulated by Thomas Kuhn, a paradigm shift begins when too many anomalies occur within the dominant

⁷⁵² *Supra*, footnote 231 at page 254. [Thompson, Are There Any Rules of Evidence]

⁷⁵³ *Supra*, footnote 175. [Roscoe Pound]

⁷⁵⁴ H.W. Arthurs, “Challenge and Response in the Law of Labor Relations” (1964-1966), 2 U. Brit. Colum. L. Rev. 335 at page 335.

paradigm. The result is a “paradigm crisis” in which the familiar tools associated with the paradigm no longer work (such as cross-examination, rules of evidence, and opening and closing statements in proceedings with one or more self-represented litigant). During a paradigm crisis there is a sense of casting about for new answers (such as alternative dispute resolution) and the fundamental principles and ideology of the paradigm are questioned (for example, through multiple studies on the experiences of self-represented litigants in adversarial court systems). Despite that a paradigm shift signals change, it does not, as noted earlier, presumptively toss out the old or, more poetically, reject “the cumulative disciplinary matrix.”⁷⁵⁵

Many of the phenomena discussed in this thesis are suggestive of a “paradigm crisis” in Anglo-American dispute resolution, particularly in family law. As cited in the introduction to this thesis, these arguably include the large population of self-represented litigants, an institutional emphasis on alternative dispute resolution, information programs that educate parents as to the benefits of alternative dispute resolution, the American “problem-solving court movement,” the Australian LAT, the reform recommendations in the Norgrove Report, the Ontario IDVC and further Ontario initiatives such as Family Law Information Centres and court-adjunct mediation, substantive law reforms contained in British Columbia’s new *Family Law Act* and similar changes in proposed amendments to the *Divorce Act*, the relatively recent inclusion of multi-professional and therapeutic approaches in law school curricula, and the rapidly expanding application of vulnerability theory.

⁷⁵⁵ *Supra*, footnote 26 at page 100. [Stobbs, Juristic Paradigms]

According to Kuhn’s principles, paradigm shifts do not occur quickly, and they strongly depend upon changes in ideology, the commentary of authoritative academics (some of which is reported here) and a professional cohort trained in the new paradigm.⁷⁵⁶ A paradigm reportedly moves from crisis to “revolution” when a viable alternative is found to unite the threads that have arisen in response to the crisis.⁷⁵⁷

It has been observed that in family law, an abundance of practical and imaginative ideas for reform have long existed.⁷⁵⁸ The Family Justice Working Group Report attributes the “implementation gap” in family law reform, in part to the “culture of the justice system.”⁷⁵⁹ The Canadian Bar Association’s Future of Legal Services Report more bluntly notes that the legal industry is conservative and resistant to change,⁷⁶⁰ and indeed, ideas for reform have co-existed with adversarial decision-making systems and enmeshed, even unconscious notions about adversarial justice. It is easy to imagine, for example, that family judges may be seen as authoritarian, approval-granting (or denying) parent-figures, particularly given that a traditional symbolic function of courts has been to moralize divorce. The unconscious acceptance of such symbolism makes it difficult to depart from the ideology it supports, despite broad recognition of ample reason to do so.⁷⁶¹

⁷⁵⁶ *Supra*, footnote 26 at page 142. [Stobbs, Juristic Paradigms]

⁷⁵⁷ *Ibid.*, at page 103. [Stobbs, Juristic Paradigms]

⁷⁵⁸ *Supra*, footnote 75 at page 128, for a discussion of the “multi-door courthouse” concept, which originated in 1976. [King, Freiberg, et al.]

⁷⁵⁹ *Supra*, footnote 23 at page 9. [Family Justice Working Group Report]

⁷⁶⁰ *Supra*, footnote 136. [Canadian Bar Association, Future of Legal Services]

⁷⁶¹ Jane M. Spinak, “Reforming Family Court: Getting It Right between Rhetoric and Reality” keynote address for the Washington University School of Law Ninth Annual Access to Equal Justice Conference, (2009), 22 *J.L. & Pol’y* 11 at page 22.

It would be disingenuous not to note that it serves lawyers and justice systems for the best-interests-of-the-child test to remain amorphous, or, as one author put it, as specific as the expression “long as a rope.”⁷⁶² I do not suggest that professional protectionism entirely explains resistance to reforms that go to the heart of existing legal structures, but it must be acknowledged that the legitimate interests of the legal profession as producers of legal services can “block consumer welfare reform.”⁷⁶³ Regardless of the reason for the apparent hold of court systems upon family law in spite of avalanches of criticism and decades of unsatisfactory reform, the power of information technology to change the way *almost everything* is done may, ultimately, sufficiently loosen the bonds between adversarial ideology and the collective unconscious to make way for a different path.

In *The End of Lawyers?*⁷⁶⁴ it is argued that fundamental change to legal structures is an inevitable consequence of new values centred on “efficiency,” which it defines as the ability of individuals to break through knowledge barriers in order to better understand and control their own circumstances.⁷⁶⁵ The author observes that speed and efficiency have replaced formality as the primary value in both communication and information gathering, and argues that traditional approaches to legal services which benefit from a monopoly on information increasingly seem antiquated, as do systems that fail to empower those who have informed themselves. Indeed, the Canadian Bar Association’s Future of Legal Services Report notes that client empowerment is the most important recent change affecting the practice of law, although it must be noted that it

⁷⁶² *Supra*, footnote 157. [Aviel]

⁷⁶³ *Supra*, footnote 16 at page 9. (Westlaw) [Roach and Sossin]

⁷⁶⁴ *Supra*, footnote 137. [Susskind]

⁷⁶⁵ *Ibid.* [Susskind]

describes a possible exception for criminal and family law.⁷⁶⁶ I do not suggest that the need for lawyers in family law has been or could be eliminated, on the contrary, lawyers are clearly essential in complex family law cases. There is, however, no inconsistency in recognizing this fact and also suggesting the emergence of ethical demand for legal systems built upon recognition of the “vulnerable subject.”

In law, easy access to information occurred shortly after the emergence of new norms that no longer moralize the fact of family dissolution,⁷⁶⁷ and roughly in step with even newer norms that communicate disapproval of family dissolution that fails to adequately safeguard the “separated family,”⁷⁶⁸ rendering the moralizing function of the court system not only irrelevant, but self-satirizing. Further, as Mnookin and Kornhauser maintain, the *ritual and ceremonial* aspects of court systems can hardly be meaningful in the context of uncontested divorce, which is to say, most divorces, as the parties rarely attend proceedings and courts only conduct a cursory review of private agreements. The authors liken the process to “a civil fine imposed on a divorcing couple – a fine payable not to the treasury but to the divorce bar.”⁷⁶⁹ Finally, Julien and Marilyn Payne predict, “the uncontested divorce under the auspices of the judiciary is on its last legs.” The authors suggest that administrative divorce will replace desk order divorces currently processed on affidavit evidence, “provided that section 96 of the *Constitution Act* can be overcome.”⁷⁷⁰ I suggest that all of this may at some point add up to ethical demand for administrative processes in family law areas other than custody and access.

⁷⁶⁶ *Supra*, footnote 136. [Canadian Bar Association, Future of Legal Services]

⁷⁶⁷ *Supra*, footnote 37. [Carmichael]

⁷⁶⁸ *Ibid.* [Carmichael]

⁷⁶⁹ *Supra*, footnote 147 at page 992. [Mnookin and Kornhauser]

⁷⁷⁰ Julien D. Payne and Marilyn A. Payne, *Canadian Family Law*, Fourth Edition, (Irwin Law Inc., 2011) at page 12.

The primary policy rationale for creating the LTB was to relieve the problem of self-represented litigants “clogging the courts,” and to address the perceived need for a system capable of efficiently dealing with large numbers of similar claims.⁷⁷¹ The policy rationale for the Ontario Labour Relations Board was reportedly quite different; the Board arose out of a socio-economic phenomenon whereby labour strife was increasingly anticipated and its causes eradicated, making strikes less inevitable and creating *new expectations* as to how labour and management *should behave*. The underlying “socio-economic phenomenon” has been attributed to the “trite” cause of rapidly changing *technology, social complexity and interdependence*, and the not-so-trite cause of the ensuing revolution of expectations.⁷⁷² In my view, rapid change in these categories has created new expectations as to the way in which family law “is done” and will ultimately limit social tolerance for solutions tied too closely to the status quo. Systemic change often originates within existing systems, in the form of recommendations of stakeholders who envision ways of improving efficiency and outcomes *within existing power structures*. This approach is, in my view, useful only up to the point at which, to borrow a phrase, it rests upon an “old morality.”⁷⁷³

⁷⁷¹ Law Reform Commission Report: *Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies* (1968) online: <http://archive.org/stream/interimreportof00onta#page/n73/mode/2up/search/court>

⁷⁷² *Supra*, footnote 36 at page 336. [Arthurs, Challenge and Response]

⁷⁷³ *Ibid.*, at page 337. [Arthurs, Challenge and Response]

8.2 Therapeutic Justice

The concept of therapeutic jurisprudence, which began as a method of studying and evaluating law and legal systems in terms of their therapeutic or non-therapeutic effects,⁷⁷⁴ has evolved beyond a method of study.⁷⁷⁵ The term “therapeutic justice” has come to refer to practical attempts to enhance the capacity of law and legal systems to function as a “healing agent,”⁷⁷⁶ and is controversial. It has been argued that therapeutic perspectives inappropriately muddle civil justice systems with state health and welfare services, detract from the fundamental principle that judicial institutions, rather than striving to “do good as well as to do right” must focus upon “justice according to law” and must not “systematise the welfare function.”⁷⁷⁷ It has been maintained that therapeutic approaches fuel unrealistic notions that law can “make people good and happy,” detract from understanding the “art of the possible;”⁷⁷⁸ and inappropriately cast individuals as objects of assistance, rather than subjects of rights. These sentiments resonate with the traditional view that “judges should be judges,” that is, not stray from the classical ideal.⁷⁷⁹

⁷⁷⁴ David B. Wexler and Bruce Winick, *Essays in Therapeutic Jurisprudence*, (Carolina Academic Press, 1991).

⁷⁷⁵ David B. Wexler, “From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part” (2011), 37 *Monash U. L. Rev.* 33. David Wexler recently commented that there has been “tremendous development” in the past twenty years toward a “psychologically-sensitive approach to law in general,” and that therapeutic approaches have moved from theory to practice and have been internationally influential in legal practice and education.

⁷⁷⁶ Susan Goldberg, “Judging for the 21st Century: A Problem Solving Approach” (November 2004), National Judicial Institute online: <http://www.nji.ca/nji/Public/documents/Judgingfor21scenturyDe.pdf>

⁷⁷⁷ *Supra*, footnote 246. [Doughty and Merch]

⁷⁷⁸ Mavis Maclean, *Making Family Law, A Socio-Legal Account of Legislative Process in England and Wales* (Hart Publishing, 2011).

⁷⁷⁹ *Supra*, footnote 311 at page 261. [Nolan]

Barbara Babb has advocated for a therapeutic orientation in specialist family courts in the United States, whereby “specially trained and interested judges address not only the legal issues, such as divorce, custody, child support, and domestic violence, but also...consider the family’s nonlegal needs, such as substance abuse, mental health issues, or domestic abuse.”⁷⁸⁰ She describes the Maryland family justice system as a suitable “national model” for a therapeutic family court: the services available in this system reportedly include: “mediation, custody investigations, emergency response personnel, mental health and substance abuse evaluations, information services for the assistance of unrepresented litigants, lawyer referral services, and parenting seminars,”⁷⁸¹ as well as a court-appointed “family support services coordinator” to compile information about offsite community support services, coordinate these services with the family court, and report on the need for additional services.⁷⁸²

This paper does not suggest the Ontario family court system has failed to respond to changing norms and expectations, indeed, a number of proposals and reforms aimed at increasing the therapeutic effects of court processes have been discussed above. However, the question here concerns the potential for a tribunal approach to bridge the “implementation gap” as it relates to holistic family law dispute resolution. I suggest that the therapeutic potential of court systems is limited, at least in part because in Anglo-American jurisdictions the adversarial courts system has “been at the core of our legal institutions for centuries;” therefore, reforms to legal practice and procedure do not tend to “go to the heart of the legal system.”⁷⁸³

⁷⁸⁰ *Supra*, footnote 4 at pages 231-232. [Babb, Re-evaluating Where We Stand]

⁷⁸¹ Barbara A. Babb “Maryland’s Family Divisions: Sensible Justice for Families and Children,” 2013) 72 M.d. L. Rev. 1124 at page 1127.

⁷⁸² *Ibid.* [Babb, Maryland’s Family Divisions]

⁷⁸³ Nigel Stobbs, “In Defense of Therapeutic Jurisprudence: Threat, Promise and Worldview,”(2015) 8 Ariz. Summit L. Rev. 325 at pages 325-326.

It must be noted that a “holistic” family justice system is not universally regarded among family law scholars as a realistic goal; for example, Semple and Bala write that arguments in favour of holistic systems imply a state responsibility that extends beyond protecting “adult rights” and “children’s interests” to encompass protecting the “needs and interests of adults.”⁷⁸⁴ The authors maintain that ample demand is placed upon state resources just to attend to adult rights and children’s needs and interests, without added responsibility for the “welfare of adults” and the post-separation “family unit.”⁷⁸⁵ They further note, “to the extent that the family justice system is seen as a battle ground for angry and vindictive former spouses, there is little political support for increased funding in this area.”⁷⁸⁶ I do not challenge these assertions, but rather, suggest that the limited capacity of family court systems to operate holistically supports the exploration of alternative institutional models designed *not* to attract comparisons to a battle ground, which may have the potential to save adjudication resources and apply them to family services that address the interconnected welfare of all family members.

8.3 Efficiency

*Adversarial systems have an insatiable appetite for resources.*⁷⁸⁷

There is, of course, an inevitable tension between always-constrained resources and proposals for change. I have repeatedly referred to “efficiency” in this paper but, as noted, the real-world cost-

⁷⁸⁴ *Supra*, footnote 40 at pages 4-5. [Semple and Bala, Reforming the Family Justice System]

⁷⁸⁵ *Ibid.*, at page 5.

⁷⁸⁶ *Ibid.*, at page 6.

⁷⁸⁷ *Supra*, footnote 27. [Cromwell, Neither Out]

effectiveness of courts and various hybrid tribunal dispute resolution systems is beyond the scope of this project.

For the purpose of this paper it is simply noted that tribunals seem *generally* to be considered more cost efficient than courts, based upon their proliferation in response to efficiency concerns, noted above.⁷⁸⁸ This is unsurprising given reports that annual judicial salaries are upward of \$250,000, whereas mediator compensation is typically in the \$53,000 to \$80,000 range.⁷⁸⁹ The relative efficiency of tribunal processes might also be assumed because they can be designed to facilitate self-representation;⁷⁹⁰ indeed, the *ability to self-represent* is a recognized value in administrative justice.⁷⁹¹ Moreover, access to justice concerns specific to family law (such as the damaging potential of court processes and the potential for interim parenting arrangements to be converted into status quo hurdles) may be ameliorated to the extent that a multi-disciplinary tribunal would allow members with practical, clinical knowledge and experience to swiftly gauge the interests of children *from the outset*, that is, to make relatively accurate early deductions based upon expertise and available information.

Lastly, a family law tribunal may be more efficient than the court system simply because efficiency is a dominant value in administrative law, as illustrated in the seemingly constant growth and re-organization of tribunal systems in Ontario and other jurisdictions.⁷⁹² Moreover, it

⁷⁸⁸ See: *supra*, footnote 462. [Sossin and Baxter]

⁷⁸⁹ *Supra*, footnote 22 at page 428-429. [Semple and Rogerson]

⁷⁹⁰ University of Toronto Faculty of Law, “Middle Income Access to Civil Justice Initiative Background Paper” online: http://www.law.utoronto.ca/documents/conferences2/AccessToJustice_LiteratureReview.pdf

⁷⁹¹ *Supra*, footnote 462 at page 11. [Sossin and Baxter].

⁷⁹² See: *supra*, footnote 462. [Sossin and Baxter]

seems a common-sense proposition that the cost of any justice system is *increased* when it functions sub-optimally, as court systems surely do in the face of large numbers of self-represented parties.

8.4 Authority: Contempt and Restraining Orders

There appear to be ways in which tribunals can be granted a full range of contempt powers, although the extent to which there may be corresponding disadvantages, such as limiting the force of any privative clause, or creating delay, are important concerns outside the scope of this paper.

For the purpose of discussion here, it is noted that of the two branches of the common-law contempt power, contempt in the face of the court and contempt outside the presence of the court, and the two types of contempt power – civil contempt, which is the power to issue an order for compliance, and criminal contempt, which is power to issue an order for punishment such as fine or imprisonment – inferior courts and tribunals have jurisdiction only over contempt in the face of the court (or tribunal) and have only civil contempt power.⁷⁹³ Superior courts have jurisdiction over both branches of contempt and have both civil and criminal contempt powers.

The contempt powers of an inferior court or tribunal can be expanded by legislation to include jurisdiction over contempt outside the presence of the court and to include the criminal contempt power; however, there is a common law presumption against expanding the jurisdiction of

⁷⁹³ Christopher A. Taylor, “Contempt of Court and Administrative Tribunals” (1993) 14 *Advoc. Q.* 418 at page 419.

inferior courts and tribunals, and therefore clear statutory language is needed.⁷⁹⁴ It has been suggested that this presumption is narrowly construed only in circumstances where the criminal contempt power is granted, or where the grant of jurisdiction over contempt outside the tribunal correspondingly deprives the Superior Courts of jurisdiction.⁷⁹⁵ Two examples taken from a discussion of the relevant case law illustrate these principles; in *Chrysler v. Canada (Competition Tribunal)*⁷⁹⁶ the Supreme Court of Canada considered the authority of the Competition Tribunal to issue a contempt order for failure to comply with one of its orders. The enabling legislation granted to the tribunal jurisdiction to “hear and determine all applications made under Part VIII of the *Competition Act* and any matters related thereto,” as well as “all such powers, rights and privileges as are vested in a superior court of record” with respect to “the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction.”⁷⁹⁷ The court interpreted the express grant of “enforcement” power as conferring jurisdiction over contempt outside the tribunal, in part on the basis of tribunal expertise and in part because there was no privative clause by which the supervisory role of the Superior Courts was entirely usurped.⁷⁹⁸ With respect to the exercise by a tribunal of the criminal contempt power, pursuant to *United Nurses of Alberta v. Alberta (Attorney General)*⁷⁹⁹ if enabling legislation provides that an order of a tribunal may be filed with the Superior Court and enforced as such, the criminal contempt power is engaged such that disobedience of the order is likely to constitute criminal contempt.⁸⁰⁰

⁷⁹⁴ *Ibid.*, at pages 419-420. [Taylor]

⁷⁹⁵ *Ibid.*, at page 433. [Taylor]

⁷⁹⁶ *Ibid.*, at page 430. [Taylor] Referring to *Chrysler v. Canada (Competition Tribunal)* 1992 1 S.C.R. 901

⁷⁹⁷ *Ibid.*, at page 430. [Taylor] Referring to the analysis of Gonthier, J. in *Chrysler v. Canada (Competition Tribunal)* 1992 1 S.C.R. 901

⁷⁹⁸ *Ibid.*, at page 431. [Taylor]

⁷⁹⁹ *Ibid.* [Taylor] Referring to *United Nurses of Alberta v. Alberta (Attorney General)* (1992) 92 D.L.R. (4th) 609.

⁸⁰⁰ *Ibid.* [Taylor]

The capacity of a tribunal to exercise strong powers in domestic violence cases is acknowledged as a further potential limiting force; it is merely noted here that, with the exception of the IDVC, family cases in which there is a criminal component are currently divided in the court system and would remain so if family law cases were decided in a tribunal system. For cases which do not involve criminal charges, tribunal capacity to issue restraining orders does not seem problematic, as such orders are currently issued by the inferior provincial courts. Finally, without diminishing the need for strong authority in domestic violence cases, in high conflict cases that do not have a criminal law component, a holistic tribunal could combine authority to issue restraining orders with services aimed at achieving the goal recommended for high conflict family law cases in the CCMP report, that is, a more integrated and collaborative approach to dispute resolution.⁸⁰¹

8.5 From Courts to Tribunal: Landlord and Tenant Board Policy Trail

The Landlord and Tenant Board was not created through a straightforward legislative exercise, and the story of its emergence illustrates policy and constitutional issues relevant to the potential to establish a family law tribunal. Almost all controversy surrounding the transfer from the courts to a tribunal system for residential tenancy disputes was constitutional (that is, legalistic) or related to the substantive changes to landlord and tenant law that accompanied the transition. The process aspect of the change seems to have attracted much less debate.

The policy deliberations surrounding the adoption of a tribunal model for residential tenancy disputes are located primarily in the Bill Davis era. The 1968 Law Reform Commission Report:

⁸⁰¹ *Supra*, footnote 116 at page 12. [Birnbaum et al., Ottawa Coordinated Case Management]

Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies asserts that the court system was inundated with landlord and tenant matters. This is echoed in the 1978 Ministry of Consumer and Commercial Relations Green Paper, *Policy Options for Continuing Tenant Protection*. When the later Harris government enacted the *Tenant Protection Act*,⁸⁰² contemporaneous materials including the *New Directions discussion paper*, which was publicly distributed, and Standing Committee transcripts reveal much debate over “common sense revolution” issues such as rental housing market stimulation and rent control,⁸⁰³ but little controversy over the merits of a tribunal model for dispute resolution.

Once enacted, numerous complaints, both among landlord groups and tenant associations, were voiced about the *Tenant Protection Act*, which was repealed and replaced by the *Residential Tenancies Act*⁸⁰⁴ in 2006. Dissatisfaction did not apparently concern tribunal structure or functioning, but again centred on substantive law. Standing Committee hearing transcripts and concurrent media reports reveal intense bargaining of interests among corporate landlords, small landlord groups and tenant associations, primarily over “vacancy decontrol,” the ability of landlords to raise rents for vacant units without regulation, and some criticism on each side that the tribunal tended to favour the other, but no demands to abandon or substantially revise the tribunal process.

⁸⁰² *Tenant Protection Act*, 1997, S.O. 1997, c. 24.

⁸⁰³ The 1968 Law Reform Commission Report: *Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies* gives some indication of the policy rationale underlying the change to a tribunal system, as does the 1978 Green Paper: *Policy Options for Continuing Tenant Protection*, issued by the Ministry of Consumer and Commercial Relations.

⁸⁰⁴ *Supra*, footnote 381. [*Residential Tenancies Act*]

There are parallels between the problems identified in landlord and tenant law prior to the transition from courts to the LTB, and the problems currently reported in family law, as illustrated in the chart attached as Appendix A. To summarize: the transition began with policy recommendations that landlord and tenant legal processes be made more accessible; as noted, it was reported that courts were inundated with landlord and tenant matters, especially in large population centres; an early initiative for dealing with the problem was adopted in the form of a court-adjunct service to distribute information, oversee the preparation of applications, and mediate disputes (comparable, perhaps, to Family Law Information Centres); and, in the successful Nova Scotia constitutional case, the Attorney General of the province argued that court procedures were too formal and fragmented, whereas the proposed administrative system would not only ease the burden on courts, it would also provide a more appropriate setting for dispute resolution.

8.6 Constitutional Arguments

Some of the constitutional issues raised with respect to the potential to create a provincial family law tribunal were addressed in the course of the creation of the Ontario Landlord and Tenant Board, and some are unique to the prospect of tribunal jurisdiction over family law.

(a) *Constitution Act, 1867*

The establishment of an administrative family law system is complicated by the combination of federal and provincial authority over aspects of family dissolution, and by the status of section 96 courts. This section outlines potential arguments with respect to the constitutionality of a family law tribunal with jurisdiction over all aspects of family law. As noted above, an expert analysis

as the constitutional implications of tribunal jurisdiction in some or all areas of family law is recommended as a subject of further study.

Under section 91(26) of the *British North America Act, 1867* (now cited as the *Constitution Act, 1967*,⁸⁰⁵ but referred to here as the “*BNA Act*”) the federal government has exclusive authority to legislate with respect to “marriage and divorce.” The provinces have exclusive legislative authority under section 92(13) of the *BNA Act* with respect to “property and civil rights” in the province, under section 92(16) with respect to “matters of a merely local or private nature,” under section 92(14) in regard to “the administration of justice in the province” and under section 92(12) regarding “solemnization of marriage”. The provincial authority over property and civil rights has been interpreted to mean that the provinces govern the “day to day life of citizens,”⁸⁰⁶ which together with authority over matters of a “private nature” gives the provinces complete legislative jurisdiction over family law (other than divorce), including with respect to custody, support and division of matrimonial property.

Despite that federal constitutional authority over “marriage and divorce” is more technical than substantive, the federal *Divorce Act*⁸⁰⁷ contains provisions related to custody and support,⁸⁰⁸ which will be expanded if the proposed new legislation is enacted.⁸⁰⁹ Overlapping federal and provincial legislation in these areas has caused considerable debate and litigation, which is not discussed here; it is merely noted that sections of the *Divorce Act* which appear to tread upon

⁸⁰⁵ *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3.

⁸⁰⁶ S. Ian Bushnell, “Family Law and the Constitution” (1978) 1 Can. J. Fam. L. 202 at page 203.

⁸⁰⁷ *Supra*, footnote 14. [*Divorce Act*]

⁸⁰⁸ Sections 15-18, *ibid.* [*Divorce Act*]

⁸⁰⁹ *Supra*, footnote 722. [*Bill C-78*]

provincial jurisdiction over “property and civil rights,” that is, substantive family law, have been upheld.⁸¹⁰

At confederation, the jurisdiction of the High Courts of England vested in the Superior Courts of each province under section 129 of the *BNA Act*, as part of their “plenary jurisdiction,” that is, jurisdiction over everything that is not validly assigned to different court.⁸¹¹ The Superior Court’s inherent plenary jurisdiction means that the court’s existence is rooted in constitutional law, not merely legislation.

Section 96 of the *BNA Act* provides that judges of the Superior Courts, sometimes referred to as “section 96 courts,”⁸¹² must be appointed by the federal executive branch. Therefore, provincial powers over the “organization of the provincial courts” and the “administration of justice” under section 92(14) are qualified by section 96. Although not obvious on the face it, section 96 of the *BNA Act* has been interpreted to “render unconstitutional any provincial legislation which vests in provincial officers the jurisdiction exercised by, or analogous to that exercised by, those judges at Confederation.”⁸¹³

Given the comprehensive provincial jurisdiction over substantive family law, a family law tribunal would seemingly be a matter of provincial initiative. As the foregoing suggests, the *BNA Act* presents obstacles to a provincially constituted family law tribunal with jurisdiction over all

⁸¹⁰ *Supra*, footnote 806 at page 216. [Bushnell]

⁸¹¹ F.J.E. Jordan, “Federal Divorce Act (1968) and the Constitution” (1968) 14(2) McGill L.J. 209 at page 213.

⁸¹¹ *Ibid.*, at pages 216. [Jordan]

⁸¹² *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)* [2014] 3 SCR 31 at paragraphs 29-30.

⁸¹³ John Willis, “Section 96 of the British North America Act” (1940) 18 Can. Bar Rev. 517 at page 517.

aspects of family dissolution, including: 1) the prohibition against granting a power to adjudicate that was exercised by section 96 courts in 1867 to a lower provincial court or other inferior entity (that is, one with non-federally appointed judges or adjudicators); and 2) the principle that legislative power cannot be delegated from one level of government to another, derived from the division of powers in sections 91 and 92 of the *BNA Act*.

The first obstacle – how to allow provincially appointed judges to exercise powers previously within the exclusive domain of federally appointed judges in section 96 courts – has been overcome in UFCs by judicial appointments made by concurrent action of federal and provincial governments.⁸¹⁴ With respect to the transfer of judicial authority to a non-judge within a non-court entity, such as a tribunal, the “residential tendencies cases” apply,⁸¹⁵ as discussed in detail below.

The second obstacle – the prohibition against delegating legislative functions to a different level of government – can be overcome through a cooperative scheme of interlocking federal and provincial legislation, using techniques such as “administrative delegation.”⁸¹⁶ For example, the “Potato Marketing Board case”⁸¹⁷ concerned the validity of Prince Edward Island legislation delegating to the provincial cabinet authority to market agricultural products and to create boards

⁸¹⁴ Steven P Sibold, “The Unified Family Court and Section 96 of The British North America Act” (1976) 3(2) *Queen's Law Journal* 71 at page 78.

⁸¹⁵ *Supra*, footnote 656 at page 101. [Sossin, Designing Administrative Justice]

⁸¹⁶ Bruce Ryder, “Equal Autonomy Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers” (2011) *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 565 at page 597.

⁸¹⁷ *Prince Edward Island (Potato Marketing Board) v. H.B. Willis Inc.*, [1952] 2 S.C.R. 392. The other foundational cases are *Valin v. Langlois* (1879), 3 S.C.R. 1 re: federal delegation; *Hodge v. R.* (1883-84), L.R. 9 App. Cas. 117 re: provincial delegation; and *Constitutional Validity of Bill No. 136 (Nova Scotia)*, [1951] S.C.R. 31 re: subordinate legislation.

to administer these marketing plans, and Parliamentary legislation which authorized the federal cabinet to delegate federal power to regulate “inter-provincial and export trade” with respect to the same agricultural products to the same provincial board. This “interlocking legislation” was determined to be constitutionally legitimate, despite that Parliament could not have given power to enact the same regulations to a provincial *legislature*, on the basis that a provincial board is an autonomous creature from the legislature under which it is created. This “devious logic” is referred to as “cooperative federalism.”⁸¹⁸

Through these mechanisms, a provincial family law tribunal could be established to administer both federal and provincial laws.⁸¹⁹ As noted above, the authority of tribunal adjudicators to assume the same jurisdiction as family law judges would remain to be determined under the residential tenancies cases.

(b) Residential Tenancies Cases

The Ontario government under Premier Bill Davis enacted *The Residential Tenancies Act, 1979*,⁸²⁰ (“RTA”) which contained a “legislative code” governing the rights and obligations of landlords and tenants and established the Residential Tenancy Commission, mandated to take over jurisdiction from the Superior Courts with respect to residential tenancy disputes. From the outset there was some doubt as to the constitutional legitimacy of the new system, which was entirely a project of the provincial government. The Provincial Cabinet therefore referred two questions to the Ontario Court of Appeal: could a provincial tribunal exercise eviction powers,

⁸¹⁸ Peter H. Russell, Rainer Knopff, F.L. Morton, *Federalism and the Charter: Leading Constitutional Decisions* (Carleton University Press, 1989) at page 686.

⁸¹⁹ *The Prince Edward Island Potato Marketing Board v. H.B. Willis Incorporated* (1952) 2 S.C.R. 392.

⁸²⁰ *Residential Tenancies Act*, 2006, S.O. 2006, c. 17.

and could it be empowered to compel tenants to comply with obligations imposed under the *Residential Tenancies Act*? The Court of Appeal held that these powers were within the exclusive jurisdiction of federal courts under section 96 at the time of confederation and could not be transferred to a provincial tribunal, and in *Reference re: Residential Tenancies Act (Ontario)*⁸²¹ the Supreme Court of Canada reached the same conclusion, through a three-part analysis:

1. does the power conferred “broadly conform” to a power or jurisdiction exercised by a superior, district or county court at confederation;
2. if so, is it a judicial power;
3. if yes, is the transferred power of decision subsidiary or necessarily ancillary to predominately administrative function?⁸²²

The analysis is based upon the principle noted above that neither Parliament nor the provincial legislatures may impair the status or jurisdiction of Superior Courts; therefore, the Court held that only judicial powers that are subsidiary or necessarily ancillary to a valid administrative scheme may legitimately be transferred. At step one, the Court held that the powers conferred upon the Residential Tenancy Commission broadly conformed to powers of s. 96 courts exercised both before and after Confederation. At step two, the Court held that the power to order eviction or compliance remained a *judicial power* exercised “in the context of a *lis* between parties” requiring findings of fact, an analysis of law, and the application of law to the facts. At the third step, the Court held that the central function of the Commission was dispute resolution in a judicial form, and the judicial powers conferred were not part of a “broad legislative scheme” in which judicial functions were “subsumed.”⁸²³

⁸²¹ See: *Reference re: Residential Tenancies Act (Ontario)*, [1981] 1 SCR. 714 (SCC).

⁸²² *Ibid.*, at pages 729-734.

⁸²³ *Ibid.*, at page 748.

Fifteen years later, in *Reference re: Amendments to the Residential Tenancies Act (N.S.)*,⁸²⁴ the Supreme Court of Canada considered the constitutional validity of Nova Scotia's planned tribunal system for residential tenancy disputes. The Court distinguished its earlier decision in the Ontario *Reference* on the basis that only a narrow issue had been presented to the court in that case: the legitimacy of the proposed Commission's specific adjudication powers over eviction and enforcement of tenant obligations.⁸²⁵

Justice McLachlin, for the majority in the Nova Scotia case, found residential landlord and tenant disputes were resolved "co-extensively" by inferior and Superior Courts in 1867, and therefore the creation of a provincial landlord and tenant tribunal did not violate section 96 of *BNA Act*.⁸²⁶ The majority went on to consider the remaining parts of the analysis: whether, *if* the power had been a judicial power exclusive to Superior Courts in 1876, it could be delegated to a provincial tribunal as a "novel jurisdiction," that is, as a judicial power subsumed within a *new overall institutional arrangement*. In the opinion of the majority the "novel jurisdiction" test was not met, essentially because the tribunal's function and powers were purely analogous to those of the courts. As McLachlin, J. put it, the new system amounted to "covering an existing body of law with a new statutory wrapper."⁸²⁷

Most interesting here, the minority concurring decision of Lamer, C.J., Cory and Sopinka, J.J., found the tribunal *would constitute* a novel jurisdiction. First, the enabling legislation granted powers to the Director of Residential Tenancies to investigate and mediate, as well as to make

⁸²⁴ *Reference re: Residential Tenancies Act (Nova Scotia)*, [1996] 1 SCR 186 (SCC).

⁸²⁵ *Ibid.*, at para. 73.

⁸²⁶ *Ibid.*, at para. 69. [Reference (Nova Scotia)]

⁸²⁷ *Ibid.*, at para. 101. [Reference (Nova Scotia)]

decisions and issue orders.⁸²⁸ Second, the minority concluded that “residential tenancies” was a “novel jurisdiction” in the sense of being a phenomenon of modern urban society. The minority articulated a test for such determinations in future cases:

1. is the legislation an attempt to respond to a new societal interest and approach regarding a subject matter of the legislation;
2. is the legislation based on principles of law that make it distinct from similar legislation;
3. is there an identifiable social policy that is different from the policy goals of analogous legislation?⁸²⁹

(c) Jurisdiction in Family Law

At the time of confederation, divorce was religiously controversial and socially distasteful,⁸³⁰ which resulted in there being no federal legislation in this area for more than one hundred years after confederation. The initial role adopted by the federal government was to ensure that marriage in one province was valid in another province and by asserting federal jurisdiction, distancing the issue of divorce from local interests, and thereby ensuring that consensus around divorce legislation was difficult to achieve.⁸³¹ In Newfoundland and Québec there was no federal or provincial divorce legislation, but in most other provinces, including Ontario, the English *Matrimonial Causes Act* of 1857 was incorporated by reference,⁸³² and established narrowly specified grounds for divorce.⁸³³ Provincial divorce acts remained in effect until 1968,⁸³⁴ when

⁸²⁸ *Ibid.*, at para. 5. [Reference (Nova Scotia)]

⁸²⁹ *Ibid.*, at para. 37. [Reference (Nova Scotia)]

⁸³⁰ *Supra*, footnote 811 at page 213. [Jordan]

⁸³⁰ *Ibid.*, at pages 211-213. [Jordan]

⁸³¹ *Ibid.*, at page 213. [Jordan]

⁸³² *Ibid.*, at page 211. [Jordan]

⁸³³ Kristin Douglas, “Divorce Law in Canada, Library of Parliament, Law and Government Division” (March 27, 2001) online: <https://lop.parl.ca/content/lop/ResearchPublications/963-e.htm#ahistory>
Supra, footnote 538. [Douglas]

⁸³⁴ *Ibid.* [Douglas]

the first federal legislation was passed⁸³⁵ and Parliament granted to Superior Courts exclusive authority to grant divorce decrees and make corollary relief orders in divorce applications, now reflected in section 2(1) of the *Divorce Act*.⁸³⁶

It was not until 1930 that the Supreme Court of Ontario (now the Superior Court) began to issue divorce decrees; until then, a marriage could only be dissolved by private act of Parliament,⁸³⁷ that is, a political, rather than judicial process. Therefore, Superior Court jurisdiction over divorce was not *exercised by Superior Courts in 1876*. Under the first branch of the test in *Reference re: Residential Tenancies Act (Ontario)*⁸³⁸ it can be argued that the power to grant a divorce decree does not conform to “a power or jurisdiction exercised by a superior, district or county court at confederation.”

The Superior Courts *did* exercise jurisdiction over property disputes in 1867, through their plenary jurisdiction; therefore, on the face of it only Superior Courts may make property orders in family law disputes, as reflected in section 4(1) of the *Family Law Act*.⁸³⁹ It should be noted, however, that the Supreme Court of Canada has held that the question of whether a power or

⁸³⁵ *Ibid.* [Douglas]

⁸³⁶ *Supra*, footnote 14. [*Divorce Act*] In the result, parties seeking a divorce may apply to the Superior Court under the *Divorce Act* for divorce and custody, access, child support and spousal support (as corollary relief, despite provincial jurisdiction over family law, noted above), and may advance a claim in the same application for property division under the Ontario *Family Law Act*. Parties *not* seeking divorce, may apply to either the Superior Court or the inferior provincial courts for child support and spousal support under the Ontario *Family Law Act* and for custody and access under the *Children’s Law Reform Act*,⁸³⁶ but property claims (which outside of marriage are governed by common law) may only be advanced in the Superior Court. With the exception of UFCs, which exercise jurisdiction over all aspects of family law jurisdiction, family law will remain divided between Superior Courts and Provincial Courts until the new plan to expand the Unified Court system is fully implemented.

⁸³⁷ Archives of Ontario 210 Research Guide (updates 2018) online: www.archives.gov.on.ca/en/accesArchives_of_Ontario_Research_Guide_s/documents/research_guide_210_divorce_files_in_ontario.pdf

⁸³⁸ *Reference re: Residential Tenancies Act (Ontario)*, [1981] 1 SCR. 714 (SCC).

⁸³⁹ *Supra*, footnote 720. [*Ontario Family Law Act*]

jurisdiction was exercised by a section 96 court at the time of confederation depends upon the *type of dispute*, not the remedy sought, and should be narrowly construed.⁸⁴⁰ With this in mind, it can be argued that property claims between spouses were not a type of dispute resolved by Superior Courts at confederation because women had no virtually no property rights at that time, and certainly none that are analogous to current family law property rights. It can be argued that a completely different societal interest is at stake in *matrimonial property* disputes, and that while the remedy sought is a judicial decision over property rights, the *type of dispute* is the settlement of all rights and obligations that flow from family dissolution (of which property is only one component) and is quite different from anything that was before section 96 courts at confederation.⁸⁴¹ Similar arguments have prevailed; for example, in jurisprudence regarding the validity of tribunal jurisdiction with respect to worker's compensation, it was decided that the new board, "although dealing with the subject matter previously entrusted to the Superior Court," was dealing with it from a wholly different point of view.⁸⁴²

It could be further argued that decision-making authority over property and all other aspects of family law in the context of a holistic and therapeutic approach to family law dispute resolution is part of a novel jurisdiction, based upon the minority opinion and analysis set out in *Reference re: Amendments to the Residential Tenancies Act (N.S.)*.⁸⁴³ The argument is not difficult to conceive: the delegated decision-making powers would be subsidiary and ancillary to the central

⁸⁴⁰ *Supra*, footnote 656, at page 101. [Sossin, Designing Administrative Justice] The author refers to *Sobey's Stores Ltd. v. Yeoman's* [1989] 1 SCR 238. See also *supra*, footnote 813 at page 525. [Willis] The author writes: "It is *intra vires* a provincial legislature to remove from one of the courts within sec. 96 a subject matter which was being dealt with by it at Confederation and transfer it to a provincial tribunal, so long as it does not empower that tribunal to decide with respect to it the same type of question that that court was deciding."

⁸⁴¹ Constance B. Backhouse, "Married Women's Property Law in Nineteenth Century Canada" (1988) 6 Law & Hist. Rev. 201. See also: *supra*, footnote 813. [Willis]

⁸⁴² *Supra*, footnote 813 at page 540. [Willis]

⁸⁴³ *Supra*, footnote 37. [Carmichael]

tribunal function of facilitating settlement through a holistic and therapeutic settlement system, a policy agenda distinct from any existing Ontario legislation; the enabling legislation would be a clear response to a newly recognized social problem and societal interest, revealed by new social norms as to family dissolution, in particular, the unacceptable process effects of family dispute resolution through adversarial processes.⁸⁴⁴

There could be no worker's compensation tribunal system if it were impossible for a tribunal to assume jurisdiction previously exercised by Superior Courts.⁸⁴⁵ In *A.G. Quebec v. Slanec & Grimstead et al.*⁸⁴⁶ the Quebec Court of Kings Bench, Appeal Side, remarked with respect to the novel jurisdiction of the commission:

The commission has without doubt, in a certain measure, to settle legal disputes; but it has nothing of the nature of the ordinary tribunals, above all of Superior, District, or County courts. Thus, it is not necessarily composed of lawyers; it is not bound by any rules of procedure; it sits wherever it pleases; it cannot award costs, which practically deprives the interested parties of legal or attorney assistance; it revises its own decisions at will, and, sometimes even, without being requested to do so...⁸⁴⁷

As noted, the creation of the LTB coincided with substantive changes in landlord and tenant law; as the discussion above suggests, substantive law changes are essential to a novel jurisdiction argument. The substantive law changes that might accompany a tribunal transition are outside the scope of this paper.

⁸⁴⁴ Carol Rogerson, "From Murdoch to Leatherdale: The Uneven Course of Bora Laskin's Family Law Decisions" (1985) 35 U. Toronto L.J. 481 at page 536. The author's remarks suggest that a tribunal approach may signal a "serious new social problem requiring innovative solutions."

⁸⁴⁵ *Supra*, footnote 813 at page 521. [Willis]

⁸⁴⁶ *A.G. Quebec v. Slanec & Grimstead et al.*, [1933] 2 D.L.R. 289.

⁸⁴⁷ *Ibid.*, at page 296.

8.7 Summary

I argue in this chapter that while there are obstacles to the transition from courts to tribunal for family law, they are largely symbolic and ideological, and moreover, to the extent that they rest upon ideology, they are rapidly becoming eclipsed by changes in technology, social norms, perceptions of human interdependence in the context of separating families, the relative power of social institutions and the populations they serve (and the related unmasking of illusions about autonomy and “choice”), and the evolution in law, however halting, from formal to substantive equality. Finally, it seems highly fortuitous that the “novel jurisdiction” argument which supports a transition from courts to tribunal for family law is *entirely consistent* with a modern family law policy agenda.

CONCLUSION

I have argued that a paradigm shift away from adversarialism and toward a more collaborative, interdisciplinary and problem-solving approach to dispute resolution may enable experimentation with alternative *institutional* approaches to family law dispute resolution, specifically in the form of a holistic tribunal-based settlement system, at least in cases involving children's interests. The rationale for such a transition has been discussed largely in terms of longstanding (but intensifying) recognition that family litigation is damaging to children and separated families, which I argue has become so incompatible with modern social norms as to constitute a new and serious social problem which requires an innovative solution. I have suggested that a holistic tribunal "settlement system" in which multi-disciplinary mediators and adjudicators function as equals, tribunal expertise is nurtured, transparent decision-making guidelines are developed (and adjudication is a secondary, accessible, and inquisitorial component) could address the needs of the "vulnerable subject" in multiple ways, and in general improve the negotiation and settlement environment, whether or not the system is directly engaged.

This thesis reports upon new empirical research regarding day-to-day mediation and adjudication in selected tribunals. While this research may not be generalized to any tribunal as a whole, my claim is that the reported experiences of tribunal members with tribunal processes and self-represented litigants is relevant to the potential for an alternative institutional approach to family law dispute resolution. The need for further research is noted throughout this paper; my

conclusion, within the limited remit of this project, is that there is positive potential for a tribunal approach to family law dispute resolution, and further study is warranted.

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Appendix A

Chronology of Policy Considerations and Decisions re: Establishment of 1) Ontario Rental Housing Tribunal and 2) Ontario Landlord and Tenant Board

Date and Event, Document or Source	Details and Importance
1968 Law Reform Commission Report: <i>Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies</i> http://archive.org/stream/interimreportof00onta#page/n73/mode/2up/search/court	Recommends landlord and tenant legal processes be made more accessible ; finds courts are inundated with landlord and tenant matters, especially in large population centres.
March 1, 1971 Davis Conservative government to succeed Robarts Conservative government [followed by Miller as inter-election appointee: February 8, 1985 – June 26, 1985]	Beginning of 14 consecutive years of Conservative provincial government.
1972 Law Reform Commission, <i>Part IV of The Landlord and Tenant Act</i> http://archive.org/stream/reportonreviewof00onta#page/24/mode/2up	Cited by SCC in <i>Reference re Residential Tenancies Act (Ontario)</i> ; addresses substantive changes, not process change.
1976 Law Reform Commission, <i>Report on Landlord and Tenant Law</i> http://archive.org/details/reportonlandlord00onta	Cited by SCC in <i>Reference re Residential Tenancies Act (Ontario)</i> ; recommends county court judges continue to have jurisdiction over summary landlord and tenant matters; removal to Supreme Court of complex matters.
February 10, 1978 Green Paper: <i>Policy Options for Continuing Tenant Protection</i> , Ministry of Consumer and Commercial Relations [Robarts Library, Government Publications, CAONXC 16 G23 ENG]	Cited by SCC in <i>Reference re Residential Tenancies Act (Ontario)</i> ; first indication of support for a tribunal approach. (See Assignment 11 – Comparative Discourse for detailed summary)
April 4, 1978 Green Paper referred to “Standing General Government Committee” Journals of the Legislative Assembly http://archive.org/stream/journalsoflegis112onta#page/52/mode/2up/search/tenant+protection	

<p>May 25, 1978 Globe and Mail <i>Single tribunal for housing disputes urged Tories, Liberals defeat NDP bid to extend rent review</i></p>	<p>NDP motion called for creation of a residential tenancies commission and tribunal. Commission would be a public information arm of the tribunal, oversee the preparation of applications and mediate disputes. One-stop service, taking over from County Court (for evictions), the rent review tribunal (for applications for rent increases and claims for rental arrears) and municipal housing standards branches (for neglected repairs).</p>
<p>October 30, 1978 Globe and Mail <i>New tenants' bill passes second reading (source for date)</i></p>	<p>Consumer and Commercial Relations Minister Frank Drea introduced <i>Residential Tenancies Act</i> in the legislature.</p>
<p>November 15, 1978 Globe and Mail <i>New tenants' bill passes second reading</i></p>	<p><i>Residential Tenancies Act</i> passed second reading; sent to a “Standing General Government Committee” for public hearings. The <i>Act</i> provided for Residential Tenancies Commission to take over from courts as tribunal for dispute resolution.</p>
<p>April 19 – May 31, 1978 Committee Transcripts: “Standing General Government Committee” Ontario Legislative Assembly Debates, Standing Cttee. On General Government Debates, 31st Parl. 2nd Sess., 1978 at pages G17 to G634 (Robarts Government Publications CA2ONXC 16 – G23)</p>	<p>“Standing General Government Committee” holds public hearings April 19, April 26, May 1, 10, 24, 31, 1978.</p>
<p>June 21, 1979 Globe and Mail <i>Opposition stands ground on rent bill</i> Richard Furness</p>	<p>Committee engaged in “five months of committee debate and amendment.”</p>
<p>June 21, 1979 Globe and Mail <i>Opposition stands ground on rent bill</i> Richard Furness</p>	<p>Ontario New Democrats and Liberals make last-ditch efforts to have changes included before the Government's long-awaited landlord and tenant legislation becomes law.</p>
<p>June 22, 1979 Globe and Mail <i>Bill passes third reading 6% ceiling on rents stays in new landlord-tenant law</i></p>	<p><i>The Residential Tenancies Act, 1979</i> passed into law. Residential Tenancies Commission replaces the courts as forum for landlord-tenant disputes. James Renwick of NDP hinted in final stages of</p>

Richard Furness	debate that there would be a constitutional challenge.
1979 From: <i>Reference re Residential Tenancies Act (Ontario)</i>	Cabinet referred to the Court of Appeal <i>two questions</i> : whether a tribunal could exercise eviction powers and whether it could compel tenants to comply with obligations imposed under the <i>Residential Tenancies Act</i> .
1979 Court of Appeal decision <i>Reference re Residential Tenancies Act (Ontario)</i>	AG argued courts were clogged with tenant disputes, procedures were too formal and fragmented, proposed commission would ease the burden on the courts and provide a more appropriate setting for dispute resolution. COA held that Commission powers were in the exclusive purview of section 96 courts and could not be transferred to a tribunal.
May 5, 1981 <i>Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714</i> May 29, 1981 Globe and Mail <i>Canada's top court rules out Ontario tenancy commission</i>	SCC declared Residential Tenancies Commission unconstitutional. Nova Scotia, Quebec, Manitoba, Saskatchewan, Alberta and B.C. supported Ontario's position before the court. Among those arguing against the law were the federal Attorney-General, property management associations, community-based legal service clinics and Toronto's Federation of Metro Tenants Associations, an umbrella organization composed of some 100 tenants' groups, ie. both landlord and tenant groups
February 13, 1981 Globe and Mail <i>U of T wants tenants out of rooming house</i> MARINA STRAUSS	Residential Tenancies Commission remained in place and functioned as a provincial agency which had power to roll back rent increases of more than 6 per cent.
October 6, 1982 Globe and Mail <i>Landlords, tenants to boycott rent control probe</i> DUNCAN McMONAGLE	Residential Tenancies Commission functioned as inquiry and conducted hearings re: rent-control.
October 6, 1984 Globe and Mail	Residential Tenancies Commission began second phase of hearings re: rent-control system. Boycotted by landlord's "umbrella group."

<p><i>Landlords, tenants to boycott rent control probe</i> DUNCAN McMONAGLE</p>	
<p>June 26, 1985 Peterson Liberal government elected</p>	<p>No movement on tribunal: <i>Reference</i>.</p>
<p>October 1, 1990 Rae NDP government elected</p>	<p>Strengthened rent control; no movement on tribunal: <i>Reference</i>.</p>
<p>September 9, 1994 Supreme Court of Canada Docket: http://www.scc-csc.gc.ca/case-dossier/cms-sgd/dock-regi-eng.aspx?cas=24276</p>	<p>Notice of Appeal to SCC filed in <i>An Act to Amend Chapter 401 of the Revised Statutes, 1989, the Residential Tenancies Act, S.N.S. 1992, c. 31</i></p> <p>Political awareness that the issue of transferring jurisdiction from courts to a tribunal may be re-opened.</p>
<p>June 26, 1995 Harris Conservative government elected [Eves named inter-election: April 15, 2002 – October 22, 2003]</p>	<p>“Common sense revolution”</p>
<p>November 1995 Pre-legislation public hearings (Canada Newswire <i>Tenant Protection Act Takes Effect in Ontario</i> June 17, 1998)</p>	<p>“The government consulted for one year with tenants, tenant organizations, landlords, landlord associations, developers, builders, and others interested in rental housing issues before introducing the Tenant Protection Act in the legislature in November 1996.”</p>
<p>February 22, 1996 Decision in Nova Scotia Reference Canada Newswire <i>Supreme Court of Canada Renders Judgment On Appeals</i></p>	<p>Nova Scotia constitutional case: SCC finds <i>An Act to Amend Chapter 401 of the Revised Statutes, 1989, the Residential Tenancies Act, S.N.S. 1992, c. 31</i>, within the jurisdiction of the Nova Scotia legislature. Confers authority for residential tenancy dispute resolution upon a tribunal. Appears to contradict earlier decision in <i>Reference re Residential Tenancies Act (Ontario)</i>. AG Ontario was an intervenor.</p>
<p>June 25, 1996 Public Consultation Canada Newswire</p>	<p>Contains summary of Al Leach policy announcement and notice that written submissions to be submitted to Ministry of</p>

<p><i>Public Consultation Launched On New Tenant-Protection Act</i></p>	<p>Municipal Affairs and Housing by August 30, 1996.</p> <p>Note: Summary emphasizes “tenant protection;” consistent with New Directions consultation paper; later widely criticized as disingenuous.</p>
<p>9 August 1996 Canadian Press Hamilton Spectator <i>Tories cap rent hikes at 22-year low</i></p>	<p>A discussion paper detailing the proposed <i>Tenant Protection Package</i> will be considered by a government standing committee for three weeks beginning Aug. 19 in Toronto and continuing in eight other cities: Thunder Bay, Sault Ste. Marie, Ottawa, Peterborough, Hamilton, Windsor, London and Kitchener.</p>
<p>1996 (day/month unspecified) Discussion Paper, <i>New Directions for discussion, Tenant Protection Legislation</i>, Ministry of Consumer and Commercial Relations</p>	<p>Emphasizes tenant protection, conspicuously targeted at landlords and developers.</p>
<p>June 26, 1996 Globe and Mail <i>Ontario proposes rent-control reforms Landlords and tenants say changes could poison relations between the two groups</i> BY MURRAY CAMPBELL</p>	<p>Newspaper reports that both landlords and tenants unhappy with proposed <i>Tenant Protection Act</i>. Howard Tessler, Federation of Metro Tenants Associations: “back door to the death of rent control;” “association representing landlords and property managers”: “not the “fundamental change” promised during the 1995 election campaign.”</p>
<p>August 23, 26, 27, 28, 29, 30, September 3, 4, 5, 9 (part day hearing, part writing report), 11 and 12, 1996 Transcripts: Standing Committee on General Government Legislative Assembly Standing Cttee on General Govt. Debates, 36th Parl. 1st Sess. 22-33, 1996 at pages G1483 – 1704; and Legislative Assembly Standing Cttee on General Govt. Debates, 36th Parl. 1st Sess. 34 – 46, 1996 at pages G1705-2164. (Robarts: CA2ONXC16 – G23)</p>	<p>Pre-legislation Standing Committee on General Government public hearings on <i>Tenant Protection Package</i></p> <p>Composition 6 – PC; 2 – NDP; 2 – Lib.</p>
<p>September 9 and 13, 1996</p>	<p>Sept. 9: Mandate to report back to Minister on public reaction to discussion paper; opposition MPP (Marchese, NDP) requests a study on the</p>

<p>Transcripts of Standing Committee on General Government meeting on writing report Legislative Assembly Standing Cttee on General Govt. Debates, 36th Parl. 1st Sess. 34 – 46, 1996 at pages G2167-2224, and G2265 to 2268. (Robarts: CA2ONXC16 – G23)</p>	<p>effects of package on people living in poverty; Chair (Carroll) argues delay and outside mandate; motion made and defeated 6/4, party lines; (page G2182); complaints from opposition MPP that the constant narrative throughout hearings was this is only a discussion paper, yet at report-writing stage it is clear that not only was Minister’s mind made up, but also all of those he “sent forth on the committee;” opposition MPP (Curling, Liberal) refers to government MPPs as “trained seals” (page 2194) Sept 13: Report of the Committee is a summary of the submissions received prepared by research dept of government; by Sept. 13 was released to the press before it was approved by all committee members; opposition MPP (Curling, NDP) calls cttee a farce and process insulting; govt MPP moves to adopt report as written; opposition MPP (Marchese, NDP) says report makes the cttee “useless;” should just have witnesses make submissions to research staff ; expect that govt has already drafted legislation while keeping opposition “in the dark”</p>
<p>September 1996 Report of Standing Committee on General Government - Bill 96, <i>Tenant Protection Act</i> Robarts Government Publications: CA2ONXC 16 G23 ENG</p>	<p>Mandate to provide guidance to govt in drafting TPA Research summary referred to in transcript; Very brief “discussion” of submissions; one or two paragraphs per issue; liberal and NDP dissenting reports; lists supporters of various components of proposal; 168 pages; one sentence to one short paragraph and initials of submitter, eg., “We believe that a truly active duty counsel program that is designed to fit needs of local community is an efficient way to assist tenants, the courts and landlords.” WELSCO (West End Legal Services of Ottawa). Paltry document.</p>
<p>Exhibit List of written submissions Standing Committee on General Government - Bill 96, <i>Tenant Protection Act</i></p>	<p>Lists 141 sources of submissions</p>

<p>June 19, 26, August 5, 6, 7, 8, 11, 12, 13, 14 and 28 Transcripts of Standing Committee on General Government writing report Legislative Assembly Standing Cttee on General Govt. Debates, 36th Parl. 1st Sess. 83 - 94, 1997, at pages G3887 – 4113. (Robarts: CA2ONXC16 – G23)</p>	<p>Second Round of public hearings: <i>Tenant Protection Act</i></p>
<p>Aug 28 and Sept 4 p. G4347 – 4413 debates book</p>	<p>Clause by clause; opposition MPP make motions for specific amendments to the legislation; on August 28 approx. 35 opposition motions defeated, one carried - changed “reasons” to “reasons and details respecting” on eviction notices; 21 government motions carried, none defeated.</p>
<p>November 1997 (Canada Newswire <i>Tenant Protection Act Takes Effect in Ontario</i> June 17, 1998)</p>	<p><i>Tenant Protection Act</i> received third reading and royal assent.</p>
<p>June 17, 1998 Canada Newswire <i>Tenant Protection Act Takes Effect in Ontario</i></p>	<p><i>Tenant Protection Act</i> proclaimed and came into effect – established Ontario Rental Housing Tribunal.</p>
<p>December 23, 1998 Toronto Star <i>Renters score pay victory in ruling: Human Rights Commission agrees landlords can't discriminate based on income</i> By Patricia Orwen</p>	<p>Tenants awarded damages from landlords who refused to rent based on income. <i>Tenant Protection Act</i> allowed income to be a consideration. Issue: whether the HRC takes precedence over the <i>Tenant Protection Act</i>; 100 similar cases before HRC.</p>
<p>May 5, 1999 Toronto Star <i>City fights 'loophole' in tenant legislation</i> Bruce DeMara</p>	<p>Landlords claimed series of renovations was demolition in order to evict tenants and raise rents; seen as loophole in legislation. City intervenes for tenants; new report says Toronto facing affordable housing crisis.</p>

<p>February 24, 1999 Toronto Star <i>Wanted: Real solutions to blight of homelessness --- Thousands waiting for affordable housing across GTA</i> David Lewis Stein</p>	<p>Government says no significant increase in evictions under <i>Tenant Protection Act</i>, legal clinic says 23 per cent increase in 1998.</p>
<p>1995 Lampert Report Greg Lampert, <i>The Challenge of Encouraging Investment in New Rental Housing in Ontario</i>, Min of Mun Aff and H</p>	<p>Report commissioned by government asks why if <i>Tenant Protection Act</i> “very positive initiative from the perspective of new rental investment. . . .” then “why has no one built to date”? Concludes developers want government financial support.</p>
<p>June 2002 Ombudsman Clare Lewis begins Investigation into <i>TPA</i></p>	
<p>June 15, 2002 Hamilton Spectator <i>Tenant Protection Act needs revisiting</i></p>	<p>Reports “cleverly misnamed <i>Tenant Protection Act</i> has “hammered seniors” and “desperately needs revision.” Says legislation has many problems; cites substantive only. Note: accords with submissions in May 31, 2006 Committee Transcripts, Standing Committee on General Government hearings on Bill 109 - <i>Residential Tenancies Act</i></p>
<p>June 19, 2003 Ombudsman’s 2002-2003 annual report http://www.ombudsman.on.ca/Resources/Reports/2002-2003-Annual-Report.aspx</p>	<p>Expresses concern about substantive law issues.</p>
<p>June 19, 2003 Canada Newswire <i>Ombudsman concerned about services provided to vulnerable individuals.</i></p>	<p>Reports on substantive problems with <i>Tenant Protection Act</i>.</p>
<p>October 23, 2003</p>	<p>McGuinty Liberal government elected</p>
<p>Spring 2004 Ontario Government Consultation Paper, <i>Residential Tenancy Reform</i>, John Gerretson, Minister of Municipal Affairs and Housing http://www.mah.gov.on.ca/Asset1767.aspx (Robarts: CA2ONHO 2004 R27)</p>	<p>Govt goal is to repeal <i>Tenant Protection Act</i>; clear about balancing “real protection for tenants” and “ensuring an adequate stock of rental housing.” “Questions for consideration” format; sets out policy options and projected consequences;</p>

	<p>contains questionnaire asking for choices among options outlined; Appendix A is Lampert Report.</p> <p>Focus on “real” rent control ie. eliminating vacancy de-control. Re tribunal: restructure procedural rules to make them “more fair and equitable to tenants.”</p>
<p>September 26, 2005 The Canadian Press <i>Tenant act ruled discriminatory in case of working single mom forced out</i></p>	<p>Human Rights Commission set aside an Aug. 10 eviction order on basis that requirement for tenants to file a written dispute to the Rental Housing Tribunal within five days “results in constructive discrimination.”</p> <p>Five day period removed in amendments to legislation.</p>
<p>February 21, 2006 Toronto Star <i>Ontario pledges new tenant act; Number of evictions at record high Current law favours landlords: Critics</i> Richard Brennan and Christian Cotroneo</p>	<p>Reports that in 2005 in Ontario, landlords filed 64,864 eviction applications. Quotes adjudicator: “the quasi-judicial body is too focused on saving time and money to give tenants a fair hearing.”</p> <p>Note: Number reported consistent with Standing Committee Transcript of June 5, 2006.</p>
<p>March 1, 2006 Toronto Star <i>Tenant group alleges bias; Rental tribunal 'aligned inappropriately' with landlords Document in eviction ruling used to bolster argument</i> Naomi Carniol Toronto Star</p>	<p>Reports that tenant groups allege Ontario Rental Housing Tribunal has “aligned itself inappropriately” with landlords, “finding a shared financial benefit in reducing the number of eviction hearings,” said Reid's lawyer, Kathy Laird, legal director for the centre, which tries to improve housing conditions of Ontarians with low incomes.</p> <p>Note: Number of hearings increased under amendments to legislation.</p>
<p>Housing Minister John Gerretsen announced a new landlord and tenant act will be tabled during the spring session of the Legislature that begins March 21.</p>	<p>The current grievance process under the Ontario Rental Housing Tribunal has been criticized as an “eviction factory.” An adjudicator said the process discriminated against many tenants by requiring those facing eviction to file a written response within five days of getting a notice.</p>
<p>May 16, 2006</p>	<p><i>Residential Tenancies Act</i> introduced in House of Representatives</p>

<p>May 17, 2006</p>	<p><i>Residential Tenancies Act</i> passed second reading; sent to Standing Committee on General Government for public hearings.</p>
<p>May 26, 2006 Toronto Star <i>Why lack of full public hearings?</i></p>	<p>Reported “With less than 4 weeks since the surprise introduction of Bill 109, they are holding public hearings starting Monday May 29, to total only 8 hours and only in Toronto, which historically is quite unusual.” Note: Similar complaint re: tight timeframe made by opposition MPP in June 7, 2006 Committee Transcripts, Standing Committee on General Government hearings on Bill 109 - <i>Residential Tenancies Act</i></p>
<p>May 31, 2006 Committee Transcripts, Standing Committee on General Government hearings on Bill 109 - <i>Residential Tenancies Act</i> http://www.ontla.on.ca/web/committee-proceedings/committee_transcripts_details.do?locale=en&BillID=352&ParlCommID=7422&Date=2006-05-31&Business=Bill+109%2C+Residential+Tenancies+Act%2C+2006&DocumentID=20452</p>	<p>Toronto; heard submissions Submissions on hearing process on eviction for non-payment of rent. Some say the five days to give notice of request for hearing to prevent summary eviction should be 20 days; other that fair because if rent not paid tenant already aware there is a problem.</p>
<p>June 5, 2006 Committee Transcripts, Standing Committee on General Government hearings on Bill 109 - <i>Residential Tenancies Act</i> http://www.ontla.on.ca/web/committee-proceedings/committee_transcripts_details.do?locale=en&BillID=352&ParlCommID=7422&Date=2006-06-05&Business=Bill+109%2C+Residential+Tenancies+Act%2C+2006&DocumentID=20458</p>	<p>Toronto; heard submissions Dan McIntyre: “It's astonishing that 64,000 households faced evictions last year. We applaud the elimination of default evictions.”.</p>
<p>Exhibit List of written submissions to Standing Committee on General Government hearings on Bill 109 - <i>Residential Tenancies Act</i></p>	<p>91 sources of submissions listed</p>
<p>June 7, 2006</p>	<p>Clause by clause review</p>

<p>Committee Transcripts, Standing Committee on General Government hearings on Bill 109 - <i>Residential Tenancies Act</i> http://www.ontla.on.ca/web/committee-proceedings/committee_transcripts_details.do?locale=en&BillID=352&ParlCommID=7422&Date=2006-06-07&Business=Bill+109%2C+Residential+Tenancies+Act%2C+2006&DocumentID=20451</p>	
<p>Amendments proposed at Third Reading of <i>Residential Tenancies Act, 2006</i> http://www.acto.ca/~actoca/assets/files/docs/LR_RTA_Bill109_RTAmendments_CRO_June2006.pdf</p>	<p>All substantive, none relate to tribunal structure.</p>
<p>July 8, 2006 The Hamilton Spectator <i>Neither side thrilled with new rental law</i> Bill Dunphy</p>	<p>Tenants unhappy legislation does not end “vacancy de-control,” landlords unhappy at end of “default decisions,” the provision that gave tenants just five days to appeal an eviction notice before a default eviction order was issued, and that tenants given right to introduce evidence about other issues during eviction hearings.</p> <p>Note: Accords with submissions made by both landlord and tenant groups.</p>
<p>January 31, 2007</p>	<p><i>Residential Tenancies Act, 2006</i> proclaimed and came into effect. <i>Tenant Protection Act, 1996</i> Repealed</p>

APPENDIX B

Empirical Research Data

Colour Key:

Common Responses

Responses Consistent with Common Responses

Responses Inconsistent with Common Responses

Outlier Responses: Unrelated to Common Responses

No Common Response

CHILD AND FAMILY SERVICES BOARD

Self-Representation

	a) What is the approximate balance of SRLs as between applicants and respondents? b) Is there a typical SRL profile or experience?	a) Are adjudicators comfortable dealing with SRLs? b) What are main sources of frustration for applicants?	Are advice services available for tribunal clients and are they effective?	a) How does the tribunal prepare SRLs for hearings? b) How do SRLs prepare themselves; is this changing?
CFSRB	a) - applicants are overwhelmingly self-represented for children's aid society matters, most of which are under s. 68; if there is representation most commonly for school expulsion cases	a) - absolutely comfortable - adjudicators are very comfortable; there is no added sense of pressure with SRLs - "it's all we do"	- not a lot of lawyers do applicant work; "there should be legal aid funding" - there should be duty counsel for s. 68 proceedings; s. 144 cases are too complex for duty counsel to be of much assistance	a) - a lot effort is made to ensure that SRLs understand the process - intake case coordinators are "hand holders;" encourage applicants to fill out application, then Board

	<ul style="list-style-type: none"> - for s. 68 complaints low income; for s. 144 more of a range because includes foster parent community - for s. 68 vast majority of SRLs have low income and education; “victimized groups over-exposed to judicial system”; for s, 61 and 144 more diversity, more middle class SRLs - for s. 68 overwhelmingly self-represented, for s, 61 and 144 seeing more representation but still not common - the Board sees a whole range of human experience; many needy people in s.68 cases - SRLs in s. 68 cases are very often single mothers, poorly educated, “street smart and gutsy” (need to be to take on system); often end up admiring them - there are a range of characteristics of SRLs, but the reason for self-representation is still financial; “even people with 	<ul style="list-style-type: none"> - yes, “we know that’s our reality” - if an adjudicator is not comfortable with SRLs should not work at this Board; “it’s what we’re all about” - experienced adjudicators are quite comfortable dealing with SRLs - yes, not all adjudicators are lawyers, some are clinicians “used to helping people” - SRLs are not particularly challenging because of “institutional competence” in making process manageable - it’s a neutral event whether represented or not; job is just different because no lawyer to perform certain tasks, but not more difficult - for SRLs with mental health issues members are constantly accommodating; these cases can feel risky and are taxing b) - uncertainty about how to question witnesses, what to say and when, trying to speak 	<ul style="list-style-type: none"> - legal assistance would not be very helpful in s. 68 matters because the Board has little remedial authority - legal advice would not improve outcomes in s. 68 cases; case coordinators are very good at answering questions - in theory prefer applicants to be represented, but lawyers can unnecessarily complicate proceedings; the board can deal with power imbalances - some lawyers need to show they are “tough” and can impede settlement; prefer CAS to appear appears without lawyer (they occasionally do) - would not say advice isn’t helpful, but maybe not central s. 68 applications, which is most of what the Board does 	<ul style="list-style-type: none"> can figure out whether within Board mandate; do not leave it to SRLs to define their problem in legal terms - clients are “in crisis” when they approach Board; case co-ordinators can make them aware of options - through pre-hearings; the Board has developed a document that explains the purpose of pre-hearings; parties now better prepared; often make disclosure orders at pre-hearings and can become an informal settlement conference - applicants often arrive at tribunal with no understanding of process, claims or remedies; this develops through interaction with the tribunal - some SRLs rely too heavily upon case coordinators and expect them to give legal advice and prepare case - intake process includes mediation option; if no settlement reached a “mediator report” is
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	<p>good salaries don't want to pay \$400 an hour"</p> <ul style="list-style-type: none"> - majority of Applicants have emotional problems or "thinking disturbances" - some have mental health issues - some are reasonably sophisticated, others not at all, must adjust process and approach depending upon characteristics/needs <p>- there is no common SRL profile; impossible to generalize</p> <p>b)</p> <ul style="list-style-type: none"> - SRLs are very often emotionally stressed for all applications - SRLs are frequently overwhelmed by emotion during hearings because there is a child involved <p>- SRLs seem isolated; there is "a wall" between CAS professionals (representatives and CAS counsel) and self-represented applicants; other side is very formalized</p>	<p>and being stopped or interrupted</p> <ul style="list-style-type: none"> - "acting like a lawyer stuff" ie. conducting examination and cross-examination of witnesses and dealing with opposing counsel's interruptions and objections - feeling that they have been misunderstood by children's aid society, and are unable to fix this - feeling that claims are not believed; cannot convince CAS of competence - the Board's limited remedial powers re s. 68 applications 		<p>generated; serves as a hearing agenda but not carved in stone; new issues can be added</p> <ul style="list-style-type: none"> - pre-hearings are by telephone if they follow unsuccessful mediation; figure out what's needed for hearing - pre-hearing member can preside at hearing with parties' consent - in pre-hearings adjudicators can "put remedies on the table" and inform SRLs of claims of which they appear unaware - there is a tendency to assume that SRLs understand more than they do about the case and the evidence needed; they have their story and translating it into evidence does not come naturally, so tribunal helps with that - a lot of "heavy lifting" done by adjudicators in pre-hearings; have to think about what self-represented litigant could say but is "at sea about"; must explain disclosure, filing and set
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				<p>parties up so that the hearing can proceed more fluidly</p> <ul style="list-style-type: none"> - pre-hearings would be more effective if more focus on the evidence needed, how and when to obtain (and have case coordinators go over pre-hearing report in advance of hearing to check whether evidence obtained - prehearing adjudicator will always preside at hearing; a one-judge approach - settlement facilitation efforts at pre-hearing stage help SRLs understand and prepare for hearings; tell them: you need to respond to X, what do you have? <p>b)</p> <ul style="list-style-type: none"> - SRLs are generally better informed than in past; now not unusual to come to hearings with case law - CanLII has contributed to Board accessibility; sometimes SRLs get it “wildly wrong” but sometimes do a good job of self- informing
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				<p>- have had people show up with material printed from websites such as “Court Watch” and fathers’ rights groups, or SJTO website</p> <p>- there has not been much change in the level of SRL preparedness; occasionally, but rarely, receive intelligent and well thought-out SRL materials</p>
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CFSRB - Self-Representation (...continued)

	Has goal of accessibility without representation been met?	Are tribunal proceedings approached by SRLs with fear and dread?
CFSRB	<p>- to varying degrees, yes, but power imbalances remain a problem</p> <p>- for s. 68 applications yes, because they are not legally complex; for s. 61 and 144 cases power imbalances are a problem; but in terms of process the Board is much simpler to navigate than a court process and the Board</p>	<p>- not approached with dread in same way a court process might be, but certainly approached with some fear</p>

	<p>compensates better than courts for power imbalances</p> <ul style="list-style-type: none">- yes, in the sense that the Board does a good job of assisting SRLs to feel comfortable and to manage the process, but no, in the sense that Applicants are “a vulnerable population” and “hugely disadvantaged,” facts are complex and decisions have important consequences-yes, in terms of the ease with which the process can be invoked; compared to tribunal processes a court process is “hugely sophisticated and complex”- more manageable for s. 68 applications; for s. 144 representation would be preferable because so much is at stake- for s. 61 and 144 sometimes better to have applicant represented- SRLs have said “I didn’t know I had to have a lawyer” when they see that CAS has counsel; the Board builds up comfort level from there	
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	<p>- SRLs may initially believe the board is accessible without a lawyer, “but once they see that CAS has a lawyer (or more) they are often disconcerted”</p> <p>- the Board has gotten better at explaining processes to SRLs at intake stage and throughout; pre-hearings allow Board to fully explain options and prepare SRLs for hearings; web-based information is not enough</p>	
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CFSRB - Active Adjudication (AA)

	<p>a) What does AA mean? b) Do adjudicators have more latitude than judges to engage in AA?</p>	<p>What are common AA strategies? [<i>Lawyer responses</i>]</p>	<p>What are common AA strategies? [<i>Clinician responses</i>]</p>	<p>If evidence is missing could or would you suggest it be obtained?</p>
CFSRB	<p>a) - recognizing the vulnerability of some applicants and making appropriate adjustments to the hearing process - efficiently obtaining information needed to make a decision</p>	<p>- the approach is to efficiently obtain information needed to make a decision; the reality is that you find yourself asking the questions - tell parties at the outset “what I need to hear about” - more concerned about use of active adjudication since <i>S.V.D.</i> decision</p>	<p>- being aware of applicant’s disadvantage and conduct hearings with that in mind; ie. simple language, look for body language that suggests lack of understanding - recognizing and pointing out to other panel members the vulnerability of some Applicants; being patient and</p>	<p>- the Board has the authority to order independent assessments; have talked about it but haven’t seen it happen [clinician] - sometimes evidence is outdated (eg. doctor’s report) and Board will ask for update</p>

	<p>b)</p> <ul style="list-style-type: none"> - yes, but not sure on what basis - tribunals definitely have more authority than courts; this is the focus of active adjudication training, at SOAR and elsewhere - yes, but must be cautious because no specific mandate in legislation; this is “ironic because CFSRB has more subject-matter experts” that could engage deeply - yes, there is specialized training at SJTO - yes, had thought so, but judges in some courts, eg. youth courts are also increasingly active - yes, Board adjudicators are trained in active adjudication so must have authority, but it would help parties to understand if the Board had mandate in <i>Rules</i> - yes, but the “entering the fray” line is in the same place for courts and tribunals, so it’s hard to say - yes, it is confusing that investigative authority had 	<ul style="list-style-type: none"> - taking more control over the evidence than would occur in court - Board has developed a culture of respect, support for and patience with SRLs; they are not “brushed off”; these people often don’t feel heard in society, we make sure they are heard at Board - telling SRLs that the Board is used to dealing with SRLs - insisting on written statements from all witnesses in advance of hearing to reduce hearing time - the opening of hearing is critical; must explain active adjudication and get all parties to “buy-in” - engaging in active adjudication makes you vulnerable, requires confidence especially where respondent’s counsel is aggressive or belligerent - need to think defensively to do active adjudication; can't conduct inquiry, must tread softly and slowly; respondents’ counsel are conservative 	<p>making allowances for learning difficulties/extreme stress/ depression which may make it difficult to process questions and formulate answers</p> <ul style="list-style-type: none"> - not to do “clinical assessment” but to have “clinical perspective” and ask questions relevant to that perspective - if there is an area that SRL has failed to explore, cover it by asking questions after case presented by SRL - it is not a problem to delve into new areas if they have been missed - questioning a witness’ background or qualifications (because SRLs never do this) - very different than the legal member; <i>engages</i> with the parties, “stretches out” the story, asks more personal questions, different tone, less legalistic - a lot of people with learning difficulties and depression; frequently overwhelmed; we slow things down and give them time 	<ul style="list-style-type: none"> - yes, have requested drug test and have required a parent to see a neurologist [clinician] - generally ask CAS to bring more information to the table; have also asked applicants for more information and given them time to get it on consent of CAS - cannot order a psych assessment of a child or ask for other evidence not in existence but can summon witnesses
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	<p>been given to the Office of the Provincial Advocate for Children and Youth as more authority is needed by Board to effectively deal with s. 68 complaints</p>	<ul style="list-style-type: none"> - active adjudication is like a client interview: ask questions in a casual manner to elicit salient facts; judges in family law matters are “not even close” to using similar approach and not sure they should because in court process, notwithstanding questioning and disclosure, there is a sense of manipulating evidence - to question and instruct, not to cross-examine - being aware that the applicant’s understanding of the case that has to be met evolves in the course of a hearing, and being flexible about evidence; eg. asking if there is an email or any other document and if so, allowing time to get it, rather than insisting on adherence to filing timelines - requiring parties at pre-hearings to agree to timelines for disclosure and filing - conducting single session med/adj where it feels appropriate and parties agree, notwithstanding no express mandate 	<ul style="list-style-type: none"> - being aware of wandering thinking and trying to assist with focus; clarifying for SRL panel understanding of testimony - tell SRLs at outset: I won’t tell you what to say or not say, but I will make sure you get heard” - in s. 68 applications probe the applicant’s understanding of CAS expectations; look for practical ways to help applicant to meet them and deeper implications for managing relationship - asking questions in hearings and accepting guidance from lawyer member about what is appropriate - a question of personal style; do not like frequent interruptions from other panel members; will throw off SRLs; let each side make case, note any clarifications needed and ask later if still unclear and important - once cross-examination has run its course ask “fill in the blanks” questions; seek elaboration but hesitant to challenge testimony; would 	
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		<ul style="list-style-type: none"> - extending timelines for the compilation of evidence, which is challenging for SRLs - have “pretty much abandoned” active adjudication since <i>S.V.D.</i> decision - adjournment requests are not frequently granted; little flexibility on part of CAS counsel 	<ul style="list-style-type: none"> not say “you said X, now Y”; would not ask leading questions - to ensure witnesses give the Board the information it needs, must ask questions, otherwise “failing to do your job” - always explain at outset the active approach and rationale for it - adjourning to allow applicant to obtain needed evidence - interviewing older children, when appropriate - med/adj has been informally adopted on consent, ie. modifying process to suit the parties/circumstances - allowing SRL to set up printer in hearing room to make copies of documents on the spot after it becomes clear there are many missing copies 	
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CFSRB - Active Adjudication (...continued)

	How important is AA to the work of the tribunal?	Is it difficult to draw the line on appropriate AA; are there often complaints?	Is it the role of an adjudicator to level the playing field for SRLs?	Would AA guidelines be helpful? OR a) Can you comment on AA training? b) Would AA guidelines be helpful?
CFSRB	<ul style="list-style-type: none"> - it is very important - it is usually necessary to be very active; to guide and direct a lot in hearings because one side knows it all and the other is “totally disadvantaged” - active adjudication is essential from a clinician’s perspective; “entering the fray” is a legal concept so guided by the lawyer on panel - part of less formal process and getting to the point in an expeditious manner - the point of active adjudication is to achieve clarity; it is not for efficiency, which is addressed through pre-hearing processes 	<ul style="list-style-type: none"> - complaints from CAS counsel are uncommon - there is currently anxiety and confusion about active adjudication - have had CAS counsel attempt to undermine tribunal; “if this was a court no judge would allow this” - have had one lawyer storm out because of the hearing process, but this is not at all typical - complaints are uncommon, and are usually resolved by discussion and adjustments to mutual satisfaction, not by formal complaint - the Board consults with stakeholders; this helps to overcome resistance to process changes 	<ul style="list-style-type: none"> - yes; children’s aid societies have in-house counsel, almost always have a lawyer attend (sometimes more than one) and applicants are almost always self-represented in children’s aid society cases - yes, power imbalances are extreme; SRLs are often “outmaneuvered” by CAS counsel - yes, an important difference between courts and tribunals is that the Board is less formal and can address power imbalances by assisting SRLs - Board proceedings are very slanted; and isn’t there a “conflict of interest” for the CAS lawyer to represent both CAS and party opposite SRL? [clinician] 	<ul style="list-style-type: none"> - guidelines would be useful for clarity and would enhance legitimacy - published guidelines would make the Board process clearer to the public and children’s aid societies - guidelines would “of course” be helpful, as would authority in the <i>Rules</i> that would shelter members from judicial review - guidelines as to when it is acceptable to request additional evidence would be useful - the cluster trains in active adjudication; the focus is on controlling the hearing process, dealing with issues in an orderly way, but overarching goal is fairness,

	<p>- active adjudication is essential because of the extreme power imbalances in Board proceedings and the “extreme vulnerability” of Board clientele</p>	<p>- the Board is very conscious of the line between assistance and advocacy, but adjudicators should not be afraid to do their jobs</p> <p>- we know we can't be advocates, but it is not always easy to strike an ideal balance</p> <p>- it is <i>very</i> tempting to become an advocate for the Applicant, who sometimes is not even sure what the process is or why they are involved; when Respondent CAS is asked to explain have heard it reply to SRL that it is the role of Applicant’s lawyer to explain; since there isn’t one the adjudicator must explain the CAS position in addition to process [clinician]</p> <p>- it is difficult to restrain involvement; look to lawyer on panel for guidance on limits of questioning; have been cautioned by other panel members not to ask leading questions or summarize evidence; we comment on other panel members’ conduct, a lot of trust</p>	<p>- applicants would prefer to have lawyers, of course; the Board tries to compensate for this; “we overcompensate, if anything”; would give SRLs more help if it were possible</p> <p>- CAS has significant resources and CAS counsel does a lot of court work; they have an adversarial orientation, but the simplicity of Board processes somewhat levels the playing field</p>	<p>must be more active for benefit of SRLs</p> <p>- training would be more effective if the Board had a specific mandate in its <i>Rules</i> to conduct active adjudication; an express mandate would also help the public understand Board processes</p>
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		<p>between panel members [clinician]</p> <ul style="list-style-type: none"> - not difficult to draw the line, have never had a complaint from CAS counsel; just clarify the evidence; act as if I missed the point, not as if the witness was lying - the adjudicator's conduct in <i>S.V.D.</i> crossed the line; cannot ask questions that take up 44 pages of transcript - the adjudicator's conduct in <i>S.V.D.</i> was not extreme and was justified - do not agree with the scope of active adjudication articulated by the Board post-<i>S.V.D.</i> - the Board will have to re-group after <i>S.V.D.</i> in order to not feel too restrained - since <i>S.V.D.</i> decision active adjudication is very restrained; there is a philosophical rift between adjudicators and the Board's legal department; review goes beyond whether test set out and extends to re-writing - the effect of <i>S.V.D.</i> has been to "muzzle" adjudicators 		
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CFSRB - Mediation

	How does mediation work at the tribunal?	a) Is there an institutional style of mediation? b) Are mediated outcomes superior?	Are there time limits; can they be exceeded?	Are you concerned about settlement pressure?
CFSRB	<ul style="list-style-type: none"> - mediation tends to be highly evaluative, and is effective and strongly encouraged for section 68 claims - most members are both adjudicators and mediators - there is no formal mediation training; learn by observing others - mediation (“settlement facilitation”) is built into the process for s. 68 applications in the sense that a pre-hearing may be converted into a mediation session if parties agree; for s. 61 and s. 144 applications the board only encourages mediation when telephone 	<ul style="list-style-type: none"> a) <ul style="list-style-type: none"> - mediators inform applicants of options even though CAS lawyers may see this as giving advice - mediators do not hesitate to discuss options, remedies, things parties haven’t thought of - a lot of work is done in mediation to get to the centre of the dispute; don’t suggest arguments to SRLs, but tell them what CAS needs to prove and what Board will need to hear from them - the Board looks at the real underlying issues in the dispute and tries to come up with a plan for re-organizing the relationship 	<ul style="list-style-type: none"> - there are no formal time limits; generally scheduled for a day; can be extended - mediation is part of pre-hearing process; more than one pre-hearing can be scheduled for continuation of mediation - one session is usually enough - at least a day is needed and always give extra time if needed - it is no problem extend; it takes half a day just to get parties settled, issues out and productive discussions underway - yes, mediation is generally booked for a whole day, would not like to see that 	<ul style="list-style-type: none"> - the Board is not under pressure to avoid conducting hearings, encourages mediation for section 68 claims but sensitive to the problem of settlement pressure - yes, important to stress that it is voluntary; if sense discomfort during mediation then caucus with parties and ensure that Applicant feels heard and not pressured to settle - yes, use caucus to speak to SRLs privately to make sure that what is being said and done accurately reflects where they are at - there is pressure to mediate in s. 68 cases,

	<p>pre-hearing suggests potential for settlement</p> <ul style="list-style-type: none"> - mediation is strongly encouraged for s. 68 complaints; relatively new for s. 61 and 144 matters; it has enormous value for everyone concerned in both instances - mediation is strongly encouraged, but there is a very clear message that it is voluntary <p>- some CAS counsel are very collaborative and it works well in First Nations files through use of talking circles</p> <p>- sometimes applicants want to settle (or withdraw application) once the hearing process is explained</p>	<ul style="list-style-type: none"> - very evaluative, tell parties what result would be in adjudication - highly evaluative; explain likely outcome and options - do a lot of shuffle mediation; try to get applicants to understand CAS perspective; to bring civility to relationship; “trust-building” is important; try to get to agreements that will benefit long-term relationship with CAS - mediation is highly evaluative; delve into claim and remedies; parties expose vulnerabilities they would not reveal in hearing, this style of mediation would not be appropriate for med/adj - mediation is ineffective in s.68 matters because children’s aid societies know that the Board cannot impose significant remedies in adjudication so no incentive to avoid adjudication - there is no uniform approach, probable that clinicians do it very differently than lawyers 	<p>reduced to half-day as in other tribunals; the issues are too sensitive and complex; time is needed to build trust</p>	<p>because there is an ongoing relationship to preserve and because Board has limited remedies</p> <ul style="list-style-type: none"> - yes, there is pressure to settle, but some people need an outcome that feels authoritative and they are not necessarily more invested in (and more likely to comply with) a settlement - yes, applicants may settle out of fear of hearing, especially if the CAS indicates that hearing will be complex and involve many witnesses - no, even if parties appear to have been pressured into mediation they are often really pleased once they are in the process, and mediated outcomes are superior because of satisfaction of having resolved by agreement
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		<p>- a matter of personal style</p> <p>b)</p> <p>- mediation achieves much better outcomes; more depth and range of issues dealt with; family feels heard and can be win-win; especially true for those with mental health issues who cannot tolerate hearings</p> <p>- mediated outcomes are generally better; more of a buy-in and more likely to be a win-win</p> <p>- never satisfied with mediation; often concerned that applicants concede too much and feel complicit in this; that they will later have regrets</p>		
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CFSRB - Multi-Disciplinary Panel Decision-Making

	For what cases is panel decision-making important?	What are the dynamics of panel decision-making?
CFSRB	- panels are always important for best-interests-of-the-child determinations	- deliberations are respectful and collaborative; members given equal voices

	<ul style="list-style-type: none"> - a great deal of reliance upon, and comfort in expertise of other panel members - should always have 3-member panel to decide best-interests-of-the-child cases; never needed for s. 68 cases - grateful for panels in best-interests-of-the-child cases, recognize the strength of clinicians and welcome their knowledge - in best-interests-of-the-child cases panels “feels better” - panels make it easier to avoid pitfalls like reacting to personalities; a good reality check - panel members complement and balance one another, especially in emotionally charged matters - panel members allow Board to have much more specialized support than is available to courts; have had a judge remark that Board is “lucky” to have clinician 	<ul style="list-style-type: none"> - members “constructively challenge” one another; cultivate an atmosphere of “respectful trusting” to maximize benefits of expertise - panels do not work based upon a simple “majority rule” approach; dissenting views are never disregarded; there is always a strenuous effort to reach common ground; there have been dissenting opinions written, but this is rare - have only had one experience in which deliberations were conflictual - mental health experts share informed perspective on behaviour issues - there is a temptation to share opinions early on to influence others, but its best to wait until the end of proceedings - deliberations are often very active; extensive discussion to reach consensus - some deference to clinicians in best-interests-of-the-child cases, but not absolute, still
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	<p>involvement in best-interests-of-the-child cases</p> <ul style="list-style-type: none"> - in cases where there are mental health problems very grateful for clinicians on panel - panel members may weigh factors differently; different perspectives on best-interests-of-the-child are very valuable and enrich decision-making <p>- no absolute preference for panels, but there is comfort in panels [clinician]</p>	<p>need to convince other panel members</p> <ul style="list-style-type: none"> - absolutely defer to clinicians re: child centred issues and lawyers are deferred to on legal and process issues - ultimately majority rules, but always with a firm understanding of points of view and attempts to persuade others
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CFSRB - Expertise, Consultation, Informality and Guidelines

	<p>What is the nature of institutional expertise?</p>	<p>a) How is expertise formally built and shared? b) How is it shared informally?</p>	<p>Would a digest-style record of Board decisions and perspectives be helpful?</p>	<p>How informal are tribunal proceedings? How does informality work?</p>
<p>CFSRB</p>	<p>- the Board has subject-matter expertise; members have high regard for the varied knowledge and experience of other members</p>	<p>a) - expertise is built through Institutes, although this approach is not ideal; it is less effective than Board-level meetings because Institutes</p>	<p>- there is not enough “downloading of experience, expertise and perspective” to allow expertise to become institutionalized; there is not enough facilitation of the interchange of knowledge and</p>	<p>- it is absolutely the goal of the Board to be a “comfortable place” - the level of formality depends on the adjudicator or panel members, but the institutional ethic is that</p>

<ul style="list-style-type: none"> - term limits are a problem because of loss of expertise - members include or have included psychiatrists, psychologists, social workers, teachers, lawyers who are familiar with court system and/or child welfare system, children’s aid societies, and their clientele, with insights into mental health issues and institutional dynamics - the tribunal is more expert than courts in its subject-matter - term limits are fine because they allow membership to be “refreshed”; it is good to have up-to-date perspectives - some children’s aid societies are resentful of the Board’s authority and do not respect Board competence - the Board has earned the respect of children’s aid societies - children’s aid societies 	<p>are not sufficiently targeted to Board issues</p> <ul style="list-style-type: none"> - expertise is shared informally by panels working together over a period of years - members educate one another in training sessions, eg. presentations by clinicians at Institutes - professional development is difficult within the cluster format - Board expertise is wasted because the Board is not in control of its own training and ongoing learning needs - Institutes do not build expertise; they are focussed on larger volume tribunals; only the occasional issue crosses over to Board - there is not enough communication and assertion of Board expertise to the client community, especially children’s aid societies, and to courts - monthly Board teleconferences are “better than nothing” but not as 	<p>not enough preservation of Board knowledge for training and future use</p> <ul style="list-style-type: none"> - Divisional Court decisions and some Board decisions are summarized and distributed; this could be expanded and deliberately refined to create body of knowledge specific to board - a digest approach to recording and preserving Board practices and approaches could be passed on and re-interpreted by new waves of members - it would be helpful to build a public profile of Board expertise 	<p>panel members should be approachable</p> <ul style="list-style-type: none"> - informality is a positive value; it helps self-represented applicants to function - board adjudication is much more open and friendly than court; in court we still bow to judges, in tribunal proceedings the question is should we allow parties to drink coffee through proceedings; some (but not all) adjudicators draw the line at eating during a hearing [lawyer] - informality is a positive value; allows panel members to call for a break when parties exhibit mental health/emotional issues have been triggered [clinician] - Applicants tend to be people who lack financial and social power; informality is critical to making them comfortable and able to communicate effectively
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	<p>appreciate the Board's assistance in section 68 applications</p>	<p>helpful as face-to-face meetings</p> <ul style="list-style-type: none"> - more regular contact among Board members would allow for better sharing and reinforcing of expertise - the lesson from review cases often relates to how evidence should be presented in decisions, not substantive issues - conference calls do not encourage the kind of dialogue that allows expertise to be shared and broadened; "this is a really important piece" <p>b)</p> <ul style="list-style-type: none"> - very frequent informal communication about problems and perspectives - regularly reach out to others with different strengths in course of deliberations (even if not in empanelled) to seek different perspectives - "constant discussions" as to how Board jurisprudence is developing, through monthly conference calls and through informal discussion and 		<ul style="list-style-type: none"> - informality and relatively simple processes enhance accessibility - informality is very important; "it allows Applicants to see adjudicators as human beings they can communicate with, especially disadvantaged people - people with mental health issues cannot live by rigid rules and processes; need flexibility within boundaries; there should be more informality in Board processes - the decision-maker should be on same level (physically) as the parties to facilitate eye contact and interaction - it's good to have everyone at eye level; feels like a meeting, relatively casual dress helps SRLs feel more comfortable - informality is important and conveyed deliberately through relatively casual dress and manner
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		<p>sharing expertise as panel members</p> <ul style="list-style-type: none"> - very little consultation outside of panel context; don't want to appear to be poking into other member's files - the level of communication is "miserably poor"; teleconference calls are not a learning experience and Institutes are not that helpful, too generic - don't want to "make decision for someone else," but will discuss in general terms "situations and experiences" without details of the case - conference calls and cluster "institutes" have replaced face-to-face Board meetings; with new approach there is less familiarity, collegiality, Board identity and trust have been eroded - legal issues may be discussed with non-panel members, and if a panel is lost on a medical or mental health issue may reach out, but rarely happens because cannot fetter discretion 		<ul style="list-style-type: none"> - informality is essential for dealing effectively with self-represented parties; anxiety negatively affects thinking; impairs ability to relate to questions and formulate answers - CFSRB hearings are relatively formal; this is a way of showing authority - accessibility is impaired by CASs that do not inform people of their right to Board review - the Board would be more accessible if children's aid societies would consistently inform clients of right to Board review
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CFSRB - Best Interests of the Child

	Are adjudicators comfortable applying the BIC test?	Do informal institutional understandings exist about how to apply the BIC test?	<i>Lawyer responses:</i> Would “best-interests-of the child” guidelines be helpful and feasible?	<i>Clinician responses:</i> Would “best-interests-of the child” guidelines be helpful and feasible?
CFSRB	<ul style="list-style-type: none"> - the Board is very comfortable applying the best-interests-of –the-child test - a very high degree of comfort and have never sensed any discomfort from other panel members - the field is well understood; some members have deep experience in child and youth work; some have taught these concepts - the Board is comfortable with the test and it’s role is important; children’s aid society case workers are often inexperienced “team players”; Board can take an independent view 	<ul style="list-style-type: none"> - there are shared understandings among some adjudicators, but not on a Board-wide level - there are institutional understandings, for example, emotional bonds and status quo are always front and centre and at some point overwhelm other parts of the test - shared understandings are developed through years of working together on panels; some combinations of members know one another very well and have common approaches - there is internal discussion about the elements of the BIC test, but not about how it should be applied in specific cases; not appropriate to seek 	<ul style="list-style-type: none"> - best-interests-of-the-child test guidelines or best practices would be problematic because of fettering discretion - could not be done in a rigid, formal way; consistency is good but there is always a concern about fettering - conscious internal development of best-interests-of-the-child understanding and practices would enhance Board credibility - the Board should build and refine institutional expertise on best-interests-of-the-child test; “one thing Board doesn’t do is assert its expertise enough” - consolidating and emphasizing tribunal expertise would enhance 	<ul style="list-style-type: none"> - best-interests-of-the-child test guidelines would be helpful, but could not be binding - low-key guidance would be good; never a “ticks –in-boxes” approach - expertise could absolutely be refined and strengthened through more discussion and training around BIC test - it would be great to consolidate Board expertise, not in a way that is restrictive, just informative; would help to even out panels because some more knowledgeable than others - the BIC test could become a conscious focus of expertise; more thoroughly understood and consistently applied

		<p>input on weight of different factors</p>	<p>tribunal functioning and credibility</p> <ul style="list-style-type: none"> - a case could be made for guidelines; other tribunals have them (eg. IRB); as long as not binding; would be helpful in training new members - any development of Board expertise re best-interests-of-the-child has to be done through Board jurisprudence or courts, because otherwise the Board becomes a policy-maker - very wary of presumptions about weight of factors because every case is different and “best practices” are not always best in every situation; may be used to override cultural issues - if a best-interests-of-the-child digest could be articulated in some way would be happy to see it; possibly to the point of non-binding presumptions 	<ul style="list-style-type: none"> - it would be useful to make tangible the collective experience of board members and to further develop institutional expertise; criteria in the <i>CFSA</i> are a “good list” but guidelines “could flesh them out from a conceptual and practical perspective” - guidance on the weight to be given to race and cultural factors, or surface conditions such as cleanliness of home vs. mild abuse at home would be useful; - Board should consciously develop and record Board expertise and share it with client community and especially with children’s aid societies - excellent members come and go; there is no mechanism for preserving and passing on their knowledge and experience and guidelines could do that - there should not be too much intervention with discretion; but would
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				<p>support attachment as the default primary factor, even to point of presumption, absent risk of harm</p> <p>- conscious development of depth of understanding of each criterion and how to apply would be helpful, not to the level of presumptions, it is very context-specific work, but guidance on weight would be helpful</p>
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CFSRB - Best Interests of the Child Continued

	What would an ideally constituted panel for BIC determinations look like?
CFSRB	- it depends on the case; lawyer on panel gives the process legal credibility; in some cases someone who understands child welfare system can identify problems in children's aid society processes; obviously mental health professionals where there are these issues

<ul style="list-style-type: none">- an ideal panel would possess experience with social services, children's mental health, the law with respect to children and families, making decisions with respect to the lives of children; could include family lawyers, social workers, psychologists- a panel should be able to see problems in the context of the "big picture" and understand systemic issues- social workers may have the best qualifications and are often under-rated- there would be one lawyer, one clinical social worker and one expert in the area of concern eg. special needs, mental health etc.
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HUMAN RIGHTS TRIBUNAL

Self-Represented Parties

	<p>a) What is the approximate balance of SRLs as between applicants and respondents? b) Is there a typical SRL profile or experience?</p>	<p>Are adjudicators comfortable dealing with SRLs?</p>	<p>What legal advice services are available for tribunal clients and how effective are they?</p>	<p>a) How does the tribunal prepare SRLs for hearings? b) How do SRLs prepare themselves; is this changing?</p>
HRTO	<p>a) - the percentage of SRLs is higher for applicants (75-85% was the most common response; one adjudicator estimated it at 60%; the percentage of <i>respondents</i> that are <i>represented</i> was pegged at 85-90%) - respondents' counsel tends to be specialized and highly competent - surprisingly high SRL rate given the complexity of law and formality of proceedings b) - the self-represented population includes a <u>significant [check] number</u></p>	<p>- adjudicators are certainly comfortable dealing with SRLs, but it is a relief when both parties are represented - it's a relief when both sides are represented, but some lawyers are not helpful - don't bother to learn about tribunal process and substantive law because they think it will be easy - there is a sense of relief when both sides are represented because self-represented litigants are more work; it is essential to read the entire file in advance identify issues, evidence needed (no lawyer to do that for you) and up to adjudicator to probe pleadings to ensure</p>	<p>- HRLSC is a specialized legal aid clinic, but it is "hugely oversubscribed" so full representation is uncommon - the HRLSC uses a triage/coaching approach whereby full representation depends upon the nature of the claim and the ability to self-represent - a triage system, there is no income test for HRLSC support, rather an "ability to self-represent" test - when applicants are represented through HRLSC it obviously makes a big difference, but not a large percentage obtain representation so it's "better than nothing"</p>	<p>a) - feels like a system very much geared to SRLs - the flexibility and relationship-building skills of case processing officers helps the tribunal deal effectively with vulnerable populations - case management used extensively by some adjudicators, others not at all; up to adjudicators whether to hold pre-hearing case conferences, issue case management directives - summary hearings may inadvertently assist SRLs, but only occur where little chance of success</p>

	<p>of people who exhibit emotional problems, obvious stress and mental health issues “such as one would expect to see in a vulnerable population”</p> <ul style="list-style-type: none"> - has had SRLs that did an “amazing job”, as well or better than a lawyer would; and lots of people are just fine - it depends on the complexity and level of analysis required - not everyone gets the basic ideas that there are legal tests and evidence is needed 	<p>everything is considered or the ultimate decision will be open to review</p> <ul style="list-style-type: none"> - some SRLs need a lot more help than others - SRLs are expected, but are still difficult to deal with when they are not “high functioning” - most adjudicators can handle SRLs because they are savvy enough to get the information needed - the tribunal can deal with self-represented parties because administrative law principles are relatively flexible 	<ul style="list-style-type: none"> - can often tell from quality of materials that HRLSC has helped - not sure what they do for people they don’t appear for, it is not obvious from materials filed or ability of self-represent whether the centre has given some assistance - it's rare, but some self-represented litigants do a better job than lawyers (although perhaps because of coaching by HRLSC) - at HRLSC intake stage frontline non-legal staff give information and help which can be “empowering”, but a “reality check” can occur at case conference or med/adj stage - some paralegals have a broad range of skills and are “very, very good”; generally getting better over time, but some applicants are underrepresented by paralegals - about 15% of applicants are represented by paralegals, at least half of these people are “under-represented” ie. low quality evidence and shallow 	<ul style="list-style-type: none"> - the public perception that the tribunal is applicant-friendly is false; very much a traditional litigation model b) <ul style="list-style-type: none"> - have not seen a big change in the sophistication of SRLs or in self-informing through CanLII - there has been a big change in self-informing; lots of self-represented litigants bring in case law from CanLII, but they often don't understand that one case is not enough; to some extent this further marginalizes those who do not have the ability or the tools to access this information
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			<p>understanding of the legal framework</p> <ul style="list-style-type: none">- some paralegals, lawyers are SRLs are unaware of sections of the legislation that may assist them- broad range of ability among paralegals; some are excellent but small minority - the vast majority of paralegals are a hindrance- lawyers can be very helpful if they are experienced in employment and labour law and have some familiarity with the tribunal, but some lawyers who appear at the tribunal have unrelated skills and background and can be a “net negative”- general practice litigators are often effective; criminal lawyers generally not- a bad lawyer is worse than no lawyer	
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HRTO - Self-Represented Parties (...continued)

	Has goal of accessibility without representation been met?	Are tribunal proceedings approached by SRLs with fear and dread?
HRTO	<p>- the job of adjudicators is to make it possible to appear without counsel</p> <p>- the tribunal is manageable at the mediation and hearing stage; the problem is getting there; the preparation stage (drafting and filing material, eg. witness statements and asking for appropriate remedies) is most challenging for SRLs</p> <p>- people rarely arrive at hearings without knowing the case they have to make and the proof needed</p> <p>- tribunal culture rewards “toughness” (ie. no adjournment) when SRLs are unprepared</p> <p>- it depends on the subject-matter; anyone can argue sexual harassment but something like duty to accommodate is much more</p>	<p>- not something to be avoided at all costs but still fear-inducing</p> <p>- SRLs are fearful because they are subject to system in which others seem to be speaking a different language</p> <p>- we try to coax parties into mediation, but not because of emotional, financial or relationship consequences of adjudication</p> <p>- depends on parties and subject-matter; some hearings can be “unpleasant, grueling, charged, draining”; stressful because applicants have to re-tell their story and listen to the other side, often in the context of an ongoing relationship such as employment, but unlikely that hearings are seen as potentially financially or emotionally ruinous</p>

	nuanced, harder to understand	
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HRTO - Active Adjudication (AA)

	a) What does AA mean? b) Do adjudicators have more latitude than judges to engage in AA?	What are common AA strategies?	If evidence is missing could or would you suggest it be obtained?	How important is AA to the work of the tribunal?
HRTO	<p>a)</p> <ul style="list-style-type: none"> - active adjudication is about access to justice for SRLs and streamlining processes - case management techniques used in med/adj and hearings are a form of active adjudication and access to justice enhancement; can identify gaps in evidence that can be filled - the point of active adjudication is to assist self-represented parties, not just efficiency (as in other tribunals) - the tribunal is unlike the court system where “lawyers put on plays”; here the job is to get the facts needed to make a decision 	<p>Pre-hearing:</p> <ul style="list-style-type: none"> - issuing case assessment directives in advance of the hearing to provide direction to parties - sending out reminders to file documents - to effectively practice active adjudication the adjudicator needs to have a firm and complete understanding of all available information about the case, before the hearing starts; all documents must have been filed and witness statements provided, and the adjudicator must have read all prehearing and case direction notes - some adjudicators use case management directives to inform parties in advance of hearing of “things they need 	<ul style="list-style-type: none"> - do not request new evidence or suggest that something be obtained if it is missing - requesting evidence is not the role of an adjudicator - if applicants claim damages but provide no proof of loss they are “out of luck” it is not the role of the tribunal to figure out what one side needs to make a case and then give time to go and get it - a lot of applicants lose because of insufficient evidence, not because the case is not conducive to proof, but because they haven't figured out and/or obtained necessary evidence - it is the responsibility of the parties to figure out what's 	<ul style="list-style-type: none"> - it depends entirely on the adjudicator whether active approach is seen as important - “very important” when dealing with SRLS, but it means different things to different people - the tribunal does not have a “character” apart from individual adjudicators - some adjudicators are very active and say things like “I’ll be asking all the questions”; others run a very traditional court-like process - active adjudication requires an assertive personality and litigation experience; not something everyone can do - everyone has a different style; some adjudicators are

<p>- the point of active adjudication is to get at the truth, not to enhance efficiency; does not subscribe to the “potted plant theory” of role of adjudicator</p> <p>- the goal of active adjudication is a fair process; “we all know how expensive lawyers are”</p> <p>- the point is efficiency and speed but prefer to “let people tell their stories”</p> <p>- not sure what active adjudication means; the concept is confusing and feels like “flavour of the month”</p> <p>- how would you feel if you've hired a lawyer and spent thousands and the adjudicator “rescues the applicant”; would only do this where it is essential to get to the truth and the evidence is opaque</p> <p>b)</p> <p>- yes, “absolutely” a high level of comfort with active adjudication at HRTO</p>	<p>to deal with”, but not a common approach</p> <p>Outset of Hearing:</p> <p>- the opening explanation is critical</p> <p>- always get “buy in” from both sides at beginning of proceedings; explain the approach</p> <p>- important to gain trust of respondent community; develop understanding that active approach is not preference for other side</p> <p>- a traditional court process is “useless” for SRLs; in opening statements they will always start to give evidence, therefore dispense with them and instead frame the issues and ask parties to agree very specifically that these are the things upon which evidence is needed</p> <p>- take parties through opening statements, push and probe, explain terms, “what box are you claiming to fit in?”; talk about process, witness statements (adopted or not),</p>	<p>needed and present it to the tribunal</p> <p>- the tribunal has investigatory powers but these are never used</p> <p>- tribunal cannot compel witnesses on their own motion, but can compel document production and suggest to parties that a certain witness would be of assistance; discretionary, no obligation to do so</p> <p>- even if a self-represented litigant is highly marginalized, not sure that such assistance or accommodation would be appropriate</p> <p>- there is a strong emphasis on efficiency and a “big bias” against adjournment; some adjudicators are strict, others make exceptions, generally have to be on consent</p>	<p>more assertive than others; also a question of experience</p> <p>- a matter of personal style; some adjudicators use “inquisitorial methods” but most adopt a “traditional model” of adjudication; it should be an adversarial process because “it’s just another kind of lawsuit”, and different from other tribunals where government is respondent</p> <p>- the use of active adjudication is uneven because some adjudicators have strong personalities and others are tentative; respondent counsel can push back, some of whom are senior lawyers</p> <p>- senior adjudicators love active adjudication, less experienced members are not as enthusiastic</p> <p>- although it is up to individual adjudicators how hearing is conducted including whether and to what extent to adopt active adjudication techniques, parties should not get a</p>
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	<p>because specific mandate in <i>Code</i> and <i>Rules</i> provide a “safety net”</p> <ul style="list-style-type: none"> - tribunals have more latitude than courts because administrative adjudication tradition, not because of any particular authority, but a lot of comfort is taken from <i>Rules</i>, legislation and the fact that active adjudication is encouraged by stakeholders; have had both applicants and respondents ask for an active process - the tribunal has more latitude because administrative law norms are different - “creative management” of case and hearings is encouraged at HRTO; other tribunals such as LTB and SBT emphasize efficiency - some adjudicators are more concerned about judicial review than others - adjudicators do not have more latitude because HRTO proceedings are adversarial; the Divisional 	<p>identify missing pieces and ask “do you have supporting documents?”</p> <ul style="list-style-type: none"> - giving indirect guidance at opening stage: “I don’t see anything about X, will you tell me about this later?”; talk about remedies; work with both sides to get cooperation <p>Questioning Witnesses:</p> <ul style="list-style-type: none"> - if counsel conducts examination chief will “jump in” whenever clarification is needed - will interrupt to ask questions as needed to understand evidence - on core issues, no reason not to intervene to get answers to questions - will ask questions, generally at the end of testimony <p>Cross-Examination</p> <ul style="list-style-type: none"> - all self-represented litigants are unable to effectively conduct a cross-examination; it is effective to ask the self-represented party to tell me the point they are driving at, and then provide SRL with the appropriate question 		<p>completely different experience depending upon personality of the adjudicator</p> <ul style="list-style-type: none"> - nobody wants to write a decision that is overturned by the Divisional Court - active adjudication is not very important in HRTO matters; there is no “truth at all costs imperative”; the Respondent is almost always represented by experienced counsel, and the goal is to win, in part because the other side will be inadequately prepared
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	<p>Court applies the same test to all tribunals and courts and the standards of the court do not support the tribunal's active adjudication mandate</p> <p>- aware that the Pinto Report encouraged active adjudication but there needs to be a "memo to the Divisional Court"</p>	<p>- it is acceptable for an adjudicator to ask leading questions: for example "Am I correct in saying you said X?" Adjudicators cannot say "I put it to you that you were lying", but can say "something you said doesn't make sense to me, how do you respond to that?"</p> <p>- where there is conflicting evidence there is a spectrum of adjudicative styles: extreme end of the spectrum is to jump in as witness gives contradictory evidence and say "I want you to know that when X was here he said Y; what do you have to say about that?"</p> <p>- not a former litigator so will not cross-examine; just ask neutral questions</p> <p>- has cross-examined witnesses, "sometimes aggressively", but not common to do so</p> <p>- adjudicators are not aggressive in cross-examination because adjudicators are "not trying to build a case or "score on"</p>		
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		<p>anyone; trying to get information”</p> <ul style="list-style-type: none"> - might “plug some holes” after cross-examination by a self-represented party, but can be done within the traditional adversarial model of adjudication <p>Number/Order of Witnesses:</p> <ul style="list-style-type: none"> - suggest that a certain order of witnesses makes sense and seek agreement - to cut down number of witnesses, not to limit testimony just to say “we already believe that” <p>Rules of Evidence:</p> <ul style="list-style-type: none"> - accept almost all evidence and let rules affect weight - very assertive about not hearing irrelevant evidence, eg. similar fact evidence, explain why not admissible, but cannot limit repetitive evidence because too much exposure for judicial review - adjudicators do have control over the evidence but exercise it “tentatively”; make rulings about needing evidence when both parties 		
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		<p>see it as legitimate (eg. medical evidence is unclear, probably need to have doctor testify)</p> <p>Case Management:</p> <ul style="list-style-type: none"> - a lot of case management primarily for benefit of self-represented parties - case management is an active adjudication tool; some adjudicators issue frequent case assessment directives; others use them only for simple matters - using case assessment directives to move things along. eg. direct to a summary hearing where <i>Code</i> does not appear to be engaged; or to instruct that “a 70-page claim must be reduced to 20 pages, with page numbers” - case assessment directives are used mostly as form letters re: missed deadlines <p>Summary Hearings:</p> <ul style="list-style-type: none"> - summary hearings can help self-represented litigants by giving insight as to how the tribunal is likely to see the 		
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		<p>case and what evidence is needed</p> <p>Adjournment:</p> <ul style="list-style-type: none">- if, for example, witness statement not provided in advance of hearing, take a break and require it to be prepared on the spot; don't reward failure to prepare with adjournment- had SRL show up without having filed any materials; proceedings went ahead, SRL was not allowed to call witnesses or submit documents; adjudicator congratulated by colleagues for "being tough"- granting an adjournment to allow SRL to obtain missing evidence; explained to respondent that needed for a "solid decision"- the hearing process involves rules and deadlines that are very difficult for people with mental health challenges, and accommodation is not always possible		
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		<p>Flexibility:</p> <ul style="list-style-type: none"> - want to get to a just result, not to have someone “lose on a technicality”; have allowed applicants to amend pleadings on third day of hearing - SRLs show up with documents that should have been filed 45 days prior; can usually get opposing counsel to accept and carry on 		
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HRTO - Active Adjudication (...continued)

	Is it difficult to draw the line on appropriate AA; are there often complaints?	Is it the role of an adjudicator to level the playing field for SRLs?	Would AA guidelines be helpful?
HRTO	<ul style="list-style-type: none"> - the use of active adjudication is not controversial and the line is not difficult to draw: just do not descend into the arena - complaints are infrequent, it is more common to have parties ask for an active process - must be careful; have to explain process at the outset and bring people along; do not want to be seen as a “Star Chamber” 	<ul style="list-style-type: none"> - yes, the tribunal will manage aggressive lawyers and ensure that core issues are addressed even if other side is self-represented or under-represented; it’s not about who puts on the best show - the Adjudicator may level the playing field. sometimes consciously and sometimes not - it is not the role of an adjudicator to educate SRLs 	<ul style="list-style-type: none"> - would welcome guidelines on active adjudication; it would be “nice to know what you’re allowed to do” - supportive of guidelines for active adjudication so that fearful members have something to hang onto and something to push back with - eventually clarity needs to be achieved with respect to review court treatment of active adjudication

	<ul style="list-style-type: none"> - more concern about active adjudication since <i>S.V.D.</i> decision - yes, only experienced adjudicators are comfortable with active adjudication - not really an issue; our process is not very different from a court; the lawyers who represent respondents tend to be from large firms used to appearing in at places where both sides are represented; they do not suddenly become accommodating to self-represented litigants 	<ul style="list-style-type: none"> or to “help them”; there is a lot of available information out there - there is a perception that the tribunal will do more for SRLs than we do; we are not going to be “rescuing the applicant”; must maintain impartiality - “we take parties as they come”; it is not the adjudicator’s role to level the playing field. - power imbalances are not always one-sided; sometimes respondents bring counsel who are not experienced in the area of law, such as in-house counsel or criminal lawyers 	<ul style="list-style-type: none"> - active adjudication is a work in process; it is evolving, still trying different methods - general principles in guideline form might be useful, but essence of role is that of an independent decision-maker and people have their own ways of working - active adjudication guidelines are not needed because it is not difficult to draw the line on intervention
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HRTO - Mediation and Med/Adj

	How does mediation work at the tribunal?	Is med-adj a good system?	Are there time limits; can they be exceeded?	Are you concerned about settlement pressure?
HRTO	- mediation is offered to almost all parties at outset and throughout the hearing	- the med/adj program has been “massively successful”; 95% of cases settle compared	- usually not more than one session, but can be extended	- yes, there is too much settlement pressure; personal costs may be lessened, but the law

<p>- mediation style is a matter of personality and strengths of individual mediators; ranges from “folksy” and conversational to swiftly evaluative; mediators need to adopt the style that is comfortable for them</p> <p>- in med/adj the approach to mediation is non-evaluative, can suggest range of likely outcomes but tread carefully; must preserve the role of adjudicator if settlement not reached</p> <p>- may suggest to parties during hearing that “there is a lot of common ground”, which may lead to offer and acceptance</p> <p>- sometimes people agree to mediation to please the mediator/adjudicator; to “play nice”, can still end up with productive mediation</p> <p>- when mediation is done before file is complete the mediator doesn’t have enough information to be evaluative or even comment much</p>	<p>to about 80% in ordinary mediation</p> <p>- med/adj is invariably encouraged; a hearing without it would be unusual (unless a party clearly not a suitable mediation candidate)</p> <p>- at least 85% of cases settle in med/adj; it is offered to everyone</p> <p>- med-adj is offered to all unless obvious unsuitability (there is a box to check) and almost always used; results in 75-85% settlement rate</p> <p>- high settlement rate for med-adj because mediator is more fully informed in med-adj context</p> <p>- what the mediator says has high impact in med-adj because the parties know he/she is the decision-maker, and without saying so directly parties get a sense of who would succeed in a hearing</p>	<p>- if mediation is commenced and after half day there is no settlement may sit longer or arrange further discussions by phone to keep momentum if seems worthwhile</p> <p>- half a day is not enough time; if possible keep going (have gone until 1:00 am) or book a new date, but most settle on first day or during hearing;</p>	<p>doesn’t evolve and human rights become “privatized”</p> <p>- yes; if settlement is not reached, seen as a “failure”</p> <p>- if the mediation box has not been checked then parties are contacted by tribunal and attempts are made to persuade into mediation; although a “big fan” of mediation but does not like to push people (but worried about settlement stats)</p> <p>- “unfair pressure” on mediator because of “stats”; this pressure is passed on to parties</p> <p>- cannot put too much emphasis on settlement without respondents seeing the tribunal as an advocate for applicants; need principled adjudication at centre</p> <p>- mediation is probably “oversold”, but not when it is inappropriate</p> <p>- mediation is strongly encouraged, but must be careful not to seem like</p>
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	<p>- a lot of legal information (not advice) is provided by mediators; eg. legal entitlements and range of remedies/probable outcomes, what seems reasonable and what doesn't</p> <p>- in med/adj; adjudicators must adopt distinct dual roles so that parties don't feel railroaded</p> <p>- telephone mediation works well where both parties are represented</p> <p>- those who don't settle have unrealistic expectations, are mentally unstable or want the approval of a decision-maker</p>			<p>you "won't take no for an answer"</p> <p>- settlement is better; people are often disappointed at the end of hearings</p> <p>- would not discourage an improvident settlement because hearings are uncertain, time-consuming and require a lot of preparation work</p>
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HRTO - Expertise, Consultation, Informality and Guidelines

	<p>What is the nature of institutional expertise?</p>	<p>a) How is expertise formally built and shared? b) How is it shared informally?</p>	<p>How informal are tribunal proceedings? How does informality work?</p>
<p>HRTO</p>	<p>- all members have subject matter expertise, as absolute minimum criterion; adjudicative expertise can</p>	<p>a) - quarterly mini-training sessions led by vice chairs are important; bi-weekly</p>	<p>- even though the setting is informal compared to a court, for unsophisticated parties it seems formal and the process</p>

	<p>be taught, aptitude for adjudication can be acquired on the job, but background knowledge is essential</p> <ul style="list-style-type: none"> - tribunal expertise centres more on the area of law that they adjudicate, less on background of individual members - the tribunal is more expert than courts in its subject-matter - term limits are inconsistent with merit-based appointments process; drains tribunals of expertise because terms run out or key people leave because of limited future 	<p>meetings/conference calls where draft decisions can be voluntarily shared are helpful; Institutes are too general and wide-ranging, not enough common ground among tribunals to be effective</p> <p>b)</p> <ul style="list-style-type: none"> - “tons” of informal consultation; will go to others with different background for input - there is an “open door” atmosphere and exchange of ideas - the legal department circulates new Divisional Court decisions 	<p>is not informal; any informality comes from how adjudicators relate to people; some make a conscious attempt is made to put people at ease to make it a more accessible process</p> <ul style="list-style-type: none"> - the HRTO has a certain gravitas because of the way it is set up; it is essentially an adversarial process with parties controlling the evidence, but adjudicators are generally friendly, approachable and try to put people at ease, do some “trust-building” - the tribunal is informal in mediation sessions but in hearings adopt a traditional judicial role - tribunal proceedings may be friendlier than courts but this does not extend to accommodations for SRLs - HRTO is informal in the sense that adjudicators can run hearings in any manner with which they are comfortable - the HRTO is not informal, but informality is a positive
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			<p>value; SRLs are less defensive and proceedings flow better in informal atmosphere</p> <ul style="list-style-type: none"> - HRTO is informal in that, unlike courts where clerks do all menial work, adjudicators will make copies of documents, set up own conference calls, don't require people to stand or bow as in courts - HRTO could learn about informality from other tribunals
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HRTO - Expertise, Consultation, Informality and Guidelines

	Do informal institutional understandings about how to apply the law exist?	Would “best-practices” guidelines be helpful and feasible?
HRTO	<ul style="list-style-type: none"> - there is absolutely a sense of institutional perspective - accepted practices are communicated in training: there are shared understandings about approaches that the Divisional Court has upheld or vice chairs generally accept 	<ul style="list-style-type: none"> - a system other than CanLII for recording Board decisions, with commentary would be amazing, would create institutional memory; CanLII is a limited tool for searching procedural points -would welcome guidelines on substantive law, especially

		<p>on something like “duty to accommodate” which is amorphous</p> <ul style="list-style-type: none">- guidelines would assist adjudicators because precedent is effectively binding; it is part of the litigation orientation of the tribunal- the tribunal does not anthologize expertise; a “key cases digest” would be helpful- would help compensate for lost expertise when key people leave because of expired term limits <p>- it would be impossible to compile a best practices digest; too many divergent views; guidelines - would be “unwieldly and fettering”</p> <ul style="list-style-type: none">- very opposed to guidelines of any kind; discretion should not be structured in any way and best practices are communicated in training, afterwards rely upon CanLII, it would be “legally inappropriate” to develop formal institutional perspectives
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SOCIAL BENEFITS TRIBUNAL and LANDLORD AND TENANT BOARD

Self-Represented Parties

	<p>a) What is the approximate balance of SRLs as between applicants and respondents?</p> <p>b) is there a typical SRL profile or experience?</p>	<p>a) Are adjudicators comfortable dealing with SRLs?</p> <p>b) What are main sources of frustration for applicants?</p>	<p>What legal advice services are available for tribunal clients and are they effective?</p>	<p>a) How does the tribunal prepare SRLs for hearings?</p> <p>b) How do SRLs prepare themselves; is this changing?</p>
SBT	<p>a) - majority of applicants are not self-represented, but many receive “self-help” legal aid coaching rather than full representation - legal aid clinics help to identify the evidence needed, helps to compile evidence and sends them off</p> <p>- only about 5-10% of applicants are self-represented, although many are making simple claims that can be managed without counsel - some applicants are eligible for legal aid but decline it because they feel strongly they can handle it themselves</p>	<p>a) - yes, members get lots of training in active adjudication so they have the skills needed to get necessary information</p> <p>- with SRLs adjudicator does more prep work, but hearings go faster and are more fluid</p> <p>b) - SRLs are not a big issue; there aren’t that many</p>	<p>- SRLs are informed by letter and if Ontario Works recipients, also by OW worker, that legal assistance is available;</p> <p>- if not represented at hearing, again told that eligible for free legal assistance, and proceedings are adjourned to allow for this if requested (about 50% want to adjourn and get advice)</p> <p>- proceedings are eligible for legal aid, but representation is not guaranteed because of clinic capacity limits</p> <p>- legal aid is available to all based on income criteria, not complexity; low income</p>	<p>a) - the tribunal is focused on getting SRLs legal advice</p> <p>- some have legal aid lawyers and some paralegals, legal aid lawyers and most paralegals are “very, very good”, know the system; rarely get non-legal aid lawyers (where ODSP part of a larger claim); can be problematic, file too much material</p> <p>b) - some SRLs are highly competent but it is rare for them to have case law</p>

	<ul style="list-style-type: none"> - about half of applicants who are represented have para-legal representation - on Respondent side, submissions are written; in about 30% of cases a CPO will appear at hearing - Ministry is increasingly sending CPOs to hearings <p>b)</p> <ul style="list-style-type: none"> - a “fragile community”; physical disability often leads to depression - hearings have emotional impact; inherent in subject-matter - lots of people cry; do the utmost to ease the emotional impact of hearings by being “very good at dealing with people” 		<p>is a proxy for “person with complex needs”</p> <ul style="list-style-type: none"> - clinics and SBT have worked together to determine best triage practices – representation depends upon needs of individuals (language or other communication barriers and complexity of case) ie. capable people with simple cases do not get representation solely based upon low income - there is a “self-help” stream in legal aid clinics, lawyers take on a coaching role; unlike duty counsel, they are able to see people repeatedly and assist with advising as to needed evidence, helping to put together evidence if necessary, but do not appear at hearings; very helpful for adjudicators because appellants made aware of weaknesses in case before hearing, don’t see adjudicator as “bad guy” and more accepting of process and result 	
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			- extent of assistance given in “self-help” stream varies depending upon legal aid clinic; some clinics send written submissions for every case as part of “self-help” approach	
LTB	<p>a)</p> <ul style="list-style-type: none"> - tenants are almost always self-represented; about 50% of landlords are represented and of those about 75% by paralegals or “landlord’s representatives” who may not be paralegals, but rather property managers <p>b)</p> <ul style="list-style-type: none"> - self-represented community tends to be poor, disadvantaged, emotional, often with mental health issues - LTB clientele have a lot in common with family law clientele - they start off in a mutually beneficial relationship, something goes wrong, can end up hating one another, and may want to continue the relationship or 	<p>a)</p> <ul style="list-style-type: none"> - the Board is very comfortable with SRLS - tenants often have unrealistic expectations as to the level of help they will get; expect the adjudicator to tell them how to get the most out of the landlord <p>b)</p> <ul style="list-style-type: none"> - SRLs are frustrated with their circumstances in life, which often include poverty, and this extends to hearing room; they have difficulty not interrupting other side, applying information such as the difference between asking questions and giving evidence 	<ul style="list-style-type: none"> - duty counsel is available onsite in some locations: they are legal aid lawyers from local legal aid clinics and operate differently depending upon the clinic they are with; clinics have their own rules and processes - surprised that people often decline to talk to duty counsel, then appear with no argument, evidence or proposal in support of their position; sometimes directed to duty counsel but effectiveness of duty counsel varies greatly - duty counsel is not very effective; gives 15 minutes of advice and does not write submissions or go to hearings, may attend perhaps 10% of hearings, 	<p>a)</p> <ul style="list-style-type: none"> - parties are encouraged to see duty counsel in advance of and when appropriate in the course of adjudication and mediation <p>b)</p> <ul style="list-style-type: none"> - no significant changes in the way parties self-represent

	<p>not; similar emotions are involved</p> <ul style="list-style-type: none"> - people often use the Board to punish one another 		<p>although some duty counsel will sit in back of hearing and become involved if there is a need</p> <ul style="list-style-type: none"> - in locations where duty counsel is not available, legal aid clinics do not offer full representation; they focus on tenants facing eviction or illegally locked out; even then only appear on behalf of people who have some disability or if there is a legal issue that the clinic is interested in; there is little available in terms of full representation - the focus of clinics is saving tenancies; will often seek adjournment so tenant can make application <p>- specialist paralegals can do a good job, but are a small minority</p> <p>- paralegal representation is generally of poor quality on the tenant side; there are some "top notch" paralegals that represent landlords</p> <ul style="list-style-type: none"> - tenants are often "under-represented" by paralegals 	
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			<p>ie. worse off than if self-represented because wrongly-informed</p> <ul style="list-style-type: none"> - “shocked” at the low-quality of paralegal services; there is a problem with inadequate training at community colleges and programs being too accessible <p>- in general, the paralegals that appear before the board have more expertise than the lawyers; regulation of paralegals has made a difference; there are more consent orders and there is more professionalism</p>	
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SBT/LTB - Self-Represented Parties

	Has goal of accessibility without representation been met?	Are tribunal proceedings approached by SRLs with fear and dread?
SBT	<ul style="list-style-type: none"> - it is a goal of the tribunal to be manageable without a lawyer, and because of active adjudication it generally is - it is not a goal of the tribunal to be accessible 	<ul style="list-style-type: none"> - no, there is not an “avoidance atmosphere” with respect to adjudication; the emphasis is in getting people legal help

	without lawyers, it just happens to be “leaning that way”	
LTB	<p>- the tribunal is accessible for SRLs because it has to be</p> <p>- the tribunal is less complicated than court system so people can manage without lawyers; SRLs better off than those who are badly represented</p> <p>- for SRLS who are rational and able to communicate clearly the tribunal is manageable; where there are a comprehension problems, or complex issues such as bankruptcy, representation is obviously helpful</p> <p>- there is a perception that the tribunal is accessible without lawyers, so SRLs refuse duty counsel assistance; this is problematic, duty counsel should be advancing arguments about tenant claims, SRLs instead assume the truth will come out in hearing and/or they can get sympathy from adjudicators</p>	<p>- no, parties do not approach adjudication with dread; they don't avoid hearings, in fact some want them</p> <p>- they are not seen as daunting</p>

SBT/LTB - Active Adjudication (AA)

	<p>a) What does AA mean? b) Do adjudicators have more latitude than judges to engage in AA?</p>	<p>What are common AA strategies?</p>	<p>If evidence missing would you suggest it be obtained?</p>	<p>How important is AA to the work of the tribunal? Why?</p>
<p>SBT</p>	<p>a) - ensuring that SRLs are heard and feel that they have been heard</p> <p>b) - “I don’t know” – maybe tribunals have just taken active adjudication more seriously because they deal with so many SRLs - perhaps more comfortable conducting active proceedings because it is an appeal forum (although the tribunal does hear witnesses and make determinations of fact) - no sense of difference between courts and tribunals</p>	<p>- making sure SRLs understand the issues, process, rules; explaining the role of CPO so they don’t feel attacked - asking questions to get information needed, being patient because people meander - balancing efficiency with letting people say what they need to say – up to a point, making sure they feel heard</p> <p>- much more active with SRLs; have to make sure that all necessary information obtained without being unduly interruptive; don’t need closing submissions; can shorten hearings by stopping repetitive testimony and continually focusing proceedings - if it looks like there is a hole in the applicant’s case;</p>	<p>- the tribunal has no mandate to request new evidence; prohibited from doing so - it is rare to make a request for evidence, would never happen for medical evidence, which is responsibility of Appellant; Regulations prohibit adjournments to obtain new medical evidence - the tribunal expressly does not have authority to request new medical evidence</p> <p>- if evidence exists that is missing will adjourn to allow it to be obtained</p>	<p>- the client community faces personal challenges; therefore, active adjudication has always been a natural component of adjudication with SRLs</p> <p>- it is very important; part of the reason that legal aid clinics adopted a “self-help” coaching model was that they “trusted” that adjudicators were active enough that this would be sufficient - proceedings are less adversarial because the “human dimension” is striking, stories are sad - legal tests require detailed information, such as effects of the disability on the “whole person;” therefore asking questions is important</p>

		<p>suggest legal counsel be obtained and adjourn</p> <ul style="list-style-type: none"> - sensitivity to differences in sub-culture re comfort with eye contact, personal contact 		
LTB	<p>a)</p> <ul style="list-style-type: none"> - Board can only assist in getting information out; it is up to the applicant to make the case; the test is balance of probabilities; this balance should not tilt because of anything the adjudicator does - power imbalances are addressed through active adjudication <p>b)</p> <ul style="list-style-type: none"> - adjudicators assume there is more latitude, but the extent of active adjudication authority is unclear 	<p><i>Clarification</i></p> <ul style="list-style-type: none"> - only have to explain to parties the “landmarks” that lead to a decision - clarifying testimony as the hearing progresses, not waiting for cross-examination to bring out more information - tell SRLs “you’ve asked for X, how do you plan to prove it” - tenants often go to duty counsel, don’t take notes, come to hearing and ask for adjournment without knowing on what basis; adjudicator must unpack that <p><i>Questioning Witnesses</i></p> <ul style="list-style-type: none"> - try not to cross-examine, but do direct questioning and challenge a witness if necessary to get the information needed - if a witness is evasive it enough to notice and draw 	<ul style="list-style-type: none"> - the Board is empowered to request evidence; if reasonable explanation for not having it already might do so - would not adjourn to allow a self-represented party to put together evidence unless a good explanation for not having it; not because they are seeing the case unravel and wish they had thought of how to present it better - if a new issue comes up the tenant is advised to withdraw and file an application with the new claim and proper evidence; if a new defense comes to light that the tenant was unaware of - refer the tenant to duty counsel - might say to SRL “it is surprising you don’t have X”; might allow to withdraw and re-file rather 	<ul style="list-style-type: none"> - it is important because it allows information to be clarified as things move along and nobody who isn’t a lawyer is comfortable with cross-examination - it is important for efficiency, moving things along and to address power imbalances - a lot of variation in adjudication styles, uniformity is not needed because people think differently and it’s empowering for adjudicators to have process control; it contributes the sense of authority needed to be an effective adjudicator

		<p>adverse inference; don't need to insist on clear answer</p> <ul style="list-style-type: none"> - more inquisitorial powers would make the adjudicator's job easier but would not be fair - sometimes ask if parties want to skip cross because they often start to give evidence not ask questions - will interrupt counsel to explore a particular area, not just to clarify evidence given, also to focus parties (ask "how does that fit in here; this is what I need to know") and to exclude irrelevant material <p><i>Evidence</i></p> <ul style="list-style-type: none"> - allowing almost all the evidence go in, and then letting rules of evidence go to weight, rather than going through the fuss of explaining hearsay and other rules of evidence - if a party shows up with a box of materials; adjourn and tell them to come back with everything organized and pages numbered; it is not the 	<p>than adjourn; "adjourn" is a "bad word"</p> <ul style="list-style-type: none"> - if a SRL says "I can get this" re evidence, sometimes allow this, other times say "your hearing is today"; depends on circumstances 	
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		<p>tribunal's job to organize people</p> <p>- have threatened to fine parties who are intrusive or behave inappropriately; very effective</p>		
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SBT/LTB - Active Adjudication (...continued)

	Is it difficult to draw the line on appropriate AA; are there often complaints?	Is it the role of an adjudicator to level the playing field for SRLs?
SBT	<p>- it is completely natural because client base consists of "vulnerable population"</p> <p>- members don't struggle with active adjudication limits</p> <p>- very rare for other side to object to active adjudication</p> <p>- once cautioned by disability adjudication unit ("DAU"), a government representative, but very rare event</p> <p>- CPOs do not have a personal stake in outcomes so don't tend to object to active approaches; not very</p>	<p>- power imbalances exist because of the client community; conscious attempt is made to "level the playing field"</p> <p>- power imbalances are addressed through active adjudication</p>

	<p>concerned about appearing to advocate for other side</p> <ul style="list-style-type: none"> - don't know if AA guidelines would be appropriate; have done a lot of training on it 	
LTB	<ul style="list-style-type: none"> - there are frequent allegations of bias dealt with through internal review process; not through judicial review - complaints are not a big problem, although there are internal reviews - when a member goes too far with cross examination it always results in complaint from the losing party; these are resolved internally, not through judicial review application - mindful of fairness to represented party; there is a difference between getting information and making someone's case 	<ul style="list-style-type: none"> - it is the role of an adjudicator to level the playing field - leveling the playing field is "absolutely essential"; - Board can only assist in getting information out; it is up to the applicant to make the case; the test is balance of probabilities; this balance should not tilt because of anything the adjudicator does - in mediation power imbalances are dealt with by informing SRLs of their legal entitlements, telling them that the board promotes consistent decision-making and recommending a hearing if a proposed settlement falls short of legal entitlements

SBT/LTB - Mediation and Case Management

	How does mediation work at the tribunal?	a) Is there an institutional style of mediation? b) Are mediated outcomes superior?	Are there time limits; can they be exceeded?	Are you concerned about settlement pressure?
SBT	<p>- early resolution opportunity (“ERO”) is presided over by an appeal resolution officer (“ARO”) who is not an adjudicator, but rather an administrator trained in mediation; not only about resolving issues also about clarifying issues</p> <p>- AROs become contact person at tribunal</p>			<p>- there is no settlement pressure; hearings are highly accessible</p> <p>- emphasis has always been on getting people to legal aid, not settlement</p> <p>- there was no settlement mechanism at tribunal until recently, all matters dealt with by hearing, sometimes de facto consent orders (CPO indicates no resistance to order); moving toward review at government level</p> <p>- no significant settlement pressure because there is no “avoidance atmosphere” with respect to adjudication</p>
LTB	<p>- adjudication and mediation are separate functions performed by different personnel; the Board does not</p>	<p>a) - mediators typically conduct interest-based mediation; sometimes the mediator has not</p>	<p>- CMH, which is telephone mediation, can be extended to in person CMH or “special mediation”</p>	<p>- efficiency driven adjudication leads to pressure to engage in mediation, expressed</p>

<p>have adjudicators who are also mediators, but adjudicators can negotiate settlement in the hearing context; eg. “he/she seems to be saying X will work; or propose a payment plan, but must be clear that adjudicator is facilitating negotiation between parties, not mediating because mediators are unionized employees</p> <ul style="list-style-type: none"> - case management hearings (“CMH”) are really a mediation session run by dispute resolution officers (“DROs”) who are mediators or case administrators depending upon location - CMH is mandatory for all tenant applications because they are the least organized group and these applications are the most easily settled - CMH done in person or by phone; 60 minutes to talk; if at the end of an hour there is no agreement, the mediator becomes a case manager; informs parties of what they need to do next: get materials together for hearing, notify 	<p>even looked at the file; not coming from a rights-based perspective, want to get people talking</p> <ul style="list-style-type: none"> - all mediation should be interests-based; highly evaluative mediation (eg. at HRT0) is not truly mediation - mediators should have their own style within an overall “holistic approach” - do not do interest-based mediation, it is a “beautiful concept” but so not have time for it and a legalistic approach is better for addressing power imbalances - do “broad-based” mediation; the relationships are not that important, at bottom it's a business relationship - part of mediator’s role is to educate self-represented about legal test that must be met, what to expect in hearing, how board has handled similar cases; goal is to ensure they arrived at the hearing prepared - do not do shuttle mediation, talk to people about rights and obligations and uses practice directions for self-represented 		<p>repeatedly throughout the process, and pressure against adjournment, which is sometimes granted for fairness but not with comfort</p> <ul style="list-style-type: none"> - adjournments are frowned upon; fairness should be more important than efficiency - there is an expectation of getting through the docket for the day and need some cases to go to mediation to do so - mediators are aware of settlement statistics and pressure to keep them up
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	<p>witnesses, might suggest documents needed if asked</p> <ul style="list-style-type: none"> - mediation at the board used to be very unstructured; mediators “wandered around” encouraging parties to mediate; the CMH project is an attempt to improve upon that - tribunal clients are not sophisticated; mediation helps parties to at least comprehend the dispute before hearing if no settlement is reached - “very often” direct people to get legal advice before mediation begins, or interrupt mediation to allow them to do so - some LTB locations hold mandatory case conferences if mediation fails - mediators do a lot of “behaviour agreements”; payment plans can be done more quickly and efficiently by adjudicators - in CMH if people have not had legal advice may tell 	<p>parties to explain legal framework</p> <ul style="list-style-type: none"> - style is very evaluative, uses the online practice directions to inform parties of substantial law; refers to paper copy of practice directions as way of treading the line between advice and representation; important to even out power imbalances that parties are informed of the legal framework before making settlement decisions <p>b)</p> <ul style="list-style-type: none"> - tenants may get less than they would in hearing because mediators conduct interest-based mediation, not rights-based mediation; mediated outcomes are not necessarily superior - med/adj would work for LTB; would allow more flexible adjudication; as it is, can get parties to consent order if one side makes offer and other agrees - as mediator would recommend against an improvident settlement; would recommend going to hearing 		
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	<p>them to get advice and call back</p> <ul style="list-style-type: none"> - tries to ensure that if no settlement at CMH at least an interim order (usually for disclosure); try to make sure there is some tangible take away like a statement of agreed facts, clear understanding of hearing requirements so that hearing is not adjourned - CMH is working great; 80% settlement rate, and those who don't settle arrive at the hearing with some semblance of organization; results in fewer adjournments - about 50% of mediated cases settle; settlement rate is higher for CMH mediation, about 90% - more mediated cases settle than CMH cases because the former is voluntary; but for CMH some parties never come back and this should be reflected in settlement statistics 	<ul style="list-style-type: none"> - as mediator would only allow improvident settlement after explaining that law entitles the disadvantaged party to more and recommending a hearing - mediated outcomes are encouraged for efficiency, a way of getting through the docket not because of superior outcomes or because it is a superior process 		
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	<p>- the focus of the tribunal is high-volume repetitive work; adjudicators typically start the day with about 60 files, in about half of cases a party doesn't show up (often because parties have settled), some go to duty counsel which can result in adjournment, and some are streamed to mediation which is important to allow time to get through docket</p>			
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SBT/LTB - Expertise, Consultation, Informality and Guidelines

	What is the nature of institutional expertise?	a) How is expertise formally built and shared? b) How is it shared informally?	How informal are tribunal proceedings? How does informality work?
SBT	<p>- members have a broad range of backgrounds eg. teachers, police officers, lawyers, doctors</p> <p>- tribunal has some expertise in knowing its client community through training and experience</p> <p>- lawyers are not always the best adjudicators; police more</p>	<p>a)</p> <p>- monthly training by teleconference; any new issues discussed</p> <p>- all relevant Divisional Court decisions are summarized in memos circulated to members</p> <p>- performance monitoring; random internal review of member decisions by vice-chairs</p>	<p>- proceedings are informal despite representation on both sides; the atmosphere is often collaborative</p> <p>- the tribunal's proceedings are more manageable than a court process for people with physical and/or emotional challenges because they are less formal, people are more</p>

	<p>likely to be convergent thinkers - decisive</p> <p>- term limits are not a problem; can move to another tribunal and new term starts; can make a career of adjudication</p>	<p>- use CanLII to search law; legal department is comprised of “wonderful, skilled lawyers”; review member decisions for first 6 months</p> <p>- both training and ongoing supports for members are great; Institutes, conference calls, new member training and formalized mentoring are all effective</p> <p>b)</p> <p>- a lot of multi-disciplinary consultation based upon differences in ODSP knowledge and litigation experience of members</p> <p>- it is not an expertise-sharing environment based upon background, but rather experience</p> <p>- phone and email contact among members and vice-chairs and legal department are all helpful</p> <p>- don’t tend to consult with others who have different backgrounds because up to member to assess limitations implied by medical evidence, don’t want the medical people</p>	<p>relaxed; CPOs do not approach proceedings aggressively</p> <p>- trying to get the best testimony from people and the more at ease they are the better</p> <p>- whether informality is a positive value depends on the adjudicator</p>
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		to be “in-house experts”; up to the adjudicator to assess disability based upon whole picture	
LTB	<ul style="list-style-type: none"> - in some LTB locations all adjudicators are lawyers and in others not; tribunal expertise is not based on background, but develops through dealing repeatedly with similar fact patterns - some adjudicators develop specialties like long hearings or complex mental health issues - the vast majority of adjudicators are lawyers; expertise is re: subject matter of Board, not background - panels are only used when needed to clarify, eg. where there are conflicting decisions 	<ul style="list-style-type: none"> - there is a lot of internal consultation, about cases being decided and in general - new members will leave hearing room and seek guidance as needed from a colleague or vice-chair - cluster-wide Institutes are an effective umbrella approach to professional development; LTB also holds quarterly half-day training sessions for all members to drill down on their own legislation/issues - legal department circulates new and relevant case law; Institutes also build expertise 	<ul style="list-style-type: none"> - the tribunal is not informal: the setting is formal, there is a raised dais in most hearing rooms, any informality comes from the personal style of the adjudicator; some are “diva-like” others very informal in manner - it is not a priority to put the parties at ease; it is still a legal process - in LTB proceedings adjudicators have had no advance contact with parties, contributes to formality - it is a traditional litigation process: direct/cross/; direct/cross and seldom departs from this format; if parties start to give evidence rather than cross-examine will sometimes ask if they want to skip this step - adjudicators have personal styles but everyone

			<p>basically uses the same traditional process</p> <ul style="list-style-type: none"> - needs to be formal enough not to be a free-for-all; a certain level of sternness helps to keep things moving
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SBT/LTB - Expertise, Consultation, Informality and Guidelines (...continued)

	Do informal institutional understandings about how to apply the law exist?	Would “best-practices” digest or decision-making guidelines be helpful and feasible?
SBT		<ul style="list-style-type: none"> - an online digest-form record of decided cases (such as in criminal injuries compensation) would be useful, but would need frequent updating and refinement - not necessary, there is a “Hearing Handbook” that canvasses all issues
LTB	<ul style="list-style-type: none"> - yes, for example adjudicators can make decisions on compassionate grounds eg. to extend a payment plan or delay eviction eg. if children affected; assess relative unfairness to landlord - the role of an adjudicator is to apply the statute not to 	<ul style="list-style-type: none"> - guidelines exist in the form of practice directions which cover substantive law and are meant to inform the public; CanLII is the source of information for adjudicators - The Board used to have internal guidelines that were

	<p>force the landlord to be a creditor for the tenant's benefit</p> <ul style="list-style-type: none">- can recommend to landlord that tenant be given relief or accommodation based upon life circumstances (length of tenancy, number of children in household); it is common to do so; can force this on landlord	<p>constantly tweaked, now use CanLII</p> <ul style="list-style-type: none">- new Divisional Court and Court of Appeal cases are distributed by legal department with memos attached- guidelines, an institutional memory, for issues that come up frequently would be a good idea; website information is for the public
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