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Article

The Administrative Justice System in the New Millennium: A Vision in Search of a Centre

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The author's premise is that justice systems in this country are, in point of fact, comprised of both a judicial justice component and an administrative justice component, with the latter being arguably as significant from a justice perspective as the former. However, the status of federal and provincial administrative law agencies as agents of justice — has rarely been sufficiently acknowledged, and the special needs attendant on their justice system role have often been ignored. The author proposes a new vision for administrative justice systems and advocates the creation of a network of provincial and territorial "Administrative Justice Centres" devoted to the pursuit of that vision.

***172** This paper is about two things:

First, a vision for Canadian administrative justice systems in the new millennium.

Second, a means of fostering that vision - a national network of non-government, non-profit, provincial and territorial *Centres for Administrative Justice*.

1. THE CONTEXT

The quality - the civility, if you like - of a society is to a large extent reflected in - and ultimately, perhaps, determined by - the nature and quality of that society's *idea* of justice. And, of course, a society's idea of justice is to be found embodied in the structures and processes it establishes for administering justice.

We also know, generally, that structure and form strongly influence substance, and nowhere is that truer than in the justice system. Thus, a society's idea of justice will be shaped and defined by the individual citizen's daily experience of that society's justice structures. We are, as they say, what we eat, and, over time, our society's idea of justice will become what its members experience it to be.

It follows, this author believes, that of all things we hold in trust for future generations, the quality and appropriateness of our justice structures is one of the most fundamental.

That being said, it is then particularly distressing to contemplate how little attention has ever been paid to the justice imperatives of our administrative law structures. It is a failure that is especially troubling when one considers that over the past three or four decades, more individuals will have experienced this society's idea of justice in their interaction with administrative law structures than in their interaction with the courts [2]

*173 2. WHAT IS THE ADMINISTRATIVE JUSTICE SYSTEM?

(a) First - a *System*

It is only in the recent past that we have recognized that our administrative law agencies are individual components of a *system*. The Macaulay report [3] was an early, Ontario instance of formal recognition of administrative law agencies as individual components of a system of agencies, and it was released in 1989.

Even now, there seem to be continuing pockets of resistance to the idea that individual administrative law agencies are appropriately characterized as components of a *system* of administrative law agencies. [4] Of course, central co-ordination, an essential feature of any *system*, is not to be found in this system. And, those resistant to the system concept may point to the absence of a centre as the clinching argument against the system analysis. To so argue, however, is, with great respect, to beg the question.

In this author's submission, the lack of a centre for this system is no more than a historical anomoly reflective of the *ad hoc* and seriatim nature of the developments that have ultimately landed us with this large number of rights-determining agencies operating in isolation one from the other. When we stand back and look at what a series of unrelated legislative initiatives over the years has finally wrought, we see a large group of organizations which, taken together, now in fact comprise a major component of our justice system. Bound by common principles of law and procedure, using common techniques, skills and resources, and, broadly speaking, serving common purposes and pursuing common goals, this is a group of organizations that, from an efficiency perspective alone, cries out for central co-ordination and planning. Viewed from the perspective of the public interest in a coherent rights-determination infrastructure, the need for central co-ordination and planning must be seen to be imperative.

***174** Of course, as might have been expected, what reason would suggest, the analysts have proposed. Central co-ordination of our *ad hoc* collection of administrative law agencies to one degree or another has been a feature of virtually every Canadian report on administrative law

agencies. [5] In Ontario, the Macaulay Report referred to above, the 1997 Wood Task Force Report, [6] and *Everyday Justice* - the April 1998 Report of the Agency Reform Commission on Regulatory & Adjudicative Agencies, [7] are unanimous that central co-ordination of administrative law agencies is necessary.

A brief summary of the various reports' and studies' views on the need for some form of a centre, as well as a brief account of the implementation of centre concepts in Québec, the U.K., the U.S, and Australia, will be found in the Appendix to this paper.

In the author's view, that we have a system of administrative law agencies is obvious. The only question remaining is when will the structural lacunae at the centre of that system be remedied.

(b) Second - a *Justice* System

The recognition that this system is not only a system, but a *justice* system - as integral a part of our society's overall system of justice as are the courts - is even more recent. Ontario's Chief Justice McMurtry may have been the first to make explicit, what the author would argue should always have been self-evident. In his November 1997 address to the COBA Conference, [8] Chief Justice McMurtry said this:

> The justice system must now be understood as comprising two distinct components - the *judicial* justice system and the *administrative* justice system - with the administrative justice system being, for a large proportion of our population, ***175** the *custodian* of the justice that is most commonly relevant to their affairs ... in fact, the face of justice ... that is most commonly seen ...

That administrative law agencies are to be understood as integral elements of our justice system is also the explicit premise of *Everyday Justice*. [9]

The Ontario's Agency Reform Commission's choice of *Everyday Justice* as the title for its 1998 report was, in this author's respectful view, inspired. The title captures perfectly what administrative law agencies are about - everyday justice. Not the dress up and go to town justice found in the courts, but justice dealing with the day-to-day personal and economic lives of Ontarians and the economic and social environment in which those lives are lived - justice that can, as the Reform Commission has noted, profoundly affect people's lives and livelihood. [10]

Not everyone will be comfortable with the idea of administrative law agencies being seen as integral elements of the justice system. Have we not, some will argue, invented agencies precisely

for the purpose of removing their decision-making from the procedural and process rigors of a justice system?

It is true that we *have* invented agencies for the purpose, in part, of removing their decision-making from the procedural and process rigors of the *courts*. However, it was never intended to remove that decision-making from the justice system. Agency decision-making remains an authorized means of making binding determinations of legal rights and obligations. And, that is what justice systems do. The implicit understanding of this reality on the part of the courts may be seen in their historic determination to maintain court supervision of the compliance of administrative law agencies with the principles of natural justice - the best "privative" clauses legislatures could devise notwithstanding.

As we know, however, it by no means follows that the rigidities of a court-like system are necessary. Once one acknowledges, as the Chief Justice of Ontario has acknowledged, that there are two parts to our justice system - a judicial justice system and an administrative justice system - it becomes possible then to claim for *administrative* justice ***176** a different *regime* of justice - a regime that, in terms of its process and procedures, is appropriate for the special mandate and role of the administrative justice system's various elements.

In the author's opinion, the historic failure of governments - and of the public - to recognize administrative law agencies as integral components of the justice system has been a principal influence in the endemic neglect of agencies that, traditionally, has been such a pervasive feature of our administrative law arrangements. [11]

The idea of the administrative law system as a justice system is intuitively more comfortable when one is thinking of those agencies whose decision-making is focused principally on determining rights that are of fundamental personal importance to individuals - the Human Rights Commissions, the Immigration and Refugee Board, the Workers' Compensation Tribunals, the social assistance tribunals, etc. From his experience as a legal aid clinic lawyer in a disadvantaged community in years gone by, the author understands very well, for instance, that it is impossible to perceive bad experiences with tribunals of that type as anything but miscarriages of *justice*.

The concept may be intuitively less comfortable when one thinks of regulatory agencies like the Canadian Radio-Television and Telecommunications Commission (CRTC). Because of the large and overt policy component in the decision-making of that type of agency, it is, of course, impossible to think of them as *courts* of justice.

But the CRTC *does* make authoritative determinations of legally binding rights and obligations. Furthermore, it is trite law that parties to CRTC proceedings - applicants for broadcast licenses or those in danger of losing their licenses, for instance - are entitled, by and large, to have their proceedings governed by the principles of natural justice. They are entitled to adequate notice of

the case they have to meet, a fair opportunity to persuade the Commission as to the merits of their position, and informed, fully considered, competent, timely, and impartial, decision-making.

***177** Given these various aspects of their mandate, even agencies like the CRTC - or the Ontario Energy Board - must be seen, implicitly, to be integral parts of the justice system.

(c) Provincial Focus - National Network

The vision the author is proposing for Canadian administrative justice systems in the new millennium is directed at the administrative justice system in each province or territory, as the residents of those provinces or territories experience it. The Centre concept this paper presents also has a provincial rather than a national focus.

The reasons for this provincial focus are largely practical. In the first place, the nature of administrative justice systems - and their problems and the potential remedies for those problems - are largely idiosyncratic to the provinces and territories in which they are found. Each system has its own unique history, traditions, culture, political context and reform potential.

In the second place, to be effective, the new structures will need to have the local influence - the home town clout, if you will - that only organizations with provincial or territorial roots can hope to achieve.

This paper was first delivered to the Administrative Tribunals 2000 Conference in Toronto, in June 1999. At that time, the author was pre-occupied with the concept of an *Ontario* centre. However, in the intervening months he has had occasion to discuss the centre idea with administrative justice practitioners in other provinces. He is now of the view that a better strategy would be to think in terms of a *national network* of provincial and territorial Administrative Justice Centres, promoted and assisted by a national organization - perhaps a *Federation* of Administative Justice Centres.

(d) Federal Content

As the foregoing reference to the CRTC indicates, there is a question as to how - and whether - federal, administrative justice agencies are to be a part of the proposed new vision. For the reasons set out above, the focus needs to be the administrative justice system *in* each province or territory. However, in the author's opinion, that focus cannot be limited to provincial or territorial, administrative justice agencies. It must necessarily include federal, administrative justice agencies. The latter agencies operate in each province and territory and determine legal rights and obligations of the residents of those ***178** provinces and territories. The quality of justice in Ontario, for example, is just as affected by the quality of justice dispensed in Ontario by federal agencies as it is by the quality of justice dispensed by Ontario agencies.

Thus, it is necessary, in the author's opinion, to see the public sector of the administrative justice system in each province or territory as being comprised of a provincial segment and a federal segment. Of course, pubic policy development in respect of those two segments will have to be responsive to the parallel, but different political and bureaucratic structures within which each segment operates. However, recognition that there is a pressing provincial interest in the quality of the federal agencies operating in each province should, in the author's submission, make a potentially useful change in the dynamics of the reform process respecting those agencies.

(e) A Public Sector and a Private Sector

The new millennium vision of the administrative justice system the author is proposing encompasses more than just the provincial, territorial and federal governments' agencies, boards and commissions.

From a public policy perspective, “administrative justice” must be understood to include any binding resolution of disputes about legal rights and obligations that is achieved through the disputing parties' resort to dispute resolution services outside of the judicial system of justice. In short, the word “administrative” should be used - indeed, has always been used - simply in contradistinction to the word “judicial”. Thus, *administrative* justice as distinguished from *judicial* justice.

The administrative justice system must, therefore, be understood not only to encompass government agencies, boards, and commissions, but to include, as well, the private individuals or organizations whose dispute resolution mandates are derived from the agreement of parties. The former may be usefully referred to as the “public sector” of the administrative justice system, and the latter as the “private sector” of the administrative justice system.

The perception that our administrative justice systems properly encompass both public and private sectors, has not, perhaps, been a common one. However, the basic point is simple. In any society, justice services are inherently a necessary and legitimate focus of public policy regardless of whether they are public or private services.

***179** One knows very well that, in the development of public policy respecting *medical* services, it has proven impossible to ignore the private alternatives to the public system. And, there is no reason to expect that the experience with respect to justice services will be different. In the long run, in the development of public policies governing justice services, it will not be possible to ignore the private alternatives to the public justice systems. We have already seen editorial comment to the effect that in Ontario the evolving, so-called private courts, populated by retired judges, present the specter of an emerging two-tiered system of justice. [12] And the line between the public and private sectors of the administrative justice system is already beginning to fade. See, for example,

Everyday Justice's endorsement in Ontario of the possibility of agencies contracting their ADR functions to private practitioners. [13]

Also, it seems evident that, eventually, mechanisms for regulating private justice services in the public interest will be needed. Of course, professional organizations of ADR practitioners are already making strides in that direction - and those professional initiatives may, indeed, prove to be sufficient. It is impossible, however, not to recognize that the quality, appropriateness, and accessibility of these private justice services are, and will remain, necessary and legitimate public policy issues.

In the author's opinion, it must follow that, when one is thinking from a public policy perspective of the architecture and structure of the administrative justice component of our justice system, one must have in view both the public and private sectors of that component.

(f) The Interface Focus

Any rational vision of our administrative justice systems in the new millennium must also have in view the importance of the system interfaces - the interface between the private and public sectors of those systems, and the interface between those systems and the judicial justice system. These are aspects of the systems on which any, comprehensive, justice-policy planning must be fully focused. In Ontario, interface issues are emerging in the context of the mandatory mediation system that is currently being grafted onto the judicial system, and other interface issues, now latent, will have to be dealt with in due course.

***180** Furthermore, at the interfaces, in addition to issues, one finds public policy opportunities. What else, one can usefully ask, might one appropriately move out of the judicial system and into the public sector of an administrative justice system? And, are there matters now in the public sector that might, on reflection, have been better left to the courts? Are there matters now dealt with by either the courts or the public sector of the administrative justice systems that might, in fact, be better dealt with by the private sector of the administrative justice systems? Is the structural relationship between the administrative justice systems and the courts all that it should or could be?

3. THE SYSTEM'S GOALS

The *Everyday Justice* report (which, of course, deals only with the public sector of the administrative justice system) [14] identified eight goals that it considered common to all agencies. [15] In the author's respectful view, the *Everyday Justice* goals are estimable goals and they are as germane to the private sector of the system as to the public sector.

The eight goals are: Fairness, Accessibility, Timeliness, Quality and Consistency, Transparency, Expertise, Optimum Cost, and Courtesy.

It is important to note that, as one might have expected, *Fairness* is explicitly defined by the report as the provision of service and the performance of [adjudicative/regulatory] functions in an "impartial, lawful, unbiased and just manner".

The word "*Courtesy*" is an insightful addition to what might be regarded as otherwise a fairly traditional list. Presumably, the word *Respect* would capture the same idea.

However, while these are certainly worthy goals, and, in the author's submission, entirely sufficient goals, the *vision* of an administrative justice system can be writ larger.

*181 4. THE MILLENNIUM VISION

The vision the author would propose for Canadian administrative justice systems in the new millennium is this:

> Administrative justice systems of implicit competence and undoubted independence, that are highly esteemed - across the full spectrum of political, economic and social interests - for the wisdom and impartiality of their decisions, and the appropriateness of their process.

5. THE CENTRE PROPOSAL

(a) Introduction

The question is, then, how is such a vision to be realized. How would we get there from here?

In Ontario, the *Everyday Justice* report provides an excellent beginning. It has made the commitment to excellence in Ontario's administrative justice system explicit. Furthermore, it has provided a "blueprint" that if implemented in the spirit in which it was written would transform administrative justice in Ontario. Significantly, its recommendations have been expressly accepted by the Ontario government.

Any proposal for architectural or structural reform in Ontario must, therefore, be cognizant of the *Everyday Justice* blueprint, and responsive to the possibilities and opportunities for constructive change that it presents.

The author believes that in the history of administrative justice reform in this country, the *Everyday Justice* report is nothing short of a small miracle. But, if it is to grow into the larger miracle for which it holds such promise, it needs to be cherished and nurtured.

Unfortunately, the *Everyday Justice* report itself does not specify how the ongoing central co-ordination of the administrative justice system, which the report's blueprint envisions, is to be structured. Neither does it say whom, over the long term, is to do the cherishing and nurturing of the principles it has espoused. The question of from where the ongoing championing of this radically new conception of administrative justice agencies is to come is left unanswered.

In Ontario, the government's working group, co-chaired by Brian Goodman and Janet Skelton, that worked so intensively on the ***182** implementation of the *Everyday Justice* recommendations is now disbanded - the initial implementation work deemed to be completed. A committee chaired by Peter Allen, Manager of the Public Appointments Secretariat, has also completed its work on the development of recommendations for a new appointments policy as proposed by *Everyday Justice*.

The Government has established a stand-alone staff unit within the Management Board Secretariat with the mandate to work for a further period of two years with the line ministries and their agencies in coordinating ongoing efforts to ensure that the *Everyday Justice* potential is realized.

However, if the *Everyday Justice* potential is to be fully realized, it will be necessary for the effective and ongoing championing of the *Everyday Justice* goals to find a permanent home - a home in which administrative-justice user organizations and professional organizations will have an effective voice.

It is for this purpose that the concept of non-government, non-partisan, Administrative Justice Centres is proposed. They are to fill the structural lacunae at the heart of our administrative justice systems referred to earlier.

Such provincial, non-government Centres would be non-profit and non-partisan - politically neutral in fact and appearance. They would also be expert in administrative justice system issues (in the sense of having informed, expert staff and advisors) and would be governed by Governing Boards that are as representative of the full spectrum of interests as is possible. To be successful, the Centres will have to be implicitly trustworthy and highly esteemed - across that spectrum of interests.

(b) The Centre's Vision, Mission, and Goals

These prestigious, non-profit, provincial and territorial organizations of unquestioned impartiality would pursue a *vision* of their administrative justice systems comparable to the Millennium Vision proposed above.

Their *mission*, in the author's respectful submission, ought to be this:

> ***183** The pursuit in the public interest of sound policy, good design and excellent performance in both the public and private sectors of the administrative justice system.

Their *goals* should be comparable to those defined in Ontario's *Everyday Justice* report.

(c) The Centre's Structure

It is envisioned that each Centre would be created under the auspices of a confederation of sponsoring organizations - organizations representing user and professional interests, including existing professional associations. In Ontario, for example, these would hopefully include the CBA-O, SOAR,[16] one or more employer or business organizations, perhaps the Ontario Federation of Labour, other organizations of users, and one or more of Ontario's universities. It would operate under the control and direction of a "Governing Board", but with the advice and assistance of a permanent "Sponsors' Council" comprised of representatives of the sponsoring organizations.

The Governing Board would be comprised of individuals with interests in the administrative justice system from the full galaxy of perspectives. Each position on the Board would be defined by representative criteria specified in the Centre's constitution. One or more spaces would be reserved for members of the judiciary.

Members of the Board would not be representative of their respective communities in the sense of taking direction from those communities. They would be expected to exercise their own judgments based on the information available to all Board members. It would be their backgrounds that would be representative, not they themselves.

The appointment and re-appointment of members of the Governing Board would be the prerogative of the Sponsors' Council, to be exercised in accordance with procedures defined in the constitution.

The first Chair of the Governing Board would be selected by the Sponsor's Council. Thereafter, the Board would appoint its own Chair, after consultation with the Council.

Central to the Centre concept is the idea of an organization that, like the administrative justice system it envisions, would be highly esteemed across the full spectrum of political, economic and social ***184** interests, for its implicit competence, undoubted independence, and for the wisdom and objectivity of its counsel on administrative justice issues. To be effective, it will have to become a *de facto* moral and legal authority on administrative justice system issues.

It is evident that the starting point in that regard would be the recruitment to the office of the Chair of the Governing Board of an individual who would embody those same characteristics. One has in mind persons of a caliber and standing comparable to that of, say, a retired member of a Court of Appeal or of the Supreme Court of Canada.

The management and administration of the Centre would be the responsibility of a Chief Executive Officer (President) selected and appointed by the Board and responsible to the Board.

(d) The Centre's Role - Preface

Imagine a June day in the year 2010. The Centre for Administrative Justice in the reader's province or territory, by now a mature organization, well established as the authority on administrative justice system issues, is holding an open house. If one were to visit the Centre on that day, what activities might one find on display?

Before the author suggests the activities that, in his view, one should expect to find so displayed, the reader must be warned. The author's list of such activities is extensive. Many of the people with whom he has been working on the idea of a Centre in Ontario - the “Centre Project” Advisory Group, of which more later - find the list too extensive. It is, they feel, unnecessarily encompassing of all conceivable possibilities. From an organizing perspective, it is an intimidating list that, in their view, may only serve to discourage interest.

On the other hand, there is not a full consensus within that group as to where the priorities should be seen to lie. Furthermore, in contemplation of an expansion of the number of organizations and people interested in the concept, the author has found it difficult to predict what particular aspect of the range of a Centre's possible activities might strike responsive chords. This was especially true when he began to try and envisage what interests might be invoked in provinces or territories of which he has no personal experience. It also seems to the author that at the stage of debating the general merits of the basic concept it is important to focus the discussion as broadly as possible.

Accordingly, the reader should be aware that the array of possible activities described in the following pages has not only been written ***185** from the perspective of that future, *mature* Centre, but it also represents the author's own views of the range of activities that are readily conceivable for such an organization. It is not a list of what a particular Centre itself would necessarily find essential or desirable - or possible. Neither is it necessarily an exhaustive list.

It is, of course, obvious that, as a practical matter, an embryo Centre would begin with a short list of readily attainable objectives and, if and when opportunities arose and resources became available, would gradually broaden its scope. The question of what activities it should take on at the outset would depend on the fledgling organization's sense of priorities and on the practical, funding possibilities.

Where it started and in what directions it progressed are questions that would, naturally, be debated and decided by each Centre's representative Governing Board, in consultation with its Sponsors' Council.

(e) The Centre's Role in The Public Sector

(i) Introduction

In both the public and private sectors, a Centre's activity would be principally focused on the general function of "quality assurance".

Everyday Justice specifies *excellence* as the standard of performance for administrative justice agencies in Ontario, and, presumably, that would be the standard accepted in all provinces and territories. However, in the public sector of the administrative justice system, there are major, practical obstacles to the realization of a standard of excellence.

In the first place, one finds in the public sector of the administrative justice system relatively few structural, or ingrained, influences supporting a standard of excellence. It is, in this respect, completely different from the judicial justice system.

In the judicial justice system, the system's commitment to excellence is promoted by a number of cogent, innate and pervasive influences. There are, for example, deeply rooted common-law traditions, including a common-law court culture that values and respects excellence in judicial performance. Furthermore, the standing and respect which society generally accords to the role of judge, typically commands in the individuals selected for the position a deep respect for the responsibilities of the job.

***186** There is, as well, in the judicial justice system a *de facto* regime of quality assurance that is a pervasive influence in all its proceedings. Three structural elements support that regime: first, the appeal courts, with their direct, central monitoring of trial court decisions and process; second, the principle of *stare decisis*; and, third, the effective, central leadership inherent in the offices of the chief justices. Furthermore, at the root of the judicial justice system's quality assurance program, we find a peer group selection process largely committed to the appointment of people who through a long career have demonstrated the character and intellectual capacity required for excellent performance in these demanding positions.

None of the foregoing judicial justice system quality assurance influences are at work to nearly the same degree — or, in some cases, at all — in administrative justice systems.

It is, of course, true that administrative justice systems can, and do, attract people of character and intellectual capacity equal to that of judicial appointments. It would not be credible, however, to suggest that the appointments processes for selecting members of administrative justice agencies

is as focussed in that respect as are the processes for selecting judges. Leaving aside the patronage tradition, that may be on the wane in some jurisdictions, the author is not aware, for instance, of any administrative justice selection process comparable to the judicial appointments committees through which candidates for appointment to the federal bench are screened.

A second, innate obstacle to the promotion of excellence in the public side of administrative justice systems is the fact that none of the players in that system are positioned to offer credible criticism. This is true of governments, of the legislatures, of legislatures' standing committees on agencies, of the host ministries, of the parties, of the bar, certainly of the media, and, of course, of the agencies themselves.

Such system participants are either not in a position to know or not in a position to speak. Those who know and might be prepared to speak have conflicting interests that undermine the credibility of any comment they might make. For example, losing parties have no credibility in complaining about their experience with an agency, and their counsel are constrained from speaking out by contemplation of their future appearances before the same agency on behalf of other clients.

Accordingly, if we are to aspire to a standard of excellence in the administrative justice system, explicit quality assurance strategies of ***187** a special nature are required. It is implicit recognition of this essential need - a need not found in the judicial justice system - that may be seen to underlie many of the quality assurance recommendations in the *Everyday Justice* report.

Centres for Administrative Justice, as described in this paper, would be uniquely positioned to assist with those quality-assurance strategies. Their potential contribution to the assurance of quality in the public sector of administrative justice systems might be usefully organized into four, distinct areas of operational activity:

- Research and Design

- The Championing of Constructive Change

- Education and Training

- Direct Services.

Each will be dealt with in turn.

(ii) Research and Design

Potential projects for a Centre's research and design department may be readily identified. The following are a few examples.

A. Performance Standards.

For the performance of the public sector of the administrative justice system to aspire to an overall standard of excellence, systemic standards of various kinds will have to be defined.

Some of these are, of course, already in place. In Ontario, for example, SOAR has produced a model code of professional responsibility for adjudicators that has been widely accepted. It has published, as well, “Principles of Administrative Justice” - a set of broad criteria that would be the hallmarks of a system of excellence.

Many tribunals now have their own codes of conduct. Moreover, under the direction of the Ontario government, and in pursuance of the *Everyday Justice* recommendations, each Ontario administrative justice agency has recently developed a range of concrete performance measures of its own.

The focus of a Centre's research and design function in this area would be on the specific standards against which agency performance - and system performance - could be appropriately judged.

A Centre's research department and its associated library could be expected to develop collections of existing, and emerging standards, ***188** and of data respecting the experience with the use and enforcement of such standards, in its own province or territory and in other jurisdictions, both domestic and foreign. Through empirical studies and academic and comparative research, Centres would develop expertise in this area that would allow them to give independent advice on best practices, principles and theory, as well as providing the basis for its own developmental design work.

A national Federation of Centres might well provide a coordinating and supporting role in this activity.

B. Evaluation Strategies.

"*Everyday Justice*" recommends that each agency develop its own performance criteria for measuring the agency's success in meeting the goals specified in the report, and calls for each agency to assess its performance against those criteria on an annual basis. As noted, these are recommendations that have been accepted by the Ontario government, and, as has been said, each Ontario agency has been occupied over the past several months in developing its individual performance criteria.

Also, the need for routine evaluations of the performance of individual adjudicators is arguably an inescapable consequence of *Everyday Justice's* call for a transparent and objective system for dealing with *re*-appointment decisions. In Ontario, adjudicator performance evaluations were expressly called for by the Wood Task Force.[17] They were also recommended in SOAR's well known report on performance management.[18] In some agencies, the evaluation of the performance of individual adjudicators has become a regular routine. Amongst federal agencies, the Immigration and Refugee Board is a prominent example of an agency known to be active in continuously evaluating the performance of its individual members.

If performance standards - and performance measures - are to be meaningful, there must be effective and appropriate *evaluation* strategies. Thus, for the assessment of an Ontario agency's performance, *Everyday Justice* recommends annual reports of performance data ***189** relevant to the published performance measures, including, it may be particularly noted, reports on *annual* client satisfaction surveys. *Everyday Justice* makes no reference to the evaluation of individual adjudicators, however, and, thus, has nothing of a concrete nature to suggest on that subject.

Clearly, we are not accustomed to structured systems of performance evaluation in our justice systems. And, indeed, if we were thinking of introducing them in the context of the *judicial* justice system, there might well be general agreement that there was something outlandish about the idea. However, as has been noted above, the administrative justice system is largely missing the innate influences on performance excellence found in the judicial justice system. Accordingly, if the administrative justice system is to aspire to excellence, sophisticated performance evaluation strategies will be necessary.

The problem with performance evaluations of either agencies or individual adjudicators, however, is not only to know how it is to be done, but, also, to determine who is to do it.

If the performances of either adjudicative agencies or individual adjudicators are to be routinely evaluated, it is trite law that the principles of independence and autonomy will have to be respected. Respect for those principles must, therefore, be an essential condition in the design of evaluation systems. In the author's opinion, it is difficult to imagine how systems for the evaluation of the performance of individual adjudicators - or of the agencies themselves - could possibly satisfy that condition if they are devised and administered by the government or its contractors, or by the agencies or agency chairs or their contractors.[19]

***190** It would seem, therefore, that, at least in the post-*Everyday Justice* era in Ontario, there should be an essential role for independent, expert, performance evaluation services. A Centre, as proposed in this paper, would be a uniquely appropriate vehicle for such services.

In the area of performance evaluation, a Centre's research and design department would presumably be focused on the development of creative strategies for the evaluation of both agencies and individual adjudicators - strategies that would be effective but, at the same time, compatible with the applicable principles of autonomy and independence. This might conceivably include, for example, examination of the concept of a formal "accreditation" of agencies.

Hospitals are a possible model in the latter respect. In Ontario at least, a condition of a hospital's continued operation is that its "accreditation" as a hospital be renewed every few years. The accreditation is renewed through a process in which every aspect of the hospital's operation is inspected by an independent, expert body, and judged against agreed criteria.

The ISO system of accreditation of organizations that has become a recent feature in the international business community and, now, even amongst local law firms, is another possible model for certifying quality.

For Ontarians, yet another, closer-to-home and more recent precedent is the Ontario Legal Aid Plan's quality assurance program for community-based legal aid clinics. While not specifically so designated, ***191** that quality assurance program is, effectively, an accreditation program for clinics.

Evaluation strategies to be studied might also include strategies based in part on periodic surveys of performance - surveys of clients, as recommended by *Everyday Justice*, and also, perhaps, surveys of counsel.

One must acknowledge, of course, that, at first blush, the idea of surveying counsel or their clients as to their level of satisfaction with particular experiences before specified agencies seems inherently incompatible with the principle of adjudicators' and agencies' independence. Nevertheless, it should, in the author's view, be possible to devise satisfaction survey strategies that through the use of statistical devices for rendering the data anonymous would overcome those obvious concerns.

A precedent of some considerable interest in this latter respect is a Nova Scotia, judge-initiated, pilot project for the evaluation of the adjudicative performance of members of the Nova Scotia bench. This project relied on the formal, routine surveying of the views of counsel who had appearing before the judges whose performance was being evaluated. [20]

C. Agency Procedures, Process And Rules.

What is contemplated under this title is a central collection of information relating to agency procedures, process and rules - both statutory and *ad hoc* - in both domestic and foreign jurisdictions, and of the domestic and foreign jurisprudence concerning their application of such procedures, process and rules. The existence of such a collection would be an impetus to research and to the identification and analysis of best practices.

D. Management and Information Technology — Best Practices.

A central collection of information — both domestic and foreign — respecting management and information technology strategies and techniques, including, particularly case management strategies and techniques, would be an invaluable resource. Its very existence would ***192** influence the proliferation of management best practices throughout the system.

E. The Pathology of Agency Design.

What is contemplated here is research into the systemic, design lessons to be found through studying high profile failures in domestic and foreign administrative justice systems. Tracking and assessing the agency failures reflected in judicial review jurisprudence would also be an obvious and valuable activity.

F. Appointments Policies.

The "*Everyday Justice*" report tells us that when Ontario's Agency Reform Commission asked agency users and agency members and staff, "how do we make agencies serve people better?" and, "how do we make agencies more accountable?" the most frequent response was: "Make sure you get and keep good people". [21]

There are numerous obstacles to getting and keeping good people in the public sectors of administration justice systems as they are presently configured in Canada, but it is not necessary to detail them here. Hopefully, in Ontario, the work of the Allen Committee will prove capable of resolving many of these obstacles. There will, however, always be problems with which the research function of a Centre could clearly help.

To take one example, there is, as far as one knows, no current source of objective and credible, comparative salary and benefits data for agency chairs and members.

Other appointments-related research activities might include maintaining files of job descriptions, and job classification precedents from within the province in question and from other jurisdictions; conducting regular, confidential, job satisfaction surveys - and exit interviews -amongst chairs and members; conducting labour market surveys amongst categories of people in the government

and private sectors of the labour market from which appointments to agencies would typically be made; maintaining up-to-date demographic data on incumbent agency members and chairs; tracking selection and appointments policies and practice in the province and in other domestic and off-shore jurisdictions; etc.

***193** A current example of the kind of research that is needed and has been largely missing may be seen in a recent report on British Columbia's administrative justice system. [22]

(iii) The Championing of Constructive Change

It is apparent that if Centres were to be successful in their mission of pursuing in the public interest sound policy, good design and excellent performance in the administrative justice system with which they are concerned - if they were to become, in short, champions of constructive change in those systems - they would have to find successful strategies for influencing change in the systems' policy, design, and performance. Some obvious examples of strategies that might be devoted to that mission are:

- Publishing or supporting professional or academic papers and/or periodic newsletters or reports based on the information collected by its research department.

- Identifying and promoting cases of best practice.

- Advising governments on administrative justice policies and policy proposals

- Organizing workshops, roundtables and conferences on administrative justice system issues The latter activities would need to be organized in collaboration with other organizations and would be focused on the public, and particularly the user communities, as well as on the bar and members of the public service.

• Public analysis and comment.

(iv) Education and Training

It is now acknowledged, at least in Ontario, that training in the public sectors of administrative justice systems has rarely been adequate. In their budgeting of agency resources, governments have not seen training as a priority. *Everyday Justice* recognizes the need for additional training, and new policies in that respect are to be developed and, presumably, new resources made available.

***194** There is an issue as to where control of training programs for adjudicators should be lodged. Central government control of training seems incompatible with an appropriate environment of independence. Governments, on the other hand, worry that agencies themselves are not sufficiently objective for the role. Agencies are also perceived to have a conflict of interest in their promotion of more training funds.

Provincial Centres, working in collaboration with provincial governments and, in Ontario, with SOAR - and, in other provinces, with SOAR's counterparts - and with the agencies, might provide an appropriate, professional home for such programs.

A. Adjudicator Education and Training, Including Continuing Education.

This activity should extend beyond orientation and threshold qualification training and include continuing professional education. Centres might run their own programs or collaborate in, or sponsor or support, the programs of others. There are, of course, existing programs. For instance, in Ontario, SOAR now offers a five-day, adjudicator training program for persons who have been appointed to agency adjudicative positions, and other programs that are open to all adjudicators. In B.C., the Council of Administrative Tribunals provides similar programs, and similar programs are also being offered to federal agency members. The author is not familiar with what is being offered in other provinces or territories, but no doubt similar training initiative are to be found there. The CIAJ [23] provides agency-specific in-house training courses, as do some private enterprise training organizations.

Centres would also be well placed to offer - or to sponsor - comprehensive educational and training programs for persons seeking to enhance their qualifications *in expectation* of a possible appointment to agency, adjudicative positions. Successful completion of such programs would be acknowledged by prestigious, Centre certificates or diplomas. This might be accomplished in partnership with one or more community colleges and, in Ontario, would presumably be developed in collaboration with SOAR and other organizations. Indeed, a Centre-sponsored “college” of administrative justice might be a future possibility.

***195** Also, viewing the educational possibilities from the perspective of a national network of Centres, one can readily imagine a national, "virtual" administrative justice college, sponsored by the Federation of Centres, located largely on the internet, and utilizing various "distance" education strategies.

- Management training courses for agency chairs and senior agency staff

- Courses on best practices in case management and agency-related IT

(v) Direct Services

There are a number of significant services which Centres for Administrative Justice would be uniquely positioned to offer. These services would contribute to the Centres' mission and goals, as well as constituting potential sources of operating revenue.

A. Evaluation Services.

Centres would be well placed to offer reviews of the structure and performance of individual agencies, at the request of either the agency or the government. It is a service that would compete with review services that have been offered in the past by consulting firms. However, a Centre's evaluation service would have the advantage of being conducted by an organization with specialized expertise in the adjudicative environment, and with a unique degree of independence, objectivity, and credibility.

B. A Centre-Sponsored, Agency Accreditation Program.

For a Centre to sponsor and administer an agency accreditation program, a provincial government would have to be sold on accreditation as a principal element of its quality assurance policy for agencies. As mentioned above, Ontario's legal aid clinic system's new, *de facto* accreditation system would seem to offer a useful - arguably, for Ontario, a telling - precedent.

C. Designing and Administering Systems for the Evaluation of the Performance of Individual Adjudicators.

*196 D. Satisfaction Surveys.

One can imagine Centres designing, implementing and administering arms-length, client satisfaction surveys, such as those recommended by the *Everyday Justice* report. Surveys of counsel might also be included.

There is a presumptive credibility problem with satisfaction, or performance surveys designed, administered and evaluated by the agencies themselves, and an independence problem with surveys administered by governments, or by their contractors. It is arguably only an institution, like a Centre, at arms length from both the agencies and the government, which would be appropriate and credible as the administrator of such surveys.

E. Grievance Procedures for Individual Adjudicators.

If systems established for the routine evaluation of the performance of individual adjudicators are to be reconciled with the principles governing independent and autonomous adjudication, some form of recourse for adjudicators to an arms length arbiter would seem to be essential. A Centre would be a natural home for an adjudicator grievance process. [24]

F. Independent Inquiries into Special Problems.

What is in contemplation here is the conduct by the Centres of expert and arms length special inquiries undertaken at the request of an agency or government. The need for such inquiries arises when something particular appears to have gone wrong in a major way in a particular agency or particular case. A number of such inquiries have been necessary in the recent past - certainly in Ontario. Inquiries assigned to a Centre could include both informal inquiries, and inquiries established under public inquiries statutes.

In the past, in Ontario and elsewhere, such inquiries have appeared to have been typically organized on an *ad hoc* basis and have often been assigned to government officials or academics. Agency experience or expertise has typically not been represented, conflicts of interest have on occasion been present, and the person or persons doing ***197** the inquiry have not always had the authority or standing that would give their ultimate report the necessary weight.

A Centre, with its non-partisan, high profile reputation, independence, and expertise, would be well positioned to take on such inquiries. And, from a government perspective, having a credible vehicle for such inquiries ready to hand would often prove useful in defusing burgeoning controversies.

G. A Centre-Operated Public Complaints Process.

There is a long-recognized need for a formal, independent process of dealing routinely and appropriately with public complaints about the conduct of individual adjudicators or the performance of agencies in individual cases. A Centre for Administrative Justice would be an appropriate and convenient vehicle for such a process. Presumably, however, specific legislative

authority would be needed. Centre involvement in the design and oversight of such a process lodged elsewhere would be an alternative.

H. Job-Classification Services.

The need for this service from an institution like the Centre would arise whenever a government introduced a system-wide salary and benefit policy. The principle of independence should militate against job classification analyses being performed by a government. Analyses by individual agency chairs are likely to suffer from a credibility problem, and would, in any event, be incompatible with a system-wide policy.

I. Mentoring and Mediation Services for Agency Chairs and Senior Members of Host Ministries.

It is known that, in the ordinary course of the working relationships between an agency, or its chair, and senior members of the agency's host ministry, misunderstandings and difficulties sometimes arise. The availability of a mentor who is expert, objective and trust-worthy and, in serious cases, of the services of an expert mediator, would be invaluable aids, particularly, perhaps, for agency chairs.

For chairs and senior ministry officials coming new to the world of administrative justice agencies, routine confidential access on an informal basis to experienced and expert consultants would also be extremely useful.

*198 (f) The Centre's Possible Role in the Private Sector

(i) Introduction

As we know, the delivery of ADR services by mediators and arbitrators is unregulated. Anyone - lawyers and others - are free to offer ADR services to the public. This is not to infer shortcomings in the work of current practitioners. It is only to note a circumstance that from a public interest perspective seems innately problematic, in the long term.

In Ontario, there is one arbitration/mediation system in which private-sector practitioners are active which is regulated. It is the system of arbitration/mediation in the field of labour relations. It is a system that might be taken as offering some evidence of the inherent need for regulation of private-sector mediators and adjudicators generally.

In the Ontario labour relations system, the consumers of ADR services - the disputing parties in grievance arbitration - are sophisticated and well-informed, and they enjoy a relatively equal power relationship. As a group, they also have the cohesion and political clout to largely control the structure of their dispute resolution systems. In that environment of choice, one finds a statute-based, party-controlled, *de facto* licensing system.

In the author's view, this contrast between the regulatory control deemed necessary by astute, private users of dispute resolution services in the field of labour relations and the absence of any regulation or control over ADR services in other areas of dispute resolution in Ontario is instructive. Most private users of ADR services are not, by and large, well informed or technically sophisticated about ADR matters. Neither do they typically have the group cohesion that would permit - nor the influence that would be required to insist on - a regulated system. Thus, the choice of a licensing system by consumers of ADR services in the labour relations field who are informed and who do have that cohesion and influence, rather implies the possibility of an inherent, if unarticulated, similar need in other areas of dispute resolution.

Indeed, in Ontario, at least, recognition of that need has already led to the formation of various professional associations of ADR practitioners focussed on introducing some structure and regulation in the field. The CBA-O, ADR Section's code of conduct is an instance of that activity. The work of the Arbitration and Mediation Institute of Ontario is another example.

***199** However, these are voluntary associations with no licensing or disciplinary powers. Neither are they likely to have the resources that would support a high level of regulatory activity, even if such activity were otherwise feasible. Also, their credibility in such matters is inherently limited by their dependence on consensus amongst their own members, all of whom will be seen to have personal interests at stake.

One knows, however, that the work of these organizations has been admirable. This is certainly true in Ontario. New Centres for Administrative Justice would, therefore, have to approach any quality-assurance role in the private sector from a position of great respect for existing accomplishments, and with a commitment to collaborating closely with existing organizations. One can argue, however, that a Centre's independence and standing, and its broadly representative governance structure, would uniquely position it to play a role or roles in this area that the professional associations themselves might well find of inherent value.

In the private sector of the administrative justice system, a Centre's possible role may also be usefully organized into the same four separate streams of activities as those proposed for its role in the public sector, viz:

- Research and Design;

- The Championing of Constructive Change;

• Education, and Training; and

• Direct Services.

(ii) Research and Design

• The study, generally, of private sector justice issues.

• Periodic, sector-wide, client/counsel satisfaction surveys.

• Maintaining statistical data on key indicators in the private sector.

• The central collection of studies, reports and jurisprudence relating to voluntary, professional certification regimes.

(iii) The Championing of Constructive Change

• Publishing or supporting an academic/professional, peer-reviewed journal on private sector administrative justice system issues.

***200** • Promoting the acceptance and credibility of professional standards.

This activity would involve a Centre collaborating with the professional associations in the development and/or promulgation of appropriate standards. One can also imagine a role for a Centre as an official sponsor of such standards.

- Exploring Centre-supported, volunteer certification systems.

Successful, volunteer certification systems require a high-profile "certificate" and a credible mechanism for enforcing standards relative to the performance of individual certificate holders. The possible involvement of a Centre, in collaboration with professional associations, in a certification system and, perhaps, in the operation of the enforcement mechanisms of such a system, might provide a new starting point for the establishment of such a system.

- Developing a proposal for a systemic "legal aid" strategy for ADR services.

(iv) Education and Training

- Adjudicator education and training, including continuing education.

This activity might involve a Centre running its own programs or collaborating in or supporting the programs of others. There is, however - certainly in Ontario - currently a high level of such activity organized by professional associations and on a private-enterprise basis. This is particularly true with respect to mediation and other ADR skills. A Centre's involvement in this area would presumably, therefore, not be a high priority.

- Publishing or supporting professional newsletters.

(v) Direct Services

- The administration of a voluntary certification system.

• The hosting and administration of a complaints process (including, perhaps, a fee taxing process - for unsatisfied clients).

*201 6. FUNDING

How are such Centres to be funded?

In addition to whatever financial support the sponsoring organizations might be able to provide, one would hope that the intrinsic merits of the proposal, its significance for the health of a major component of our society's justice system, and the credibility imparted to the project by the stature of the sponsoring organizations, would attract significant inaugural money from one or more foundations. It might also be possible to mount a successful campaign for sustaining memberships within the bar, amongst the individual members of the administrative justice system, and within the user communities.

Once the organization was funded at a basic operational level for an inaugural period of, say, three to five years, the revenue opportunities inherent in its educational activities, and direct services, would generate operating funds that might eventually be sufficient to make it self-supporting.

It may also be possible to imagine ways of structuring government financial support - were it available - in such a way as to not compromise a Centre's independence.

7. ONTARIO PROGRESS REPORT

In Ontario, a small group of individuals with an interest in the idea of a Centre for Administrative Justice for Ontario have met to explore the merits of the idea and to consider how it might be implemented. The group has formed itself into an Interim Advisory Group for what is being called the “Centre Project”.

The *ad hoc* Advisory Group for Ontario's Centre Project is currently comprised of the following categories of members. (The author's conference paper listed the names of the participants but in contemplation of the publication of the paper it seemed appropriate to remove the personal information.)

• The Chief Executive Officer of a major industrial corporation.

• Three former Deputy Ministers.

• Two leading administrative law counsel.

• The President of a research institute.

• A former Ontario cabinet minister.

• Two former chairs of Ontario administrative justice agencies.

***202** • Two leading members of the ADR bar.

• The heads of two national unions.

• The senior member of a management labour law firm.

• The General Counsel of a national union.

- The President and Chief Executive Officer of an association of industrial corporations.

- The head of an association of major employers.

It should be noted that while members of the Centre Project's Advisory Group endorse the concept of a Centre for Administrative Justice - basically as it is outlined in this paper - they have not had an opportunity to consider the paper itself. The analysis and articulation of the need for a Centre that appears here is entirely the author's own responsibility, as are his imaginings concerning the range of potential Centre activities.

It can also now be reported that following discussions with the CBA-O Administrative Law Section Executive and representatives of other CBA-O Sections, the Administrative Law Section of the Ontario Branch of the Canadian Bar Association has approved the Centre concept in principle. A number of its members have volunteered to work with the Centre Project in the development of a Centre proposal.

Since the original presentation of this paper in June, 1999, little progress has been made towards the actual operationalization of the Centre concept. The Ontario's Centre Project's Steering Committee is now focused on the strategy of having an Ontario Centre undertake a small number of fundable, finite research and education projects of demonstrable interest and value. It is felt that a series of such projects will lead, in time, to a better appreciation and acceptance of the broader concept.

*203 APPENDIX

The following is a summary of the historical support for the concept of central co-ordination of administrative agencies. As far as the Canadian reports are concerned, the summaries are based on the summaries written by Margot Priest in her seminal article, Structure and Accountability of Administrative Agencies, Law Society of Upper Canada, Special Lectures, 1992.

Canadian Bar Association, “Task Force Report on the Independence of Federal Administrative Tribunals and Agencies in Canada”, September 1990 (Ratushny Report)

This report, written by Professor Ratushny, was primarily directed at the issue of the independence of administrative tribunals, and hence studied the appointment process, terms and conditions of appointment, training, codes of conduct, performance appraisal and evaluations and political control.

One of the recommendations was the enactment of a *Federal Agencies and Tribunals Act*, which would establish the Office of Commissioner for Federal Tribunals and Agencies and a Council of Tribunal and Agency Heads

The Commissioner would: ensure the institutional independence and efficient of bodies falling under the Act; maintain public lists of vacancies, establish job descriptions and standard application forms, and screen candidates; examine the sharing of resources; and conduct performance reviews for ascertaining agency quality, efficiency and.

The Council would: hear appeals on non-renewal of appointments; set policy for training; write a code of conduct; mediate disputes between chairs and members; investigate complaints from the public; and handle discipline

"Report of the Working Group on Administrative Tribunals", 1987, Quebec (the Ouellette Report)

The Ouellette Report proposed a Council on Administrative Tribunals to supervise tribunals, address training, discipline, recruitment and evaluation of members, to make recommendations for appointments, to make rules of procedure and a code of ethics, and to investigate complaints against members. This report was the forerunner of the creation in Québec of a single Administrative Tribunal and a Council. See below.

"Directions, Review of Ontario's Regulatory Agencies" (1989), Robert Macaulay, Q.C. (the Macaulay Report)

Macaulay recommended the creation of a co-ordinating body for regulatory (as opposed to advisory or operational) administrative agencies, which he proposed be called the Ontario Council of Administrative Agencies. For ***204** Macaulay, the concept of regulatory agencies included agencies that exercised adjudicative functions.

The Council was to report directly to Office of the Premier, the Attorney General, Management Board or a Committee of Cabinet on agencies. It was to have an advisory role only, except with respect to rule making.

The Council was to have its own quarters, including hearing rooms, library, etc. There was to be one full-time Chair, with part-time members drawn from chairs of administrative agencies, the public, the bench, the Law Society, academia, the senior civil service, the Ministry of the Attorney General and Management Board, plus a small staff.

The Council would be involved in:
• training;

• co-ordinating appointments and reappointments;

• establishing rules of procedure for agencies;

• doing performance appraisals;

• studying and making recommendations for remuneration and tenure;

• centralizing hearing rooms, equipment and library;

• developing conflict of interest guidelines;

• monitoring funding for interveners;

• monitoring the need for and production of annual reports;

• looking into and conducting hearings into matters of public concern in the area of administrative law, and reviewing draft legislation.

Ontario Law Reform Commission, "Fundamental Reforms to the Ontario Administrative Justice System in Rethinking Civil Justice: Research Studies for the Civil Justice Review", 1996 (written by Margot Priest)

Priest reviewed for the Law Reform Commission previous reports recommending the creation of some form of central body. She concurred in this recommendation. She envisioned an Administrative Justice System Council which would deal with: the investigation of complaints; discipline; conflicts between agencies and government; performance appraisals; and policy and research related to the administrative justice system.

She noted that the existence of a Council would reinforce the coherent nature of the system and raise its profile with the public and with government.

***205 Government Task Force on Agencies, Boards and Commissions, "Report on Restructuring Regulatory and Adjudicative Agencies", February 1997 (The Task Force was chaired by Ontario MPP, Bob Wood, and the report is known as the Wood Report)**

The Wood Report advocated a new agency system: an integrated, commonly managed network of agencies delivering administrative justice in a clear and consistent framework of accountability

All agency chairs would report to one Minister of the Crown and be accountable to that Minister for the agency's performance and the management of it funds. An administrative "Chief" working with a committee of all agency chairs would together manage the financial

and administrative operations of all agencies. Agencies would share services such as accommodations, registration, translation and interpretation services, a library and research service, general office administrative ensure common or shared services. The central committee would review and apply performance standards, and standardize procedures.

"Everyday Justice: Report of the Agency Reform Commission on Ontario's Regulatory & Adjudicative Agencies", April 1998. (The Commission was chaired by Ontario MPP Garry Guzzo and the report is sometimes referred to as the Guzzo Report)

Everyday Justice made a number of recommendations that support the concept of central co-ordination of administrative agencies. These included the following: agency sharing of resources in the development of best practices; common technology infrastructure; uniform base, case management practices; common staff training and development; a reformed public appointments policy (to be developed by the Public Appointments Secretariat); a screening committee of recognized, reputable people established by the government to evaluate all applicants for new appointments against selection criteria and to create pools of qualified candidates; basic administrative services (such as finance and human resources) to be provided through the mandatory government shared services bureau when it is implemented; specialized services such as mediation, adjudication and legal services to be shared within families of agencies; a sector-wide central library; common education and training; common business standards; and public/private partnerships.

Implementation of the Centre Concept

Québec

In 1996, Québec passed *An Act Respecting Administrative Justice*, which integrated most of the existing tribunals into a single institution: The Administrative Tribunal of Québec. The Act was implemented in 1998. The ***206** Tribunal consists of four divisions: Social Affairs, Immovable Property, Territory and Environment, and Economic Affairs. The legislation also created a Council on Administrative Justice. The Council is to advise on procedure before the Administrative Tribunal and develop an ethical code of conduct for members.

Note that the impact of various provisions of the *Québec Act* on the independence of Tribunal adjudicators was challenged in the Québec Superior Court by the Montreal bar. See note 19, *supra*, for a brief report on the Court's historic decision.

United Kingdom

The U.K. Council was created in 1958 by the *Tribunals and Inquiries Act*. It is composed of 16 part-time members drawn from all walks of life, including the Civil Service reporting to the Lord Chancellor. The Council is advisory and consultative. It has, however, the power to review

the constitution and workings of the tribunals and report on them, to consider matters referred to it, either by way of statutory inquiry or other procedure, and to make recommendations concerning the appointment of members of agencies. No rules of procedure may be made or changed without consultation with the Council. The Council must be consulted before a tribunal is removed or added.

United States

The Administrative Conference of the United States was created in 1964. It began operations in 1968 but was disbanded in 1995. It had 101 members including agency chairs, civil servants and public members. The Conference consisted of an Assembly (all members), a small Council, with a full-time Chair and staff. The Conference operated by recommendation and persuasion. It had no investigative powers. Its mandate was to study federal agency organization, procedure and management, including the efficiency and fairness of the processes by which federal agencies administered regulatory, benefit and other government programs.

Australia

Administrative Review Council (ARC), created by the *Administrative Appeals Tribunal Act, 1975*. ARC is comprised of the President of the Appeals Tribunal, the Ombudsman, the Chairperson of the Law Reform Commission and three to ten part-time members with extensive experience in public administration or administrative law and appointed by the government. ARC's mandate as set out in s. 51 of the Act includes:
• monitoring administrative decisions that are not subject to review by court or tribunal;

***207** • making recommendations to the Minister whether those decision should be reviewed;

• inquiring into the adequacy of the law and practice relating to the review by courts of administrative decision and making recommendations to the Minster;

• inquiring into adequacy of procedures used by tribunals and to make recommendations to Minister; and

• making recommendations to the Minister as to the manner in which tribunals should be constituted.

Footnotes

1 S. Ronald Ellis, Q.C., administrative justice practitioner and labour arbitrator, former chair of the Workers' Compensation Appeals Tribunal and a past president of the Society of Ontario Adjudicators and Regulators. (E-mail address: srellis@idi-rect.com).

2 In a January 2000 address to an Ontario adjudicator training course, Mr. Peter Allen, the General Manager for the Public Appointments Secretariat in the Premier and Cabinet Office of the Ontario government, offered an estimate of the total number of rights-determining decisions currently being issued each year by the adjudicative and regulatory agencies for whose appointments his Secretariat is

responsible. The figure was 800,000 decisions. Mr. Allen emphasized that this figure reflected only a rough estimate. It is also apparent that a large proportion of that total number of decisions will be non-contentious - for example, decisions to grant workers' compensation benefits where entitlement and quantum are not disputed. Nevertheless, this figure, which, it may be noted, is exclusive of the rights-determination decisions by *federal* agencies operating in Ontario, provides signal confirmation of the ubiquitous and pervasive role of administrative justice system agencies in the everyday life and business of Ontario residents.

3 Robert W. Macaulay, *Directions: Review of Ontario's Regulatory Agencies* (Toronto: Management Board of Cabinet, 1989), [hereinafter Macaulay].

4 See R. Ellis, “Everyday Justice in Ontario, The Guzzo Report - an Assessment” (1999) 7 R.A.L. 49 at 52.

5 For a detailed history of those analyses prior to 1993, see M. Priest, “Structure and Accountability of Administrative Agencies”, in *Administrative Law: Principles, Practice and Pluralism: Special Lectures of the Law Society of Upper Canada* (1992).

6 Ontario, *Report on Restructuring Regulatory and Adjudicative Agencies* (Government of Ontario Task Force on Agencies, Boards and Commissions, 1997) (Chair: B. Wood).

7 Chaired by Mr. Garry Guzzo, MPP, Ottawa-Rideau. For a summary and analysis of this significant report see note 4.

8 Conference of Ontario Boards and Agencies - an annual two-day conference presented by the Society of Ontario Adjudicators and Regulators.

9 They are, the report says, “an important part of the justice system in Ontario”. See *Everyday Justice*, supra note 4, Introduction at 1.

10 *Ibid.*

11 For an instructive reminder of that endemic neglect, see Hawkins & Shoemaker, “Reputational Review II: Administrative Agencies, Print Media and Content Analysis” (1998) 12 C.J.A.L.P. 1. See, also, Priest's apocryphal “Agency from Hell” (*supra*, note 5, at 11), and the wry comment observation at the time by the noted Ontario administrative law counsel, Andrew Roman, that that agency “is not from Hell, but from Ontario”. *Ibid.* at 64.

12 “A Mercenary Judiciary?” *Law Times* [editorial] (October, 1997).

13 *Everyday Justice, supra* note 4 at 12.

14 In point of fact, the Commission does not use the word “system”. It prefers the word “sector”. However, its concern with matters involving the central co-ordination of the sector makes it clear that it does indeed perceive the sector as an integrated system. For a comment by this author on the Commission's reluctance to use the word “system”, see the article referred to in footnote 4.

15 *Everyday Justice, supra* note 4 at 18.

16 Society of Ontario Adjudicators and Regulators.

17 See note 6.

18 SOAR, “Towards Maintaining and Improving the Quality of Adjudication: SOAR Recommendations for Performance Management in Ontario's Administrative Justice System” (1996) 9 C.J.A.L.P. 179.

19 Six months after this paper was first presented to a conference in Toronto, this hypothetical issue suddenly assumed substantive form. On December 16, 1999, the Montreal Bar's application to the Québec Superior Court for a declaration that a number of key sections of Québec's new Law on Administrative Justice were void, inoperative and of no effect, was decided. They were

void, the Bar had said, because they did not satisfy the law's requirements for the independence of adjudicators. The new Law on Administrative Justice, proclaimed in 1998, had created the Administrative Tribunal of Québec (T.A.Q.). Amongst the sections of the new statute challenged by the Bar were those dealing with the mechanisms the statute provided for evaluating the performance of individual T.A.Q. adjudicators, for determining their pay scales, and for deciding whether or not their term of appointment would be renewed. The Québec Superior Court [*Barreau de Montreal* c. *Québec (Procureur général)*, (16 decembre 1999), no. C.S. Montreal 500-05-039664-980 (Qué. S.C.), per Justice Rochon] largely accepted the Bar's views concerning the negative impact of these sections on the adjudicators' independence, and declared these sections, amongst others, null, inoperative and of no effect. The declaration was suspended for 180 days to give the Québec Assembly an opportunity to make adjustments. On January 18, 2000, the Québec government moved to appeal the decision. The reason the T.A.Q. decision is of particular significance at this point in this paper is because one of the major flaws the Québec Superior Court identified in the legislation was the combination of the T.A.Q. Chair's involvement in the evaluation of T.A.Q. members' individual performances and his or her involvement in the development of the recommendations to renew or not to renew their appointments. The issue of how the principles of adjudicator independence and autonomy are to be squared with Chair or agency evaluation of adjudicator performance is, accordingly, no longer of theoretical interest only, and the potential need for arm's length evaluation mechanisms has become more apparent. For the information about the T.A.Q. decision, the author has relied on an early, English-language summary of the decision written by Brian Goodman, Special Counsel, Policy Projects, Ontario's Ministry of the Attorney General.

20 See D.H. Poel, “Nova Scotia Judicial Development Project, A Final Report and Evaluation”, (School of Public Administration, Dalhousie University: Halifax, Nova Scotia, August 1997).

21 *Everyday Justice, supra* note 4 at 15.

22 Bryden & Hatch, “British Columbia Council of Administrative Tribunals Research and Policy Committee - Report on Independence, Accountability and Appointment Processes in British Columbia Tribunals” (1999) 12 C.J.A.L.P. 235.

23 The Canadian Institute for the Administration of Justice.

24 However, if a Centre were also engaged in the administration of adjudicator performance evaluation systems, an operational level conflict would arise which the system design would have to address.

13 CJALP 171