How Do I Implement Proactive and Proportionate Systems to Manage and Resolve Cases?

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A. What is Proportionality and Why Does it Matter?

For most Canadians, the legal issues impacting their lives will be resolved by a tribunal and not by the courts.

Tribunals vary greatly, having different mandates and statutory schemes tailored to the specialized areas in which they adjudicate. However, despite these differences, all tribunals have been specifically designated to adjudicate in an identified area instead of the courts. As a result, tribunals are generally intended to offer faster, less formal and more accessible adjudication and are critical to the promotion of access to justice.

Although access to justice can be defined in more than one way, in broad terms, access to justice is concerned with whether “users” of a justice system are able to participate in the system in a meaningful way and whether their participation is impeded due to the complexity, length of time, or cost of the adjudication.

Proportionality is critical to the promotion of access to justice. Proportionality is achieved when the time and expense required to adjudicate an issue is relative or proportionate to what is at stake.[2] For access to justice to be realized, adjudicative procedures must be tailored to the needs of a particular case. Without proportionality, individual matters are unnecessarily delayed and complicated, often leading to parties giving up on their claims or not able to fully participate. More generally, a lack of proportionality can strain tribunal resources and lead to inefficiencies and systemic issues, including delay.

In *Hyrniak v. Mauldin*,[3] a unanimous seven-member panel of the Supreme Court of Canada stated that a culture shift in the civil justice system is required to achieve access to justice. The Court identified several specific changes required for the culture shift to be successful, including recognition that:

- Proportionate models of adjudication can be fair and just. A full trial is not needed in those cases where a more proportionate, expeditious and less expensive model can also achieve a just result;

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[2] Honourable Coulter A. Osborne, Q.C., “*Summary of Findings and Recommendations of the Civil Justice Reform Project”*, (November 2007), [Osborne Report] Part 19, “Proportionality and Costs of Litigation.”
[3] 2014 SCC 7 (CanLII).

- Alternative methods of adjudication are no less legitimate than conventional trial procedures, and the best way to adjudicate an issue will not necessarily be the most complicated or painstaking option; and
- Complicated, undue procedures can actually prevent disputes from being adjudicated fairly and justly by resulting in unnecessary delay and costs.[4]

Overall, the procedures used to adjudicate must fit the nature of the claim: “If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.”[5] At the same time, the Court emphasized that neither fairness nor justice can be compromised in the pursuit of promoting access to justice. The need for a culture shift also does not alter the necessity of a decision-maker having confidence that she or he can find the necessary facts and apply the relevant legal principles when adjudicating a matter.[6]

The principles articulated in the *Hryniak* decision have been found to be even more applicable to administrative agencies than the courts:

> What is true for the traditional civil trial system is even more applicable to the administrative tribunal system, which was designed to be a more expeditious and cost-effective process for the resolution of disputes.[7]

Administrative tribunals have relied upon the *Hryniak* decision when altering processes to simplify proceedings.

For example, the Ontario Labour Relations Board positively referred to *Hryniak* when upholding a procedural decision to limit oral evidence from witnesses. The Board found that the parties had an appropriate opportunity to present their evidence but the abbreviated manner of receiving the evidence also ensured the Board could issue a timely decision. The Board specifically stated that full oral evidence would have been costly and “literally added years to the hearing process without increasing the quality of the decision.”[8]

To be effective, proportionality must be incorporated into a tribunal’s entire adjudicative process from start to finish. Tribunals must be proactive before the hearing stage and identify potential issues in order to ensure that the right adjudicative approach is available and employed. Proportionate adjudication also requires commitment from not just tribunal administrators, staff and decision-makers, but representatives and parties as well.

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[4] *Hryniak* at paras. 2, 4, 24, 27, 28 and 32.
[5] *Hyrniak,* para. 29.
[6] *Hryniak,* paras. 23, 28 and 50.
[7] *Aiken v. Ottawa Police Services Board*, (“*Aiken*”) 2015 ONSC 3793 (CanLII).
[8] *United Brotherhood of Carpenters and Joiners of America, Local 27 v Donia Aluminum & Roofing Limited,* 2015 CanLII 39779 (ON LRB) at paras. 16 to 24.

The determination of what is proportionate involves consideration of both institutional factors, as well as specific barriers that arise in individual cases. These institutional and specific elements are considered in the next two sections. Ultimately, what type of adjudicative method or approach will be proportionate and fair in any particular situation will depend on the nature of the issues to be decided, the parties involved, and what the adjudicator ultimately determines is necessary to be confident in her or his decision.

B. What Does Proportionality Look Like? Some Institutional Considerations

In order to achieve proportionality in adjudication a tribunal's overall institutional adjudicative approach must be considered.

For many agencies, achieving proportionality will require moving away from traditional adversarial procedures as much as possible and using appropriate alternative tools in order to reduce formality, complexity, and delay. In general, traditional in-person hearings should be viewed more as a "last resort" rather than the "ultimate" end goal of an adjudicative process. However, the "appropriate" adjudicative tools for any particular tribunal will depend on a number of factors.

i. Statutory Mandate and Powers

As "creatures of statute", a tribunal's governing legislation ultimately controls the adjudicative approaches or processes that a tribunal can utilize. However, many tribunals are given broad procedural discretion, particularly with respect to the admission of evidence or ability to seek information on their own initiative. This freedom not only allows for innovative processes at the hearing itself, but flexibility when processing a claim as well. In general, for adjudication to be proportional, and relief to not be denied on the basis of minor technicalities, procedural and/or evidentiary flexibility, as well as powers of investigation, must be taken advantage of as early and as much as possible.[9] Tribunals should consider not just what they are allowed to do as expressly set out in their governing legislation, but also whether the legislation expressly prohibits them from adopting certain processes or adjudicative approaches.

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[9] Canadian Judicial Council*, "Statement of Principles on Self-Represented Litigants and Accused Persons*", (September 2006) [Statement] at 2 and 4. In a short and unanimous 2017 decision, *Pintea v. Johns*, 2017 SCC 23 (CanLII), the Supreme Court of Canada specifically endorsed the Statement established by the Canadian Judicial Council – see para. 4.

ii. Guiding Principles when Determining the Best Adjudicative Approach

Many tribunals employ neither purely "inquisitorial" nor "adversarial" approaches but instead are "hybridized", incorporating elements of both adjudicative methods.[10] However, not all "hybridized" adjudicative models are as well designed to promote proportionality and access to justice.

For example, it is not uncommon for a tribunal to have adopted a hybridized adjudicative model that is premised on a traditional adversarial model, with inquisitorial elements integrated at a later time. The application of an "inquisitorial gloss to a basically adversarial process"[11] can hinder a tribunal's ability to promote proportionality, and then relatedly, access to justice. This is especially true when inquisitorial elements are integrated into a larger adversarial model at different times and haphazardly, resulting in adjudicative processes that fail to work together cohesively and/or require parties to pivot back and forth between adversarial and inquisitorial positions.[12]

Further, although many tribunals often have broader investigative powers and greater flexibility to adopt non-adversarial approaches to adjudication than the courts, in many instances when a tribunal's "hybridized" model begins with an adversarial "backbone", the tribunal's overall approach to adjudication will often end up being fairly similar to a traditional adversarial court model.[13]

Some guiding principles when determining the best overall adjudicative approach to promote proportionality and access to justice include:

- A "one size fits all" adjudicative approach should be avoided: the procedures required in a complex claim are likely unnecessary when adjudicating a more straight-forward matter. Proportionate processes tailored to the needs of a particular case should replace court-like procedures imposed by traditional adversarial design as much as possible.[14]

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[10] For a discussion of different adjudicative approaches see Michelle Alton, "*Rethinking Fairness in Tribunal Adjudication to Best Promote Access to Justice*", (2019) 32 C.J.A.L.P 152 and cited resources.

[11] Robert Thomas, Chapter 3, From "Adversarial v Inquisitorial" to "Active, Enabling, and Investigative": Developments in UK Administrative Tribunals", in Laverne Jacobs & Sasha Baglay, eds, The Nature of Inquisitorial Processes in Administrative Regimes (Surrey: Ashgate Publishing Limited, 2013) at 61.

[12] Shannon Salter & Darin Thompson, *"Public-Centered Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunal*", McGill Journal of Dispute Resolution, Vol. 3 (2016 -2017), 113 [Salter & Thompson] at 116.

[13] Lorne Sossin, "Designing Administrative Justice", (2017), Osgoode Hall Law School, Legal Studies Research Paper Series, Research Paper No. 26, Volume 13, Issue 6 [Sossin], at 2 and David Mullan, "*Tribunals Imitating Courts – Foolish Flattery or Sound Policy?",* (2005), 28 Dalhousie L.J. 1 at 3.

[14] *Davies v. The Corporation of the Municipality of Clarington*, 2015 ONSC 7353.

- Typical “u-shaped” adjudicative processes should be avoided. One method to avoid this common pattern is to limit the need for parties to characterize their dispute in a highly adversarial manner at the onset of the adjudicative process.[15]
- “Dialogue” between the parties and (as appropriate) with decision-makers should be encouraged as early as possible. It is particularly beneficial to ask for general information at the beginning of the adjudication process on initial forms. This may not only help all participants understand the issues arising in a particular claim in a less adversarial manner, but allows for realistic assessments of claims by parties, tribunal staff, and decision-makers and resultantly, earlier and more responsive case management by the tribunal.
- Consider adjudicative options beyond just mediation and a “traditional” hearing in which oral evidence is presented. This includes:
  - Exploring different options for hearing evidence (written statements, affidavits, videos) and receiving submissions, and abandoning the perception of a strict written versus oral hearing dichotomy.[16]
  - Adopting active adjudication approaches, particularly when parties are unequally matched or there is only one party participating. This can include decision-makers not only being more interventionist and asking questions but also taking control of setting the issue agenda and determining what issues will or will not be considered in the proceeding.[17]
  - Exploring other models, such as “med-arb” in which the same decision-maker is assigned to mediate and then adjudicate a matter if it cannot be settled, with the consent of the parties.
  - Utilizing technology as well as alternative hearing formats, such as telephone or video conference, to adapt the adjudicative process to the needs of users.
- Explore whether modifications to certain standard procedures can be made in a fair manner to reduce time fulfilling certain procedural steps. For example:

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[15] A “u-shaped” adjudicative process is characterized by the parties typically spending a great deal of time preparing and characterizing their dispute in a highly adversarial manner at the start of a legal proceeding, followed by a lull of inactivity until the hearing approaches, when the parties must again spend a considerable amount of time and expense preparing and participating. This pattern of frenzied, adversarial activity contrasted with inactivity often necessitates duplicative work as parties and representatives are essentially required to prepare twice (or more) for the same matter – see Salter & Thompson at 120.

[16] The OLRB’s consultation procedure is an example of an adjudicative process that is less formal than a traditional hearing, with the decision-maker playing a much more active role and evidentiary rules being relaxed, although the precise format of the consultation will depend on the individual circumstances of a case – see http://www.olrb.gov.on.ca/english/hearing.htm#Consultation.

[17] This can be very important for cases with self-represented parties.

- Considering “asymmetrical” treatment of parties when one party is an “institutional litigant”[18] who regularly appears before the tribunal and is therefore familiar with the tribunal’s general processes and may not need to be consulted about every procedural issue.[19]
- Adopt an approach of granting certain types of requests without asking for submissions from the other participating parties.[20]

iii. “Structured Flexibility” and Enhanced Screening

Effective adjudication often involves striking a balance between certainty and consistency on the one hand, and flexibility and responsiveness on the other.

Flexibility is crucial to being able to successfully achieve proportionality in adjudication. When incorporating flexibility into adjudicative processes it is important to ensure that:

i. Parties have adequate certainty with respect to the adjudicative processes that will be utilized, and

ii. Similar issues will be addressed in a similar manner.

One way in which a tribunal can achieve both flexibility and consistency is through the adoption of “structured flexibility”. In general, “structured flexibility” involves establishing what types of tailored adjudicative options are appropriate to a tribunal’s general and specific circumstances of adjudication, and then, transparently explaining the underlying rationale for why a particular adjudicative approach will be utilized, as well as when the process might be varied depending on the specific needs of users.

For a structured flexibility approach to be successful, comprehensive screening of cases is critical and will ideally be done as early in the adjudicative process as possible.

Proactive, enhanced screening specifically allows for:

- The identification and determination of preliminary issues that should be resolved before the merits of a case are determined, including procedural (ex. witnesses) and substantive (jurisdiction) issues.
- The identification of additional evidence that would be beneficial to obtain so that a full record is available to the decision-maker at the hearing, and

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[18] Institutional litigants include governments that routinely appear to defend the denial of a benefit, as well as other parties that frequently appear, such as employers and unions, as compared to individuals who seek relief on a one-time or at least infrequent basis.

[19] This can include making a procedural decision without seeking submissions from the institutional litigant but advising that they can raise concerns.

[20] For example, at the SST, when an adjournment request is made within a specific time of a hearing being scheduled, the request will typically be granted without seeking submissions from the other party.

- The ability to stream cases into different types of processes depending on the nature of the issues to be decided and/or the needs of the parties. Early identification of the appropriate adjudicative process to adopt or vary allows for the parties to be provided with earlier and better notice about how the adjudication will proceed and a better opportunity to participate. It also provides the tribunal with an opportunity to tailor the adjudicative approach early and limit the unnecessary use of resources.

Some of the potential "streams" that can be developed to help promote proportionality include:

- Enhanced Case Management (which is explained further below);
- Summary Hearing or Dismissal;[21]
- Expedited streams for issues that either require quicker resolution because of the nature of the issues to be decided and/or require less processing.

It is important to ensure that any resulting guidelines, rules of procedure, etc. setting out the available adjudicative methods do not compromise the independence of the tribunal's decision-makers. In addition, no matter what adjudicative approach is determined to be proportionate, in all cases, the process must always be fair and allow a just substantive outcome to be reached.

iv. Determining the Best Adjudicative Approach

There are two main factors to consider when determining the institutional adjudicative approach that will best promote proportionality and access to justice. Both of these factors are very specific to each adjudicative tribunal.

The first is the nature of the issues that are being adjudicated, including the evidence required for a decision-maker to reach an informed decision. For some tribunals, it will be perfectly reasonable to conduct the majority of their adjudication in writing, with oral hearings being the exception rather than the norm. For other agencies, proportionality might be best achieved through mostly oral hearings due to the evidence required and/or available resources. Not all issues need to be decided using the same adjudicative method.

The second factor is the overall needs of the "users" that the tribunal is serving. It is now well-established that a "user-centric" approach, in which the needs of users are prioritized over the preferences of an agency, is critical to the promotion of access to

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[21] For example, the Human Rights Tribunal of Ontario has developed a summary hearing process in order to determine at an early stage whether an application should be dismissed because it has no reasonable prospect of success: https://tribunalsontario.ca/documents/hrto/Practice%20Directions/Summary%20Hearing%20Requests.html

justice.[22] Consideration of broader user needs can also help an agency determine what types of adjudicative approaches will best support proportionality.

Some factors to be considered when assessing the broader needs of the users an agency serves include:

- Who are the parties that usually appear before the tribunal?
    - Are these parties typically vulnerable?
    - Are the parties "institutional" litigants?
- Are parties usually represented?
    - If yes, what is the general quality of representation?
- How many parties usually participate in proceedings (one or more)?
- If more than one party usually participates, is it typical for there to be inequality between the parties, specifically with respect to their ability to present evidence, make submissions and generally participate? Particularly relevant to this determination is whether one party is an institutional litigant.

It is important that the perspective of all parties, including those responding, are taken into account when assessing needs, and not just the views of the party seeking relief.

It is also important that any procedures that are introduced are used appropriately. While there is no doubt that certain tools such as summary hearings or enhanced case management can save time and resources in certain cases, if used inappropriately, they will only add time, cost, and complexity. Proportionality is also comparative: slow and expensive procedures can be proportionate when they are the most efficient option.[23] Ultimately the question to be asked is whether the expense and delay of a particular process is necessary for a fair process and just adjudication.[24]

C. Specific Barriers to Proportionality and Potential Solutions

The achievement of proportionality in adjudication also requires examination of individual cases, particularly those in which the amount of time and resources required to arrive at a decision appears to be out of balance with what is at stake. It is particularly important to be mindful of patterns that arise and how these common barriers that are impeding proportionality may be addressed. Some potential specific barriers that can

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[22] Honourable Warren K. Winkler, *"Professionalism and Proportionality*", (2009), The Advocates' Journal at 6.

[23] For example, for cases that are complicated either because of the nature of the issues being decided or the parties involved, or both, additional steps pre-hearing, such as case management conferences or equivalent, can actual save time later, including at the hearing but also with respect to decision-making. Additional process, when used in a deliberate manner, can promote proportionality.

[24] *Hyrniak*, paras. 32 and 33.

pose challenges to proportionality in individual cases, as well as potential responses, are set out below.

i. Self-Represented Parties – Lack of Understanding

Self-represented parties can face special challenges when trying to navigate the legal system on their own. Self-represented parties can also sometimes impose heavy burdens on decision-makers, opposing counsel, and the adjudicative agency itself.[25] One of the common challenges that self-represented parties can face is a lack of understanding about procedures and substantive issues. This lack of understanding can lead to delay and overall impede the ability of the self-represented party to participate in the adjudicative process.

Procedural and Substantive Information in Multiple Formats

The provision of information is critical to helping support meaningful participation and proportionality.

A tribunal's rules and procedures should be confirmed in writing as much as possible to enhance stability, predictability and overall accessibility, while also promoting transparency and procedural fairness. When possible, it is helpful for key information to be presented in multiple formats and languages.[26] Guides or checklists summarizing the steps in an adjudication process, or how a party should prepare, or what type of evidence is usually relevant in the adjudication of a certain type of issue, is also helpful, particularly when provided as early as possible and made publicly available, ideally on a tribunal's website. Monitoring and recording questions received can also help pinpoint what types of resources are needed – if parties frequently have questions about a

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[25] Statement, Preamble. While self-represented parties can pose challenges, it is important to not make assumptions about self-represented parties, recognizing that some self-reps are very able and even experienced litigants and are capable of competently representing themselves throughout adjudicative proceedings. The amount and type of assistance that a self-represented party requires will depend on a number of factors, including the nature of the issues being decided and the nexus between the individual's self-represented status and their need for assistance or accommodation - see for example, *Cole v. British Columbia Nurses' Union*, 2014 BCCA 2.

[26] For example, the Human Rights Tribunal of Ontario has developed a guide for mediation that presents information about mediation at the HRTO in a different format: https://tribunalsontario.ca/documents/hrto/Guides/Guide%20to%20Mediation.pdf Videos are also another great option to present information in a different way – see for example, the videos created by the Canadian Human Rights Tribunal: https://www.chrt-tcdp.gc.ca/resources/videos-en.html

particular procedure, developing a guide or checklist can proactively address this issue, reducing delay and misunderstanding.

In addition to providing information about procedures, there is value in providing substantive legal information that provides guidance about how issues are generally approached and determined by the tribunal to stakeholders. Certain legal issues arise relatively frequently in tribunal proceedings, such as abuse of process or issue estoppel. There are other legal issues that also frequently arise in the context of each individual tribunal's specialized adjudication. Making neutral information (and possibly even neutral submissions) about these issues publicly available allows both parties and decision-makers to review this information in advance of the hearing without having to make a specific request for assistance (usually from tribunal counsel). These types of materials cannot provide legal advice but can explain factors often considered in relation to specific legal concepts, as well as noting leading jurisprudence.

It is also important to consider what resources can be developed to support staff and decision-makers interacting with self-represented parties. This can include hearing scripts and checklists.

Staff and Tribunal Counsel Assistance

Another option to support the understanding and meaningful participation of self-represented parties (and consequently promote proportionality) is to designate certain staff to help users who require additional assistance. This can include staff assisting self-represented parties with the completion of forms or providing information about applicable laws and rules. As some parties will only have a representative at the actual hearing, this initial assistance can be very important in ensuring that matters proceed as efficiently as possible.[27]

Another possible option is using tribunal counsel more on the record and at hearings, particularly when there is unequal representation of parties in an individual matter. Tribunal counsel can attend hearings and provide on the record submissions explaining legal and procedural issues for the benefit of both the parties and decision-maker. Tribunal counsel can also be used to support active adjudication, particularly when one party is self-represented and they are the sole party participating. At the request of the

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[27] For example, the Social Security Tribunal has implemented a "navigator service" to help appellants better understand and navigate the appeal process. As explained on its website, navigators work one on one with self-represented appellants and explain processes, roles, and the factors that will be considered in the decision-making process. Navigators help guide the appellant through the process so that they are prepared for the hearing and know what to expect: https://www1.canada.ca/en/sst/innovation/nav.html#a6

decision-maker, this can include tribunal counsel helping to elicit or test evidence during a hearing and providing advice as to how the proceedings can be adapted to the needs of the parties. Before the hearing, tribunal counsel can also help parties focus or streamline the issues to be decided, address procedural questions and even obtain evidence determined to be relevant by an adjudicator.[28]

ii. Innocent or Tactical Obstruction and Unrealistic Expectations

In certain circumstances, one or more parties can either tactically or innocently obstruct a claim from moving ahead. This can include for example, a party refusing to provide requested information so that the matter can proceed. Parties may also unnecessarily lengthen proceedings and add complexity by making repetitive and unreasonable requests.

Enhanced Case Management

The development of an enhanced case management procedure can be very helpful in addressing these types of issues. Under this type of process, certain matters will be provided with enhanced review and direction, usually with decision-makers involved as early as possible.[29]

Not all matters need enhanced case management however and engaging in such an approach when it is not required will likely only unnecessarily delay and complicate the progression of the matter. A good general approach is "case management when necessary, but not necessarily case management."[30]

Any enhanced case management procedure should set out:

- When enhanced case management might be appropriate. This will be specific to each tribunal but will often be helpful for cases that are particularly complex either because of the nature of the issues to be determined or the parties involved;
- A general overview of what enhanced case management entails;
- Whether parties can request enhanced case management;

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[28] For more discussion about how the role of tribunal counsel can be adapted to respond to access to justice issues, see Michelle Alton, Suman Furmah and Kayla Seyler, "Adapting the Role of Tribunal Counsel to Promote Access to Justice: How far can we go?", (2021) 34 C.J.A.L.P. 1, p. 27 – 54.

[29] In certain circumstances, particularly where staff directions are repetitively challenged and unreasonable requests are made, involving an adjudicator early can promote efficiency as the decision-makers are able to make "final" procedural decisions, including stating when no further issues will be considered.

[30] Osborne Report, Section 10, "Litigation Management".

- Who determines whether enhanced case management is appropriate in a specific case;
- The potential consequences if an “impasse” is reached. These consequences could include, for example, a decision being made on the basis of the documentary evidence only if a party is unable or unwilling to take the appropriate steps to move a claim forward.

Proactively establishing an enhanced case management procedure provides decision-makers as well as staff with the appropriate discretion to respond to the needs of users in a consistent and transparent manner. The early involvement of decision-makers can be particularly efficient in matters that are complex, and therefore require more direction than usual, or which involve parties who will only accept and follow directions from a decision-maker.

iii. Under-Representation

In discussions about access to justice, the needs of self-represented parties are often a key focus. However, “under-representation” is also a very significant challenge to the promotion of proportionality and access to justice overall.

Quality representation is critical to achieving efficient and proportionate adjudication. Representatives are expected to be competent and to encourage reasonable compromise or settlement and discourage “useless” legal proceedings.[31]

In contrast, “under-representation” describes those professional representatives[32] who do not adequately represent their clients, including failing to meet timelines or follow procedures, failing to appropriately prepare, and even failing to have the appropriate qualifications or knowledge to act in a specific matter. Poor representation can unnecessarily complicate matters and extend timelines, and in more extreme cases, threaten the integrity of the legal proceeding.

Tribunals can promote proportionality by modifying their processes and rules, but proportionality cannot be achieved without the cooperation and contributions of representatives. It is therefore very important that tribunals develop approaches to address under-representation.

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[31] See for example, the Ontario *Rules of Professional Conduct*, Rule 3.1-2 and 3.2-4.
[32] This can include lawyers and paralegals licensed to practice law or provide legal services as well as other types of “professional” representatives such as employees of legal clinics or trade unions who are authorized to provide legal services without a licence – see for example, By-Law 4 of the Law Society of Ontario.

Training and Consequences

One possible way to tackle under-representation is through training. For tribunals with adequate resources, this can include providing training about specific tribunal processes, best practices for representation, and even an overview of required skills (for example, how to conduct case law research). It is helpful for both staff and decision-makers to be involved in this type of outreach, which also helps strengthen a tribunal's relationship with representatives who frequently appear before the tribunal.

However, training will not be sufficient in all circumstances. A second option, that can be used in conjunction with training, is to develop specific processes to address representation issues. This can include developing a Code of Conduct for representatives (or similar resource) that expressly sets out expectations as well as the consequences if these expectations are not met. It can be helpful to distinguish between patterns of poor representation versus serious misconduct, as the necessary responses will likely differ. For poor representation, an approach premised on escalation, training and support, with removal of the right to appear at the tribunal as truly a last resort, is often most appropriate particularly as the reality for certain parties is that some representation is better than others. However, the key is for the process to provide the tribunal with sufficient discretion to address representation issues as appropriate.[33]

iv. Decision-Maker Issues

Finally, in some circumstances, proportionality can be impeded by a tribunal's own decision-makers.[34] For example, the adjudicative process can be unreasonably lengthened when a decision-maker is delayed in issuing a decision. There are many reasons why this can happen and as set out in the Workshop Paper, "How do I foster and measure adjudicative quality in Tribunals?" there are many options to support quality (and timely) decision-making including training, draft review, and the development of templates.

However, the procedural decisions that decision-makers make can also unnecessarily lengthen and add complexity to proceedings. For example, a proceeding can be delayed when a decision-maker directs that additional evidence or submissions be

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[33] Another option to address representation issues is to make use of different processes that promote proportionality, such as requiring detailed will-say statements, encouraging agreed statement of facts, and more active case management.

[34] Tribunal staff can also impede proportionality by not following processes or poorly performing their duties. These types of issues can be addressed through standard performance management processes.

obtained that is not actually needed for a just decision to be made. Some decision-makers use their procedural discretion to help manage their caseload and ensure that decision-making timelines are technically met.

Performance Review, Training and Assignment

It is obviously critical that a decision-maker's independence be protected and maintained. However, there are steps that a tribunal can take to manage inappropriate use of procedural discretion by decision-makers. This includes monitoring adjudicative statistics, including how often decision-makers in general require "post-hearing" work, and how individual decision-makers compare to the average. This type of information can also be considered in performance review programs, with specific training and support offered to discourage unnecessary procedural steps. To support proportionality, tribunals can also use statistical information to help inform hearing assignment – some decision-makers may be better suited to adjudicate certain matters for various reasons. Adjudicative statistics can also help tribunals assess whether their compliment of full-time and part-time decision-makers is best suited to meet their needs.

v. How do I Start to Implement Proportionality?

The achievement of proportionality is likely not something that will achieved all at once. Relatedly, once a project is finished or a new process is adopted, it is unlikely that the work to promote proportionality is complete.

As a starting point, it is helpful to consider whether an agency's institutional design features are promoting or working against a proportional approach. Beyond assessing both the needs of the tribunal's users and the type of adjudicative approach best suited to determine the nature of issues that tribunal decides, some other factors to consider include:

- What authority does the governing legislation provide the tribunal? Relatedly, is there anything that the statute expressly prohibits or requires? In the absence of express prohibitions or directions, tribunals can best promote proportionality by taking advantage of their authority to determine their own processes and procedures as much as possible.
- How are matters being screened? Is the screening process sophisticated enough to meet the needs of users and the tribunal? What changes can be made to provide more flexibility and responsiveness?
- Are there other adjudicative methods that could be incorporated to address certain types of cases? Should some cases be expedited over others?
- Are there certain types of cases that take a long time to complete? If yes, why? Is the length of time and/or complexity of procedures necessary or can changes be made to promote a more proportional approach?

- What is the best time for decision-makers to be involved in cases? Will it be more efficient for decision-makers to be involved earlier in certain matters? What are the criteria for assigning decision-makers at different stages and who should be making these decisions?
- What types of decisions can be allocated to staff? Is this likely to hinder or promote efficiency?
- Are decision-makers being assigned in a manner that promotes proportionality? Should certain types of cases only be assigned to a specific group of decision-makers to develop procedural and substantive expertise? Are there factors impeding proportionality (such as the structure of billing) that should be taken into account when assigning cases?

As a starting point, it can be helpful to identify the most pressing issues that are negatively impacting proportionality. This information can be obtained from staff and decision-maker feedback, but also comments and questions from parties, representatives and other stakeholders and data. Once the most urgent and/or significant issues are identified, a plan to address the issues should be developed. One option is to start with a pilot project for an adapted or new process to see how well it works.

The promotion of proportionality also requires, at least to some extent, consideration of fundamental underlying assumptions about adjudication, including whether the incorporation of additional process actually achieves better and fairer decisions.

Excessive “legalism” in tribunal adjudication should be avoided whenever possible as it impedes one of the main reasons tribunals exist. Instead, tribunals should strive to adopt procedures that:

- Respond to the needs of users, both broadly and individually; and
- Reflect the agency’s statutory mandate and are appropriate given the nature of the issues to be determined.

When examining processes, it is important to ask whether the procedure is necessary, in all or specific cases, and whether it actually increases the quality of the decision to be made. Successfully promoting proportionality also requires institutional and stakeholder “buy-in”, which requires time, patience, and extensive internal and external communication.

Overall, a tribunal’s focus must be on achieving just outcomes through fair processes in a timely manner, rather than striving for a “perfect” but unreasonably complex and lengthy adjudicative process.