How do I use data and evaluation to improve access to justice?

The purpose of this paper is to suggest an approach that prioritises the use of data and program evaluation to improve the design of administrative justice systems.

The approach is based on a simple premise: as tribunal insiders, we cannot assume that we know what users of the justice system need in order to participate effectively within it. We have to go out and get data that then informs any user-centred system improvement. What does the data tell us? Does it validate or contradict our assumptions?

The paper defines data loosely. The most robust data consists of statistically significant objective indicators. But many tribunals may not be dealing with large enough case volumes to be able to create robust datasets.

And for some issues, the best information is not found in a string of numbers. It consists of an accumulation of the subjective and anecdotal reactions of users. For example, these can take the form of free flow comments in response to survey questions. Where that is the case, it is necessary to look for recurring patterns in the anecdotal reactions, so that the reaction of a small minority of users is not mistaken for a systemic issue that needs to be fixed.

Once we start using data to inform the design of justice system improvements, then how do we tell if what we are doing actually works? Here I try to make the case for using structured, neutral evaluations to assess whether a design change achieves what it is meant to.

The paper is divided into three parts. The first talks about the importance of data in accounting for tribunal performance and in enabling innovation. The second talks about data collection. The final part discusses why evaluation matters, in relation to both accountability and innovation.

Most of the examples in the second and third parts come from the experience of the Social Security Tribunal (SST) over the past three years. They only reflect the experience of one tribunal. We all know how wide the range of tribunal mandates is. So what you read here may or may not resonate with you.

1. Why does data matter?

We all know that we have an access to justice problem in Canada. The recently released Statistics Canada analysis of the 2021 Canadian Legal Problems Survey quantifies it. The analysis gives a detailed and current picture of the scope of the access to justice challenges that Canadians face. Here are a few basic highlights:

- Just under one in five people faced a serious legal problem in the last three years;
- Of the people reporting a problem, 45% indicated they were facing more than one serious legal problem;
- Of the people reporting a problem, 87% took some action to address it, with the majority seeking resolution outside of the justice system;

- Of the people who took some action to address their problem, 37% said that they could not afford legal help with the problem;
- And of the serious problems reported in the three year period, only 21% had been resolved at the time of the survey.

The analysis is a people-focused and data-driven diagnosis of the problem.

Where are the people-focused and data-driven solutions?

Our legal tradition does not favour the use of data

Historically, our justice systems have not made much use of data to guide decision-making. By its nature, law is values- and rules-based. That leads us to favour values and rules when we diagnose and address problems, rather than looking at what the data tells us. In addition, the common law teaches us to focus on individual cases, and to deal with issues incrementally, rather than looking for systemic solutions. This tradition has created a solid bedrock of principles, which is great for adjudicating individual cases. But it actually inhibits innovation when it comes to justice system design and innovation.

As Shannon Salter and Darrin Thompson observe:

> Our common law tradition is built on the notion that precedent, or what came before, is inherently better and more trustworthy than some uncertain future innovation. This common law tradition is responsible for the development of important foundational legal principles, but it has also become an impediment to adopting necessary process changes to our legal system.[1]

For example, delay is endemic in the civil and criminal courts and the costs of litigation are prohibitive. Yet there are very few operational performance measures in the judicial justice system. Courts focus on the substance and process of the law, far less so on citizens' experience of the justice system. Courts don't measure the cost, delay or the intelligibility of their processes.

The decision of the Supreme Court of Canada in *R. v. Jordan* is a notable exception.[2] But the creation of that performance measure – a presumptive ceiling on the amount of time to get to trial - flows from the breach of a substantive right that is inscribed in the Charter, not from a newly discovered interest in systems management on the part of the courts. And the guideline set by the Canadian Judicial Council of 6 months for courts to release judgements (Commentary 3.B.2) is just that – a guideline.

Perhaps courts will start to impose operational performance measures on themselves. The British Columbia Provincial Court has made that choice.[3] But so far, this seems to be the exception, not the rule. The traditional measure of any court's performance is its accountability to the court that sits above it in the judicial hierarchy. And there the court is only accountable on the substance of its decisions, not on how well the court serves citizens.

Of course, it is not for the legislature or the executive to set performance measures for the courts. There are constitutional principles that prevent that, and with good reason. There also may be a concern in the

[1] Shannon Salter and Darrin Thompson, Public-Centred Civil Justice Redesign : a case study of the British Columbia Civil Resolution Tribunal, McGill Journal of Dispute Resolution, Vol. 3 (2016-2017), 113.
[2] 2016 SCC 27 (CanLII), <https://canlii.ca/t/gsds3>.
[3] AnnualReport2019-2020.pdf (provincialcourt.bc.ca)

courts that focusing on operational performance measures can become the impetus for the executive to tighten the screws on funding of the justice system.

We are supposed to operate differently from courts

But for us in the administrative justice world, the same is not true. At least it ought not to be…

Tribunals are not constitutionally insulated from expectations about operational performance and justice system improvement. We are part of the executive branch.[4] This reality broadens the potential scope of our accountability. This is why, for example, a tribunal chair can be called to testify before a committee of a legislature.

But perhaps what is more important than where tribunals fall in the constitutional separation of powers, is that the legislatures never meant us to serve the same function as the courts.

Lorne Sossin puts it this way:

> Beyond the specific policy goals of the statutes empowering administrative tribunals, all administrative tribunals reflect important policy choices not to leave particular kinds of disputes to the courts, on the one hand, or to the government itself, on the other hand. Designers of administrative justice must also take this choice as a point of departure. For example, if a tribunal is designed to mirror a court in every respect, then, arguably, it has failed to reflect the legislature's choice to assign disputes to the tribunal and not to a court in the first place. Similarly, if the tribunal is designed with the same policy motivations and discretion as a government department, then it has failed to reflect the choice to create a body other than a government department to resolve the dispute. **Thus, the critical design question for every tribunal is how, in its process, the distinctiveness of tribunals both from courts and government is clear.**[5] [my emphasis]

In other words, we are each supposed to be able to design administrative justice services that are better tailored to addressing the specific problem that led to the creation of the tribunal in the first place. In order to realise the legislature's objective in addressing a particular social policy challenge, a tribunal enjoys greater flexibility and freedom under the law to develop justice solutions that are different from the ones on offer in the courts.

With that flexibility and freedom to innovate also comes accountability. A culture of accountability towards users of the tribunal's system and to citizens at large goes beyond the requirements set out in *Vavilov*.[6] What *Vavilov* requires - clear reasons in individual cases at the back end of the process – is a necessary, but not a sufficient condition of tribunal accountability.

Accountability also requires transparency about how a tribunal operates, so that citizens can use the tribunal's system effectively at the front end of the process. And it requires transparency so that anyone

[4] *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 (CanLII), <https://canlii.ca/t/520r>.
[5] Lorne Sossin, Designing Administrative Justice (2017) 34 Windsor Y.B. Access to Just. 87 at pp.93-94.
[6] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), <https://canlii.ca/t/j46kb>

– whether they are a litigant or not - can meaningfully assess whether a tribunal is fulfilling its statutory mandate on a systemic level.

So how do data and evaluation play into that challenge?

There are two aspects to this issue.

Data to account for day to day performance

First, and at the most basic level, any tribunal that claims to operate in a way that is simple, quick and fair, ought to prove it to users and taxpayers.

Accountability for value for money is what citizens expect from every organisation in the executive branch of government. Tribunals are not exempt from this expectation. And meeting that expectation in no way infringes on the institutional independence of a tribunal or the adjudicative independence of any of its members.

The core function of adjudicative tribunals is to hear and decide cases. That makes us operational organisations. Cases are widgets on the assembly line. Some are very complex ones. All of them require some level of customised assembly. But, like an assembly line, there is a never ending stream that has to be kept moving efficiently.

As operational organisations, we all keep a count of cases. Every tribunal has statistics on the number of cases coming in and out the door, probably broken down by case type. Similarly, we all count time frames for processing, such as the time to schedule a proceeding, the time from hearing to decision and the overall time from filing to finalisation. These are also probably broken down by case type.

But do the people who use the system know? Can they find out how long they will need to wait for a hearing? And if they know what a given service standard is, are they also told how often the tribunal meets that standard in real life? Are they told what to expect in their case, or cases like theirs?

So the first function of data is to enable the tribunal to account to the public for what it does on a daily basis. And to do it in a way that is meaningful. The public measures of a tribunal's performance need to be the ones that matter most to users. Otherwise the tribunal risks publishing vanity metrics. These may make the tribunal look good, but they don't really tell a user what they can expect in their case.

Data to drive innovation

The second function is to enable justice system improvements. Almost all tribunals have been designed through a top-down exercise that starts with the tribunal's statutory mandate, general administrative law principles, and the tribunal's powers and rules. Decisions around process design and the resourcing of the tribunal follow from those first principles. The legacy of this approach is the access to justice challenge that we now all grapple with.

By contrast, user-centred design of a tribunal moves from the bottom up. The legislature sets the statutory authority mandate of the tribunal, but the way in which the mandate is executed has to be reconciled with the real life needs of the people who use the tribunal's justice services.

At least, that's how it ought to work if we were starting with a blank slate.

Unfortunately, we are almost never in a position to design from scratch. Rather, if we want to improve access to justice, then we have to retrofit bits and pieces of an existing top-down design as we go along. Given those limitations, what is the best way to make incremental, user-centred changes?

As we have seen in earlier presentations in this series from Shannon Salter and Emily Drown, as justice system insiders, we often make assumptions about what would make our systems better or what users really want. And our assumptions can be wrong.

The function of data is to ground justice system improvements in empirical evidence. Where the goal is to advance access to justice through user-centred design, then the focus of data collection is narrowed. With an empirical basis, process redesign can start.

Once we have redesigned a process, an empirical approach then demands that we see whether the supposed improvement is actually doing what it is supposed to do. That is the purpose of evaluation.

But that's enough theory. Maybe we should shift to talking about its application…

2. Data-driven improvements…where to start?

There is no right answer to that question. In this section, I suggest some ways to approach this issue, but this isn't science. The sequence that I propose may not work for every tribunal.

Most often, the choice of which area to focus on is driven by an organisational priority which is already obvious to the tribunal.

For example, earlier in this series, the Immigration and Refugee Board (IRB) talked about its focus on a systemic approach to quality in adjudication. Why focus on that issue? The statutory mandate of the IRB is high profile/high stakes human rights adjudication. It has hundreds of adjudicators handling tens of thousands of cases every year. It is subject to microscopic scrutiny by a large, well-organised and demanding advocate community. A tribunal that operates on this scale, and in this context cannot just close its eyes and hope for the best when it comes to issues of quality and consistency in adjudication.

In the case of the SST, we are applying very complex and archaic statutes. About 70% of the people who appear before the tribunal represent themselves. They are amongst the most vulnerable Canadians. In the tribunal's early years, it was heavily criticised for a taking a legalistic approach and being unresponsive to stakeholders. So our priorities in the last three years have been to simplify the tribunal process, and do it by engaging users in those changes. The overarching goal is to enable people to participate meaningfully in their own appeals without the assistance of counsel.

However, even if the broad area of focus is obvious, there are still choices to be made. Within the broad objective of enabling self-represented litigants to participate effectively in a hearing, there may be a dozen different initiatives that a tribunal might take. Which one to pick first? What's the sequence after that?

Before taking the plunge, it may be useful to first do a self-diagnosis of how your tribunal is doing in advancing access to justice.

Take Justice Canada's Index Challenge

The federal Department of Justice has created a useful self-assessment tool. The Access to Justice Index is intended for use by any tribunal in Canada. It costs the tribunal nothing but the staff time to complete a survey and send it back to Justice Canada. Justice Canada researchers then provide the tribunal with a confidential report that scores the tribunal's performance and identifies areas for improvement.

At the SST, we took the Index Challenge. The results are available on our website. The results validated some of our existing assumptions about which areas to focus on. But they also identified areas that we had not seen as a priority, such as monitoring for consistency in adjudication after decisions have been issued.

The strength of the Index lies in its holistic approach to access to justice. Questions reflect considerations from the perspective of the user, others consider procedural justice, still others consider system responsiveness. And the results can be kept confidential if the tribunal does not feel ready to release the findings.

Who uses your service? Create a demographic profile

Another step that may help in making the choice of where to start improvements is to draw on data to see who the tribunal's users are.

This may not be something that every tribunal needs to do. For some tribunals, the nature of their mandate means that they have a clear idea of who uses their service. But for many tribunals, especially ones with a high volume, the community of users may consist of different subgroups, with different levels of ability to participate in litigation and quite different needs. This is where a granular analysis can help a tribunal to better understand the user needs of individual subgroups and to devise user-focused solutions.

For many tribunals, the raw data to develop a demographic profile may be available in the tribunal's case management system. It may also be helpful to compare the specific information from the tribunal's data with broader contextual data. Statistics Canada's website has a massive and useful sectoral breakdown of data in its Releases by subject.

The SST compiled a demographic profile of appellants by mining the data in our case management system. The SST deals with Employment Insurance appeals (EI) and Canada Pension Plan and Old Age Security appeals (IS or income security). The data sources on the EI side and the IS side differ. Our EI files are much slimmer and have a faster turnaround than our income security appeals. As a result, we have more detailed information about the education and age of appellants on the income security side of our business. But for both streams, we have a reliable breakdown by gender, place of residence, rural/urban, official language and other language, type of representation, and access to a computer.

The demographic profile is useful in trying to assess the impact of any potential process change on tribunal users. It is also very helpful in conducting a user needs analysis, which I discuss below.

Just do it… but start small and don't try to be perfect

Most tribunals have a clear sense of what they need to improve on. This is just rooted in an understanding of the daily business of the tribunal and where the obvious pain points are for users. Three years ago, we started to tackle the access to justice challenge at the SST. But within the broad rubric of improving access to justice, there are multiple ways to make improvements.

I think the most important step is not to agonize over finding the right one, or trying to identify one initiative over all others through a rigorous empirical analysis. As a starting point, contextual information (such as the results of the Dept. of Justice Index Challenge and demographic information) can be combined with what the tribunal's stakeholders, adjudicators and registry staff are saying about what parts of the process need obvious improvement.

For example, the first thing we tackled at the SST was a large bottleneck at the start of the appeal process.

The *SST Regulations* (s.24) require an appellant to provide 8 pieces of information in order to start an appeal. At the time it was drafted, stakeholders and appellants were not consulted on how it would work in practice. The requirement was onerous. The SST applied the regulation as it is written. In other words, we could not start to process an appeal until all 8 pieces of information were received from the appellant. The result was that the appeals were stalled at the start of the process for long periods.

However, most of the information that we were asking from the appellant was already in the possession of the government department (Employment and Social Development Canada) that had refused the appellant's initial application for benefits. Instead of applying the regulation literally, and requiring the appellant to provide it, the SST started to obtain 4 of the 8 pieces of information directly from the department. As a result, the average number of days to start an appeal dropped from over 30 days to 1.6 days.

The change did not conform to the strict letter of the Regulation, but the overriding question was "Who will sue us?" and the answer was "No one". The solution was simple. It carried a legal risk, but the risk was small, and so choosing it as a starting point did not require a sophisticated analysis.

Starting small grows an innovation culture

Choosing one initiative to focus on from among many becomes the starting point for an agile approach to process improvement. Agile methodology has its roots in software development. It evolved as a response to cost overruns and time delays that came from trying to develop comprehensive and perfect solutions. An agile approach is incremental, and focuses on continual improvement by implementing lessons learned in stages. Making good changes quickly are favoured over finding perfect solutions slowly. The agile approach is taking root in a wide range of system design, including legal systems.

For tribunals, it means focusing on a discrete problem, developing a solution that may not be perfect but that can be implemented quickly, evaluating whether this yields an expected improvement, and then adjusting the initiative further.

Taking an incremental approach has a couple of advantages:

- First, as tribunals are fundamentally operational organisations, the core business is to keep the assembly line moving and to process the cases. This does not leave much residual capacity for process improvements;
- Second, succeeding on a series of small initiatives enables the tribunal to gradually build a culture and capacity for innovation that is lasting.

Moving toward an agile approach has been a difficult culture shift at the SST. While we have made progress in changing the way we work, there is a deep-rooted culture of perfectionism in the tribunal. I think this is ingrained in legal organisations, and in government generally. Government organisations, especially legal ones, are chronically risk averse.

An excellent free resource on agile methods that tribunals can draw on is the website of the Stanford Legal Design Lab. While its focus is on justice in the United States, it provides generic tools which any Canadian tribunal can use to improve its own processes.

Conduct a user needs analysis

An alternative to the unstructured approach I describe above is to systematically analyse user needs. Over the past three years, the SST has implemented a series of access to justice initiatives. These have focused on simplifying the appeal process in three broad categories:

- Process changes that are user-focused;
- Accessible communications, through plain language and more visual aids; and
- Direct assistance to unrepresented appellants through our Navigator service and active adjudication.

Up to now, these initiatives have been ad hoc and incremental, relying on the approach I describe in the preceding section. We are now shifting to a planned approach.

There are two reasons for this shift:

- First, the SST did not have the organisational maturity to take a systematic approach to process innovation from the outset. Three years of ad hoc initiatives have put the tribunal in a position to develop a more systematic approach with confidence;
- Second, it has taken us time to develop the data sources that are needed to take a more systematic approach. In 2020 we started doing surveys of appellants and set up stakeholder tables. These, along with consultations on specific initiatives and program evaluations, have provided the data that informs a more systematic approach.

The foundation for a planned approach is a user needs analysis. Our starting point was to analyze the user experience today. The analysis drew on the following data sources:

- Responses to surveys of appellants that we conduct after their hearing has concluded and before their decision has been issued;
- Appellant comments or queries to our registry and call centre;
- User testing of our website; and

- Feedback from stakeholders (representatives, legal clinics, unions and advocacy groups).

The unstructured approach we have used up to now has improved access to justice at the SST. Despite these efforts, a systematic analysis shows there are still significant and persistent obstacles that appellants face:

- Many appellants don't understand the appeal process;
- They don't feel prepared for a hearing;
- They find the volume and content of documents in their file to be overwhelming; and
- They face personal or socio-demographic barriers, such as access to technology.

The results of this analysis provide us with a roadmap for the access to justice changes that the tribunal will focus on for the next two years.

One area of focus is to improve access through technology. This includes developing a portal to enable electronic filing of appeals and evidence. It also includes working with Community Legal Education Ontario to develop guided pathways, so that those appellants who want to navigate the appeal process on their own can understand the process without necessarily engaging directly with tribunal staff.

But the focus is not only on technological solutions.

The user needs analysis also shows that a significant number of SST appellants don't have the technology, ability or inclination to engage with the SST online. While 90% of appellants communicate with the tribunal by email, between 40-50% of appellants report that they don't visit the SST website.

Our conclusions about the barriers to using digital technology in SST appeals are consistent with larger studies of this issue. Legal Aid BC has sponsored an examination of the digital divide and its impact on access to justice. Achieving Digital Equity in Access to Justice clearly documents the barriers that low income people face in using technology to solve legal problems. These are not limited to being able to pay for internet services or knowing how to use a digital device. Trust, health and literacy barriers also come into play. The data clearly tells us that it is not sufficient to focus exclusively on technology, if we want to promote equitable access to tribunal services.

So our second area of focus will be on communicating with appellants through traditional means. The SST has partnered with law school legal clinics across Canada to promote greater representation of appellants, but this initiative only covers a small part of the caseload.

To expand outreach, the tribunal is going to work with community organisations that support people who fit the SST's demographic profile, but don't represent them in legal proceedings. The goal is to enable non-legal community organisations to provide more effective support to appellants who are not at ease with technology. This also includes taking online infographics and guides to the SST process, and making them available in print form.

Attached to this paper is a short presentation consisting of three slides. The first is generic. It is a graphic that sets out the methodology which the SST followed to conduct its user needs analysis. Any tribunal can adopt the methodology, or tailor it to its own context. The second shows how it is being applied at the SST. The last slide explains the acronyms used.

3. Evaluation

The traditional, and still dominant, focus of success in administrative justice is on how a tribunal handles the substantive outcome of cases. Depending upon the type of review that it is subject to, does the tribunal produce decisions that are reasonable/correct, or not? This is measured by outcomes on judicial review or statutory appeal.

The impact of how a tribunal manages its cases and treats parties gets much less sustained attention. However, as part of the executive branch, it is both lawful and appropriate for the tribunal to systematically evaluate the relevance, effectiveness and efficiency of its justice service. This is essential to a data-driven approach, because evaluations provide insight into where and how an initiative is succeeding…or not.

Tribunals need to control evaluations of their services

A tribunal's institutional independence is relevant to how an evaluation is conducted. The most effective way to address this is to ensure that the tribunal itself decides whether to conduct an evaluation or not. If it does, then the tribunal needs to set the terms of reference for the evaluation and select the evaluator.

It is certainly not appropriate for an auditor-general, a government central agency or a tribunal's host department to dictate the terms of an evaluation, or who is to conduct it. This is especially true if the evaluation touches on the substance of the tribunal's adjudication, but also applies if the evaluation is about how the tribunal processes cases. This is because the substance of adjudication cannot be neatly separated from how the tribunal does its work.

Ron Ellis explains this point in a far more compelling way in his article on *The Provincial Auditor and the Administrative Justice System*.

By contrast, where the tribunal itself initiates an evaluation of the substance of its decision-making, this can become a powerful tool for both public accountability and innovation. In 2017, the then Chair of the Immigration and Refugee Board (IRB) commissioned an *External Audit of Detention Reviews*. In a series of judicial review decisions, the Federal Court was highly critical of the way in which the Immigration Division of the IRB was conducting detention reviews of long-term immigration detainees.

In light of the criticisms of the Court, the IRB retained an external administrative law expert to conduct a comprehensive audit of how the Immigration Division handled such cases. While judicial review, by its nature, looks at how individual cases are adjudicated, this audit was much broader in scope. It addressed systemic problems that the judicial review process could never touch on, such as the tribunal's adjudicative culture, professional development needs and process changes.

This is an unusual example of a tribunal critically analyzing the substance of its adjudication, and making the results public. It is a remarkable instance of tribunal accountability to Canadians. But it also served as a catalyst for change in how the IRB approaches its mandate. The audit led to the issuing of a new Chairperson's Guideline on detention, revised procedures for long-term detention cases and training for adjudicators and staff.

This is an example of a tribunal using a tool for public accountability to take charge and fix a problem of its own accord, rather than having a solution imposed upon it by the responsible minister or legislature.

Where to start?

Evaluations require expertise, methodological rigour and take time to conduct. Smaller tribunals may not have the resources to develop an internal evaluation capacity. There are some options available to tribunals that have little experience in program evaluation:

- Contracting with evaluation professionals. In setting terms of reference for an external contractor, there may be guidance from government central agencies that can be adapted to a tribunal context. For example, the federal government provides a suite of useful tools and practical minimum standards for evaluations.
- Working with academics. This can be a low cost option for the tribunal, in that academics are often motivated to both publish and demonstrate that their research has practical application. The SST has had very positive experiences in engaging academics to evaluate aspects of our work:
    - *Enhancing accessibility in written communication: A review of forms and letters for the Social Security Tribunal* conducted by the National Self-Represented Litigants Project
    - *Examining the Social Security Tribunal's Navigator Service: Access to Justice for Marginalized Communities* conducted by Professors Laverne Jacobs and Sule Tomkinson

  However, working with academics can carry some risks. Academic research can have an advocacy focus which may be at odds with a tribunal's impartial status. And recommendations may not be grounded in the practical realities that tribunals face in their daily operations.

Conclusion

A focus on data and program evaluation has the potential to improve accountability and to foster innovation in how tribunals deliver services to Canadians. Data-driven decisions can enable a tribunal to adapt its services to the particular demands of its statutory mandate and the particular needs of the people who use its services. That way – to paraphrase the SCC in *Vavilov* - administrative justice starts to look different from judicial justice.

This requires a culture shift, one that broadens the traditional tribunal focus beyond legal principles and values to include data and neutral evaluation in making decisions about the design of tribunal services. This is best achieved through an incremental, iterative approach to improving access to justice, and through increasing risk tolerance for new ways of delivering justice services.