

**Separate but Cohesive: Navigating the Separation of Powers in Promoting
Access to Justice**

Canadian Council of Administrative Tribunals – 33rd Annual Symposium

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Remarks by the Honourable Robert J. Bauman, Chief Justice of British Columbia

[1] Good Afternoon. It is a pleasure and a privilege to deliver the keynote address at the Council of Canadian Administrative Tribunals 2017 annual symposium. Bonne après-midi. C'est un honneur et un privilège de m'adresser à vous aujourd'hui.

[2] In the coming days, you will be attending sessions on everything from the standard of review and procedural fairness to tribunal design, ethical issues for tribunal adjudicators and issues faced by litigants with disabilities. You will hear from people far more qualified than myself on those topics. But I hope to kick things off with some judicial food for thought and a discussion with all of you.

[3] The challenges facing tribunals and courts are numerous and often well-publicized. At times those institutions are pitted against one another as though the solution to society's access to justice issues rests in preferring one forum over the other. Over the next twenty minutes, I'm going to take a step back and consider the broader systemic question of how courts and tribunals can work together to chart a path forward and promote access to justice. I will acknowledge the important constitutional backdrop of the separation of powers, but I hope to discuss how we might navigate that divide to advance the rule of law.

[4] I'm going to first discuss the role of administrative tribunals in facilitating access to justice. I'll talk about how all of you play a fundamental role in resolving disputes within your various areas of expertise, and some challenges tribunals face. These challenges may or may not be familiar to you, but are ones we often see in the courts as well. Next, I'll explain the fundamental role of courts in judicial review. In doing this, I will not be patting my and my fellow judge's backs — although I'm happy to have a

conversation about how hard we all work as well. Instead, I will point out challenges posed by the ever-elusive standards of review, and discuss a number of things that I think we, as courts, need to do better. I'll conclude by discussing how we might fit these pieces together; how tribunals and courts might work together and share lessons learnt in a way that will further the goal of providing access to justice.

[5] Ultimately, it is here that we find common ground. Access to justice is a problem all too familiar to both administrative adjudicators and judges. I'll make the point that we have a lot to teach one another about issues we face. And I will suggest that it is **crucial** we do so to encourage public respect for the justice system, and therefore advance the rule of law. I'm going to leave time at the end of my address in the hope that we might start this discussion with thoughts and questions from all of you.

Theme 1: The Role of Administrative Tribunals in Facilitating Access to Justice

[6] It is seemingly beyond debate now to say that some disputes are better left to be resolved outside the courts. Among the more cynical and negative reasons that have been offered up for this conclusion relate to: (a) the cost and delay of litigation; (b) the elitism and exclusionary tendencies of the legal process; and (c) distrust of judges and lawyers.¹ Although, of course, none of you have felt this way towards judges...

[7] For the moment, I'd like to sidestep that cynicism and focus on how tribunals positively contribute to access to justice. As Lorne Sossin, someone you will be hearing from after me today, has written, tribunals are established on the "core premise that an alternative to courts on the one hand and government on the other is both necessary and beneficial".² This point gets at why the separation of powers is a defining feature of our constitutional order. We see a role for each of the legislative, judicial and executive branches to provide institutional checks and balances on one another. Our Constitution does not explicitly separate the legislative, executive and judicial functions and insist

¹ Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd. ed. (Toronto: Carswell, 2012) at 1.

² Lorne M. Sossin, "Designing Administrative Justice" (Paper delivered at the Continuing Legal Education Society of BC Administrative Law Conference 2016, 18 November 2016), Osgoode Legal Studies Research Paper No. 26/2017 at 1.

that each branch of government exercise only its own function.³ But it does prescribe different roles for each of the branches, which have been shaped by the history and evolution of our constitutional order.⁴ This is a point I will return to later.

[8] Each branch has a distinct institutional capacity and plays a critical and complementary role in Canada’s constitutional democracy. It is important that the branches show proper deference for the legitimate spheres of activity of the other.⁵ The tricky part is defining the scope of those spheres. Courts have frequently reminded themselves not to overstep the bounds of the judicial function. This is very apparent in the Supreme Court of Canada’s current approach to the standard of review — a topic I will discuss later.

[9] What is more certain is the present legislative endorsement of the executive branch’s role in resolving disputes. There has been an incredible proliferation of tribunals over the last several decades. This proliferation is a relatively new development in the legal landscape where we as judges often prefer that change take place over centuries lest we get left behind, running to catch up.

[10] This may very well be the point. Judges often celebrate our generalist role, and discuss how it benefits the common law by lending a new perspective, consistency and expertise to different areas of the law. I strongly believe in the value of that role. But getting to the point where we can properly contribute as generalists takes time. I am proud of my colleagues on the bench for the diligence, effort and conscientiousness that they bring to the task of judging. However, tribunals start from day one with a particular expertise in the substantive subject area. The Supreme Court of Canada recently held that not only do tribunals have subject matter expertise, but expertise that “inheres in the tribunal itself as an institution”.⁶ This is a strong recognition by courts that

³ *Reference Re Residential Tenancies Act*, [1981] 1 S.C.R. 714 at 728 [*Re Residential Tenancies Act*].

⁴ *R. v. Imona-Russell*, 2013 SCC 43 at para. 27.

⁵ *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 389 (SCC); *Imona-Russell*, *supra* note 4 at para. 38.

⁶ *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para. 33 [*Edmonton East*].

administrative adjudicators develop expertise not just in a subject matter, but also in the practical realities they face in administering their home statutes.

[11] It is this expertise and the courts' respect for the legislative choice to devolve power to tribunals that has led to the presumption of deference on judicial review. In a constitutional democracy, citizens expect the rules they live by to come from their elected representatives. So when, as here, elected representatives delegate those powers, citizens are entitled to expect that delegates will exercise those powers conscientiously and within the limits under which they were conferred.⁷

[12] In a way, where tribunals conscientiously exercise their power in the course of adjudicating within their subject matter and institutional expertise, they reinforce the wisdom of legislators vesting the executive branch with so much power. It gives tribunals credibility in the eyes of those who are governed by the enabling statute and who may therefore appear before the tribunal. Where this occurs, it creates a virtuous cycle of tribunals delivering justice in a potentially lower cost environment.

[13] As judges, we are sensitive to the fact that we're not democratically elected. I suggest that administrative tribunals also need to be aware that they are a step removed from the democratic process. Tribunals are appointed by the executive branch. They lack the requirement of individual and institutional independence that makes courts constitutionally distinct from the executive.⁸ Instead, they are often created for the purpose of implementing a particular government policy, which may entail making quasi-judicial decisions. In this way tribunals "span the constitutional divide between the judiciary and the executive"⁹.

[14] This (what I am calling) rapid proliferation of tribunals under complex delegations of authority raises concerns about how adjudicators operate and how they and the public more broadly see their role in the separation of powers. It poses dilemmas about

⁷ Paul Salembier, *Regulatory Law and Practice*, 2nd ed, (Markham: LexisNexis Canada, 2015) at xiv.

⁸ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para. 23.

⁹ *Ibid* at para. 24.

a tribunal's institutional identity that courts themselves are confronting in a different context. I will develop this point later. Adjudicators are forced to reflect on how they can legitimately resolve disputes on a day-to-day basis within these, at times, complex delegations of authority.

[15] A couple of examples illustrate this point.

[16] Another of your speakers, Michele Flaherty, has written on the idea of “active adjudication”, particularly for tribunals who see a high proportion of self-represented parties.¹⁰ This model of adjudication involves shifting to a more inquisitorial format in which the adjudicator takes an active role in framing the issues and engaging parties in the process. Some of you already may have adopted a similar approach to self-represented litigants appearing before you. The model holds clear promise in advancing access to justice, but as Ms. Flaherty points out, it may involve shifting how judges and members of the public view impartiality and bias. Will it hurt an adjudicator's credibility in the eyes of the losing party if they witness the adjudicator assisting the other side in framing the issue? But if the adjudicator does not adopt a more active role doesn't this undermine the goal of affording litigants access to justice, which in turn hurts the tribunal's credibility in the long term? There may be room for shifting how we think about perceptions of bias and what it means for tribunal adjudicators to be impartial.

[17] In another example, we can think about the recent Toronto Star constitutional challenge to tribunals' reliance on freedom of information legislation.¹¹ This is something that I'm sure is at the forefront of many of your minds, particularly those from Ontario. If the challenge is successful then tribunals would be forced to guarantee open and transparent operations subject to doctrines such as privilege. The “open court principle” has been foundational to the justice system throughout its history, but there are potentially troubling implications when it's transposed into the administrative law

¹⁰ Michelle Flaherty, “Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law”, (2015) 38:1 Dalhousie L.J. 119.

¹¹ “Star Launches Legal Challenge to End Secrecy in Ontario Tribunals”, *Toronto Star* (7 February 2017), online: <<https://www.thestar.com/news/canada/2017/02/07/star-launches-legal-challenge-to-end-secrecy-in-ontario-tribunals.html>>.

realm. At the very least, adjudicators will be confronted with a different level of public scrutiny of their decision making. Again, the Toronto Star claim may demonstrate confusion or apprehension about the institutional role of administrative tribunals. The public may just assume that they should operate like courts.

[18] These examples, I hope, demonstrate that administrative tribunals are grappling with issues that courts have also had to confront over the years. Many of the points I discuss in my third theme offer ways in which I think courts and tribunals can work together to help alleviate this confusion while promoting access to justice. But before turning to those points I want to turn to my second theme: the role of courts and why judicial review remains a crucial piece of our constitutional order.

Theme 2: The Role of Courts – Why Judicial Review is Crucial

[19] By this point, the institutional challenges facing courts have been discussed and written about extensively. We have calls from the Supreme Court of Canada in *Jordan*¹² to address the “culture of complacency” and from other corners to increase judicial accountability and transparency. These are important challenges and issues that we are working to address.

[20] But I cannot emphasize enough that the response cannot be to say “no” to the courts entirely. The framers of our Constitution established a delicate balance between the federal and provincial governments, anchored by federally-appointed superior courts.¹³ Judges are the ultimate guardians of the ever-elusive “rule of law”. The role of courts in protecting the rule of law is embedded in the Constitution through courts’ s. 96 jurisdiction.¹⁴ This provision on its face provides that the Governor General shall appoint judges of provincial superior courts. However, it is not a mere staffing power. It prevents the Legislature from using its s. 92(14) power in relation to the administration of justice to confer superior court jurisdiction on provincial tribunals.¹⁵ More broadly, it is a law that

¹² *R. v. Jordan*, 2016 SCC 27.

¹³ *Imona-Russell*, *supra* note 4 at para. 32.

¹⁴ *Constitution Act, 1867*.

¹⁵ *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (NS)*, [1989] 1 S.C.R. 238 at 245.

vests courts with the inherent jurisdiction to apply the laws of our country. It is what allows courts to advance the rule of law, which at bottom is how the judiciary performs its institutional role.

[21] The rule of law has been defined to have three essential elements: (1) there is one law for all; (2) there is an order of positive laws; and (3) the exercise of public power must find its source in a legal rule.¹⁶ When applied to administrative law, the principle refers to the role of courts in deciding what the law is and the level of certainty and uniformity in the law that is necessary to comply with the principle. Ruth Sullivan has aptly summarized it this way:

The courts...ensure that the exercise of power is not distorted by whim or prejudice or other abuse. The rule of law thus protects individuals from abuse and society as a whole benefits from the greatest possible measure of certainty, consistency, and equality in the interpretation and application of the law.¹⁷

[22] Judicial review is the means by which courts protect the rule of law where disputes involve the executive branch. But the scope of judicial authority to interfere with tribunal decision making remains unclear. In *Crevier* the Supreme Court of Canada confirmed that the Legislature cannot appoint a provincial statutory tribunal that operates “like a s. 96 court”.¹⁸ *Crevier* and cases since then have made it clear that “true questions of jurisdiction” are at the core of the s. 96 jurisdiction. We have yet to find a question of true jurisdiction, but it’s there in theory.¹⁹

[23] This brings me to the revered and feared standard of review discussion. I tried to warn the organizers that they couldn’t invite a judge to speak and expect to avoid a discussion of the standard of review, but no one listened...

¹⁶ *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 747-53; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 71.

¹⁷ Ruth Sullivan, *Statutory Interpretation* (Concord: Irwin Law, 1997) at 35.

¹⁸ *Crevier v. A.G. (Québec)*, [1981] 2 S.C.R. 220 at 236.

¹⁹ *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 33-43.

[24] The *Dunsmuir*²⁰ framework was meant to balance two competing principles: legislative supremacy and the rule of law. The tension between these two principles has produced an evolving and often unclear jurisprudence. I've already talked about the discomfort I'm sure many tribunals face in confronting questions about the scope of their authority. The standard of review confusion is perhaps a manifestation of courts having to confront our own self-consciousness about our proper institutional role. As I've said, defining those institutional spheres can be tricky and it is the court's job to draw those lines.

[25] In modern administrative law jurisprudence it is clear that the scale is tilted heavily in favour of respect for legislative supremacy. This is true even where there may be disagreement within the tribunal itself as to the proper answer to a legal question.²¹ One can question whether refusing to intervene and resolve an intra-tribunal debate raises concern about the coherence and the consistency of the law. This of course is a piece of furthering the rule of law. Public respect for the law is enhanced where citizens have some basis on which to predict how a court or tribunal will decide their case.

[26] In fact, the presumption of deference remains firmly in place even with implicit decisions on points the parties did not raise before the tribunal. Here, courts have said that they will consider the reasons which could have been offered in support of the decision.²² Again, one can question whether this is really the way to show deference or whether it instead becomes an exercise in correctness review with courts showing a logical chain of reasoning by which a decision could be justified regardless of whether the tribunal actually had those considerations in mind. Would respect for legislative supremacy instead mean remitting the matter to the tribunal for reasons on the issue?²³ Of course then we would confront issues of cost and delay, which raise a host of access to justice issues. Perfect solutions are hard to come by.

²⁰ *Dunsmuir v. New Brunswick*, 2008 SCC 9.

²¹ *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 at paras. 61-63.

²² See *Alberta (Information and Privacy Commissioner)*, *supra* note 19 at paras. 53-54; and *Edmonton East*, *supra* note 6.

²³ David J. Mullan, "The Year in Review – Recent Developments in Administrative Law 2015-16 (Paper delivered at the Continuing Legal Education Society of BC Administrative Law Conference 2016, 18 November 2016) [unpublished].

[27] Recent Supreme Court of Canada decisions have expressed an appetite for revisiting the framework with a view to clarifying or simplifying the jurisprudence.²⁴ This is a positive development. The Honourable Thomas Cromwell has acknowledged the unpredictability and uncertainty that persist even after *Dunsmuir* and has suggested that the best path is through the doctrine of precedent: stick with *Dunsmuir* and allow the jurisprudence to develop.²⁵ This is an acknowledgment of the importance of certainty to the rule of law. Others have suggested adopting an approach to reasonableness review more akin to the *Oakes*²⁶ proportionality test in *Charter* review.²⁷ It provides a useful heuristic and a more rigorous analysis, but gives less deference to tribunals.

[28] All this to say: there is a lively discussion within the judiciary about the right path going forward. It is a sensitive and difficult discussion because it strikes at the very core of who we are as courts and the role we play in Canadian society. In Québec there are questions arising about whether expanding the provincial court's monetary jurisdiction and giving it the power to hear appeals of certain administrative tribunal decisions regardless of the amount involved is consistent with s. 96 of the *Constitution Act, 1867*. Has this vested provincially-appointed courts with a power similar to the supervisory power traditionally exercised by superior courts? In BC, it is equally important to question whether provincially-appointed tribunals carry out functions that are under the constitutional purview of superior courts. Are they operating like s. 96 courts? It is impermissible to deny superior courts active participation in elaborating and interpreting the common law and provincial and federal statutory law.

[29] This is so even where the Legislature is acting to address important social problems such as access to justice concerns. Justice Dickson, as he then was, said it well in the 1981 *Residential Tenancies Act* reference:

²⁴ *Edmonton East*, *supra* note 6.

²⁵ The Honourable Thomas A. Cromwell, "Opening Address: "What I Think I've Learned About Administrative Law"" (Paper delivered at the Continuing Legal Education Society of BC Administrative Law Conference 2016, 18 November 2016) [unpublished].

²⁶ *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.).

²⁷ This is what Iryna Ponomarenko advocates for in "Tipping the Scales in the Reasonableness-Proportionality Debate in Canadian Administrative Law" (2016) 21 Appeal 125.

I am neither unaware of, nor unsympathetic to, the arguments advanced in support of a view that s. 96 should not be interpreted so as to thwart or unduly restrict the future growth of provincial administrative tribunals. Yet, however worthy the policy objectives, it must be recognized that we, as a Court, are not given the freedom to choose whether the problem is such that provincial, rather than federal, authority should deal with it. We must seek to give effect to the Constitution as we understand it and with due regard for the manner in which it has been judicially interpreted in the past.²⁸

[30] It is therefore absolutely fundamental that there remain a role for robust judicial review. The judiciary and counsel who appear before us must work to encourage respect for the rule of law and defend the constitutional guarantee of access to an independent judiciary. Access to justice is not just about timeliness and efficiency; it is about accessing justice in the sense of an institution where there are rules and procedures designed to facilitate truth seeking and ensure peoples' rights are protected. It is important to encourage both procedural and substantive access to justice.

[31] To maintain public respect for the justice system, the bench and the bar must adopt a proportionate and less complicated approach to disputes. As Justice Karakatsanis put it in *Hryniak v. Mauldin*, “without an effective and accessible means of enforcing rights, the rule of law is threatened”.²⁹ A proportionate approach demands added flexibility. We must look at things like the monetary value at stake, the complexity of issues and the social impact of the lawsuit.³⁰ One way courts have attempted to achieve this is through judicially imposed timelines as in *Jordan* and, more recently, in the child protection context.³¹

[32] More broadly, we should encourage parties to come to an agreement on the appropriate venue and procedure, or to obtain upfront rulings from a judge on

²⁸ *Residential Tenancies Act*, *supra* note 3 at 749-750.

²⁹ 2014 SCC 7 at para. 1.

³⁰ The Honourable Chief Justice Warren K. Winkler, “The Vanishing Trial” (2008) 27 *Advocates’ Society Journal* 3 at 4-5.

³¹ The Manitoba courts have adopted three to six month deadlines in child protection cases, and the Chief Justice has assigned judges from the general division to the family division to help clear up a case backlog: Sean Fine, “Manitoba Sets Time Limits to Speed Up Child-Protection Hearings” *The Globe and Mail* (29 March 2017), online: <<http://www.theglobeandmail.com/news/national/manitoba-sets-time-limits-to-speed-up-child-protection-hearings/article34468675/>>; and a recent decision in Ontario has posited that a trial without delay is an important feature of child protection applications: *Children’s Aid Society of Ottawa v. B.H.*, 2017 ONSC 1335 at para. 74.

procedural matters. The bar also needs to focus on advancing professionalism and civility, and approach litigation strategies in a way that avoids unnecessary steps, confrontation and delay.

[33] These are all things that are achievable and important if we are to encourage public respect for the rule of law — something that is a very fragile regime that we all have a stake in.

Theme 3: Navigating a Path Forward — How Administrative Tribunals and Courts Should Work Together

[34] This leads me to my final theme, one that speaks to the underlying message of this symposium — “New Horizons for Administrative Justice”. I’d like to briefly discuss how administrative tribunals and courts can, together, navigate the separation of powers to promote access to justice.

[35] First, the solution is not to simply download court functions to tribunals and thereby erode the court’s section 96 jurisdiction. The 2014 Supreme Court of Canada decision in *Trial Lawyers Association of British Columbia* described courts’ “book of business” as: the resolution of disputes between individuals, and determining issues of private and public law. The court explained, “measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function”.³² We do well to remember this very basic idea of what courts are and what the judiciary’s strengths are. It would be very unfortunate if segments of society promoted the idea that courts and lawyers cannot be part of the solution to the difficult access to justice issues we face. Skipping over the judiciary has the potential to undermine the separation of powers and risks confusing the legal landscape further because there will always be a place for judicial review.

[36] This said, there are social problems that may be well-suited to decisions made by entities other than judges. The rule of law does not necessarily mean the rule of courts.

³² *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 at para. 32.

Technological change is part of this. There's been some recent academic writing on the potential role of machine learning as a tool for solving social policy problems.³³

Algorithms have been touted where those problems involve predictions with clear and measurable policy outcomes. But we as a society have to think about whether we are comfortable having a machine-operated algorithm make those decisions. This is a more philosophical issue that I'm sure will continue to be debated. Nevertheless, in the shorter term courts and administrative tribunals may look to these tools as decision aids. These tools could ensure that we get the most accurate and representative information on which to base our decisions.

[37] This mental image of robot judges and administrative decision makers is not meant to terrify. I hope it instead illustrates the flexibility, openness and awareness of our societal context that we all have to embrace.

[38] One initiative I'm involved with demonstrates the principled common ground courts and tribunals share. I chair the Access to Justice BC initiative in partnership with a diverse leadership group. We are dedicated to bringing about real change in the ability of ordinary British Columbians to access the promise of the rule of law in the context of civil and family justice issues. How's that for a modest goal? We have adopted a "Framework for Action" that includes what we call the "Triple Aim". The Aim balances 1. improved user experience; 2. improved justice outcomes for the population, and 3. per capita costs.³⁴ These goals overlap with a number of the "Principles of Administrative Justice" adhered to by the Council of Canadian Administrative Tribunals.³⁵ These principles and goals are not just paying lip service to what we think the public wants to hear. They are absolutely fundamental to achieving the coherence, predictability, consistency and equality that I've already pointed to as being so crucial to the rule of law. They are crucial to public respect for the rule of law.

³³ Jon Kleinberg, Jens Ludwig & Sendhil Mullainathan, "A Guide to Solving Social Problems with Machine Learning", *Harvard Business Review* (8 December 2016), online: <<https://hbr.org/2016/12/a-guide-to-solving-social-problems-with-machine-learning>>.

³⁴ Access to Justice BC, "Framework for Action" (2017) *Access to Justice BC* (blog), online: <<https://accesstojusticebc.ca/framework-for-action/>>.

³⁵ Council of Canadian Administrative Tribunals, "Principles of Administrative Justice", (2015), online: <<http://www.ccat-ctac.org/en/about-ccat/principles-of-administrative-justice>>.

[39] What does all of this high-level discussion of principles mean on the ground? I suggest that there are two guiding principles that we can adopt to improve the user/litigant experience and thereby foster public confidence.

[40] First, proportionality. I alluded to this earlier, but it is critical that we design a system that directs cases to the appropriate venue in a manner that is responsive to the particular nature of the claim: who the litigants are, the dollar value, and the rights at stake. This is the type of culture shift that Justice Karakatsanis referenced in *Hryniak* where we all must embrace efforts to simplify pre-hearing procedures and move toward proportional procedures tailored to the particular needs of the case.³⁶ The Court has recognized that new models of adjudication can be fair and just.

[41] Lorne Sossin has also written on tribunal design and how, when designing new tribunals or redesigning mandates for existing tribunals, legislators and policy analysts should consider “design thinking” which emphasizes design from the perspective of the user – or a bottom-up approach.³⁷ Access to Justice BC calls this the “improvement approach” that engages the user’s perspective, is multi-disciplinary, experimental and, perhaps most importantly, recognizes that users of the system are partners in improving it. We should be encouraging innovative and responsive cultures in tribunals that empower members to solve problems and improve operations. All of these are factors that courts are also considering as we seek to promote access to justice. There needs to be a lot more dialogue across institutional silos as we pursue these initiatives.

[42] The second guiding principle is empathy — and this is where I will conclude. Empathy is of course tied to maintaining an emphasis on users of the system, but it speaks to a broader shift not only in system design but in how we as adjudicators make decisions. I don’t mean empathy in the sense of partiality, or preferring one litigant over another. I mean it in the sense of truly understanding the people who appear before us. One scholar who has written about empathy in the context of judging explains it as

³⁶ at para. 2.

³⁷ Lorne M. Sossin, “Designing Administrative Justice”, *supra* note 2.

the essential means by which judges attempt to understand the motivations, intentions, and goals of the litigants before them. Just as we are always speaking prose, we are always using empathy—sometimes well, and sometimes poorly. Empathy is an essential capacity for living in a social world, and an essential capacity for judging.³⁸

[43] This is precisely the trait that we can all challenge ourselves to adopt when faced with disputes day-to-day; and in our position as courts and tribunals vis-à-vis one another.

[44] Let's use this time of uncertainty and challenge as a moment not to point fingers or assign blame for the access to justice issues we face, but to listen more intently, to identify each another's successes and struggles, and to consider how we can change things for the better.

[45] With that, I am very happy to stop talking and start listening with the remaining time that I have today.

³⁸ Susan A. Bandes, "Moral Imagination in Judging" (2011) 51 Washburn L.J. 1 at 8.