LAVERNE A. JACOBS & JUSTICE ANNE L. MACTAVISH, EDS.,
*DIALOGUE BETWEEN COURTS AND TRIBUNALS – ESSAYS IN
ADMINISTRATIVE LAW AND JUSTICE (2001-2007)*
(MONTREAL: LES ÉDITIONS THÉMIS, 2008)

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“Dialogue between Courts and Tribunals,”¹ a title that could describe the interplay between judges and decision-makers in the context of the judicial review of administrative decisions,² in fact refers to a series of annual roundtables organized by the Canadian Institute for the Administration of Justice [CIAJ]. Designed to bring together judges and tribunal members from across Canada for full and frank discussions of current issues in administrative law and justice, each roundtable is structured around a paper authored by an academic, practitioner or tribunal chair. Under the editorial direction of University of Windsor Faculty of Law Professor Laverne Jacobs and Federal Court of Canada Justice Anne Mactavish, the papers from the 2001 to 2007 roundtables, recently revised by their authors, have been incorporated into a most useful and stimulating collection of essays. Professor David Mullan “wraps up” the eight essays in this volume by picking out various points of interest, a task that I now turn to, and by identifying common themes, a more difficult endeavour that I take up at the end of this review.

In “Discovering What Tribunals Do: Tribunal Standing Before the Courts,” Professors Laverne Jacobs and Thomas Kuttner turn a critical eye to the rules governing tribunal interventions before courts conducting judicial review of tribunal decisions on grounds of jurisdictional error, breach of natural justice or reasonable apprehension of bias, in the context of a constitutional challenge or to assist in the determination of the appropriate standard of review. The authors note that in many of the cases decided following the leading Supreme Court judgments in *Northwestern Utilities*³ and *Paccar*,⁴ courts have devised rules for standing based on bright-line distinctions. For example, they may grant tribunals standing to make submissions on the extent of their jurisdiction but not on the “merits” of a decision, nor about a tribunal’s alleged breach of the rules of natural justice. These sharp distinctions are contested. It is notoriously difficult, for instance, to distinguish between questions about the scope of a tribunal’s jurisdiction and questions on the merits of a case that are “within a tribunal’s jurisdiction.” Accordingly, courts have created exceptions to their bright line rules, allowing tribunals to make submissions regarding alleged breaches of natural justice that relate to procedures generally observed by the tribunal, like

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1 Laverne A. Jacobs & Anne L. Mactavish, eds. (Canadian Institute for the Administration of Justice, Thémis, Montréal: 2008).

2 In a memorable passage of their essay on “The Expert Tribunal,” Professors Laverne Jacobs and Thomas Kuttner speak of the modern view of the relationship of courts and tribunals as “co-equal partner[s] in shaping the normative order”. *Ibid.* at 71.

3 *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684 [*Northwestern Utilities*].

4 *Canadian Assn. of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 [*Paccar*].

the full board meetings at the Ontario Labour Relations Board reviewed in *Re Consolidated-Bathurst Packaging Ltd.*⁵

Jacobs and Kuttner argue against courts' formalistic reliance on sharp dichotomies and in favour of a "pragmatic and functional" approach to tribunal standing, in which courts would decide standing questions on a case-by-case basis by considering several factors, including "the statutory framework and language, the nature of the tribunal, the grounds on which the decision is being challenged, the purpose of the traditional rule limiting tribunal representation and, finally, practicality."⁶ The Ontario Court of Appeal, citing Jacobs' and Kuttner's essay, recently endorsed a shift from formalistic "a priori" rules governing standing towards a more flexible, practical approach.⁷ It observed that *Northwestern Utilities* and *Paccar* were "best viewed as sources of the fundamental considerations that should inform the court's discretion [to grant standing] in the context of a particular case."⁸ These considerations include the importance of having a fully informed adjudication of the issues on judicial review, which may require submissions from an expert tribunal on matters within its specialized expertise (including its decision-making processes) and the importance of maintaining tribunal impartiality by avoiding a level of tribunal participation that could undermine future confidence in its impartiality.

In "The Expert Tribunal," Jacobs and Kuttner skillfully synthesize academic and judicial commentary on the role of expertise in establishing the proper relationship between the judiciary and specialized administrative tribunals. In addition to exploring the practical uses of expertise in the tribunal setting, including tribunals' reliance on staff reports in decision-making, the authors pose very challenging questions that arise from recent case law on expertise. For instance, they ask how the Supreme Court's standard of review analysis, under which an agency's expertise militates in favour of judicial deference to agency decision-making, might interact with "new governance" models of regulation involving private actors. What could happen if a regulatory agency, in developing a policy, were heavily influenced by the findings or recommendations of an advisory panel of private sector experts, including experts with ties to parties regulated by the agency? Jacobs and Kuttner posit that courts could decide to review such policies on a deferential standard in view of the advisory panel's expertise. The danger of deferential review, the authors suggest, lies in the possibility that the advice provided by panels staffed by private parties may reflect a preference for the furtherance of private interests over the public interest. To open such policies to challenge, courts may have to "deconstruct" expertise and ensure that, as a factor militating towards deference, it is not an undue barrier to review.⁹ I agree that courts should be alert to this possibility. In my view, however, courts should

5 [1990] 1 S.C.R. 282 [*Consolidated Bathurst*].

6 *Supra* note 1 at 13.

7 *Ontario (Children's lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309 at paras. 34-35.

8 *Ibid.* at paras. 37-38.

9 If an agency effectively handed over its policymaking function to private sector experts, an additional possible avenue for regulated parties not canvassed by the authors could be to challenge the resulting policies on grounds of unlawful subdelegation.

hesitate to discourage an agency's efforts to supplement its own internal expertise through the establishment of expert panels or the secondment to the agency of private sector experts in the absence of evidence that the agency is abdicating its policy-making responsibility and its duty to ensure that its policies are in the public interest. Moreover, courts should not automatically consider resort by an agency to external expertise as a reason to discount the agency's own expertise and to justify more intrusive judicial review of agency policies.

Another question posed by Jacobs and Kuttner in "The Expert Tribunal" arises from the Supreme Court's statement, in the *Retired Judges* case,¹⁰ that the Court was prepared to assess the qualifications of ministerial appointees to an expert tribunal, if challenged, on a case-by-case basis. The Court's assessment would be grounded in its reading of legislative intent, as it was in the *Retired Judges* case, where Justice Binnie, for the majority, relied on legislative history to read "labour relations experience and acceptability to management and labour" into the statutory requirement that arbitrators appointed by the Minister be "qualified." Jacobs and Kuttner predict that the judicial quashing of appointments based on a lack of expertise or qualifications will be exceptional, limited to exceptionally politicized conflicts such as that between the unions and government which sparked the *Retired Judges* challenge, and seldom successful, given the courts' application of a reasonableness standard to review such ministerial appointments and their refusal under this standard to "re-weigh the factors" considered by ministers in their appointment decisions. Express statutory provisions designed to reinforce ministerial discretion by ousting experience and expertise as necessary considerations in appointments also constitute serious obstacles to judicial intervention. A cursory search of Canadian decisions confirms Jacobs' and Kuttner's prediction, revealing no significant judicial interventions in ministerial appointment decisions following the *Retired Judges* case.

David Jones' article on "Standards of Review in Administrative Law" occupies over a quarter of the volume - a testament, perhaps, to the oft-criticized complexity of the standard of review analysis. Jones' treatment of this topic is, as Mullan observes, "encyclopedic in its coverage"¹¹ and includes a historical review of the standard of review analysis as well as an analysis of the problems and uncertainties flowing from the Supreme Court's standard of review jurisprudence. Jones' contribution does not deal with the Supreme Court's decision in *Dunsmuir v. New Brunswick*,¹² which brought significant changes to the standard of review analysis, including the merging of the deferential standards of review (reasonableness simpliciter and patent unreasonableness) into a new single reasonableness standard. This does not mean that Jones' article is only of historical value. Indeed, *Dunsmuir* did not eliminate the pragmatic and functional approach. To the extent that the standard of review is not satisfactorily determined by precedent, it must still be determined through an analysis focused on the statutory mechanism of review, the decision-maker's relative expertise, the purpose of the

10 *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 [*Retired Judges*].

11 *Supra* note 1 at 381.

12 2008 SCC 9 [*Dunsmuir*].

act and the nature of the question. Jones' detailed treatment of this pragmatic and functional analysis is thus both still relevant and illuminating.

Indeed, Jones' views on where the Supreme Court might take the standard of review analysis seem prophetic in light of *Dunsmuir*. For example, Jones notes that while the courts' struggle to distinguish between the patent unreasonableness and reasonableness simpliciter standards of review led some to suggest that patent unreasonableness be eliminated, other stakeholders opposed that idea, insisting on the application of a super-deferential standard to their areas of administrative decision-making. Jones proposed a "third way," eventually adopted by the Supreme Court in *Dunsmuir*: "instead of choosing between the two existing deferential standards, is it possible that they could somehow be merged to create one, new and different deferential standard?" Courts and academics are still working on the answers to Jones' next questions: "What would be the content of that new deferential standard, and how would it differ from the two existing deferential standards of review?"

Jones' views on the role of expertise in determining the standard of review also find some resonance in the Supreme Court's recent decision in *Canada (Citizenship and Immigration) v. Khosa*.¹³ Jones observes that:

[U]nrooted from legislative intent, expertise... does not provide a justification for judicial deference. (...) It is only when the legislature has not stated its intention clearly that one must resort to the four *Pushpanathan* factors – including expertise – in order to determine "the polar star of legislative intent."¹⁴

In his concurring judgment in *Khosa*, Justice Rothstein criticizes the Supreme Court for requiring in *Southam* that deference be shown to "expert" tribunals on legal questions within their area of expertise, even on a statutory appeal,¹⁵ and thus losing sight of the governing role of legislative intent. It is not for the courts, Justice Rothstein states, "to impute tribunal expertise on legal questions, absent a privative clause, and in so doing assume the role of the legislature to determine when deference is or is not owed."¹⁶ While Jones would undoubtedly agree that legislative intent is the "polar star" of standard of review analysis, he might not agree with Justice Rothstein's further assumption that the absence of a privative clause or the presence of a statutory right of appeal unequivocally reveals a clear legislative intent that no deference be shown to the views of an expert tribunal on legal questions that it decides in the first instance. This assumption is flatly rejected by Justice Binnie, for a majority of the Court in *Khosa*, who finds an intent to encourage deference in the legislature's very decision to entrust first instance decision-making to a tribunal comprised of expert members.

13 2009 SCC 12 [*Khosa*].

14 *Supra* note 1 at 209.

15 *Canada (Director of Investigation and Research) v. Southam*, [1997] 1 S.C.R. 798 [*Southam*].

16 *Khosa*, *supra* note 13 at paras. 90-91.

In "Analyzing Problems of Exclusive and Concurrent Jurisdiction," Professor Aloke Chatterjee examines how courts determine whether an administrative agency has exclusive jurisdiction over the class of case into which a particular dispute falls, or whether it shares jurisdiction with courts or another agency. Chatterjee charges that in deciding such questions about jurisdiction, the leading Supreme Court decisions pay insufficient attention to the expertise of the agencies involved.¹⁷ In *Tranchemontagne*, a majority of the Court decided that the Ontario Social Benefits Tribunal had the jurisdiction to interpret and apply the *Ontario Human Rights Code* to determine whether it should treat a provision of its enabling legislation as inoperable because it conflicted with the *Code's* provisions. Though Chatterjee is sympathetic with the Court's concern that litigants be able to adjudicate all aspects of a claim in one forum, he is concerned that the majority's presumption that tribunals able to interpret law can also apply human rights legislation applies to all administrative decision-makers regardless of their expertise and institutional features. This apparent blindness to tribunals' specific statutory and operational context is compounded by the majority's reluctance to recognize any implied discretion on the part of a tribunal to stay its proceedings in favour of competing fora, irrespective of relative expertise on human rights issues, and by the majority's restrictive view of when it would be appropriate for a tribunal to exercise even an express statutory discretion to stay its proceedings. In Chatterjee's view, the majority in *Tranchemontagne* "endorsed an approach that gives rise to jurisdictional overlap but deprived administrative decision-makers of the tools with which to manage the overlap meaningfully."¹⁸

In "Tribunal Independence and Impartiality," Professor Laverne Jacobs asks "whether the [courts' current] approach to determining the degree of independence required of tribunals... serves to fulfill the goals of providing administrative justice and instilling public confidence in the administrative justice system."¹⁹ Jacobs questions the courts' current focus on security of tenure, financial security and administrative control, which were identified by the Supreme Court as basic requirements of judicial independence.²⁰ In her view, these factors may not adequately guarantee the independence of administrative tribunals which depends on a multitude of other factors that establish an agency's operational context, including inadequate funding for its operations (extending beyond secure remuneration for tribunal members to adequate resources to retain expert staff and carry out consultations and policy-making exercises with regulated parties), internal direction and monitoring by the agency chair and legal services branch, and how the agency conducts informal communications with the government, including its home ministry and elected representatives.²¹ Indeed, Canadian courts have long held that the judicial assessment of independence must be conducted from the perspective of an *informed* person "viewing the matter realisti-

17 *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513 [*Tranchemontagne*]; *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666 [*Bisaillon*].

18 *Supra* note 1 at 343.

19 *Ibid.* at 59.

20 *R. v. Valente*, [1985] 2 S.C.R. 673.

21 *Supra* note 1 at 52-3.

cally and practically-and having thought the matter through,” and once stated that this required some familiarity with tribunals’ operational context.²² Jacobs is concerned that the Supreme Court is shifting the independence analysis away from an emphasis on empirical information about actual tribunal operation to a focus on the legislative scheme as described in tribunals’ enabling statutes, which more often than not say very little about how they operate in practice. An analysis focused mostly on the statutory text may lead courts to an inaccurate assessment of whether agency independence is appropriately protected and sufficient to uphold the public’s confidence in administrative justice. Jacobs ends the essay with a call for the incorporation of empirical information on the workings of administrative tribunals into the judicial assessment of independence and impartiality, either through the drafting of statutes that more accurately reflect those relevant aspects of tribunal operations or through the sustained efforts of advocates to bring this empirical data before the courts on judicial review.²³

In “Tribunals and Policy-Making: From Legitimacy to Fairness,” France Houle and Lorne Sossin systematically and exhaustively dissect tribunal policy-making from the perspective of the agencies themselves, reviewing courts and members of the public served by the agencies. Their analysis is fleshed out with numerous examples drawn from different tribunal settings, including the Immigration and Refugee Board (IRB), the Tribunal Administratif du Québec (TAQ) and the Canadian Radio-television and Telecommunications Commission (CRTC). One very interesting aspect of this essay is the authors’ discussion of courts’ ambivalent approach to the effect and validity of guidelines and, in particular, their recurrent tendency to view statutes and regulations as “hard” law, binding on agencies and parties alike, while viewing guidelines as “soft” law, whose normativity falls short of making them genuine legal rules.²⁴ Guidelines, the authors note, can be grouped into three “ideal” types or categories. “Self-limiting guidelines” are formulated by tribunals empowered by their enabling statute to make “open discretionary” decisions “in the public interest,” “for public safety” or for “humanitarian and compassionate” reasons. Such guidelines aim to confine and structure the tribunal’s broad discretion. As Houle and Sossin point out, because there is so much disagreement regarding their external enforceability, tribunals have great latitude in deciding whether to issue such policy instruments and, once issued, whether to publish or disseminate them.²⁵ While an agency’s failure to follow a policy or guideline may thus not be a ground for court intervention, parties are certainly able, in proceedings before the agency, to rely on a policy or to question its application in their particular case. “Interpretive guidelines” essentially spell out how an agency intends to carry out the mandate expressed in its enabling statute, and may include procedural guidelines applying to the conduct of hearings and substantive guidelines adopting specific interpretations

22 See *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 per Sopinka J.; *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405.

23 Jacobs own doctoral research on the operation of privacy and freedom of information commissions promises to generate precisely this kind of empirical data.

24 *Supra* note 1 at 112.

25 *Ibid.* at 116.

of the scope and meaning of substantive rights and obligations created by the statutory provisions. "Quasi-regulatory guidelines" are formulated pursuant to "instrumental powers" - specific statutory powers to set norms through regulation (following, at the federal level, the procedural requirements set out in the *Statutory Instruments Act*) or quasi-regulation (following procedural requirements set out in the specific enabling statute). Such guidelines are viewed by courts as enforceable and thus binding on all actors involved in the decision-making process. While agencies use self-limiting interpretive guidelines to more narrowly define or delimit what their statute requires them or allows them to do, they use quasi-regulatory guidelines to expressly change the legal order.

The authors indicate that these law/policy - binding/non-binding dichotomies are breaking down in at least two instances. The first is the Supreme Court's judgment in *Baker v. Canada (Minister of Citizenship and Immigration)*,²⁶ a decision reviewing the decision of immigration officers to deny Baker's application that she be exempted, on humanitarian and compassionate grounds including the welfare of her children, from the statutory requirement that she first leave Canada to apply for permanent residence. It was not possible for Baker to argue, in light of the CIC guidelines instructing immigration officers deciding humanitarian and compassionate applications to consider the best interests of her children, that she had a legally enforceable right to a decision reached in compliance with these guidelines. However, the Supreme Court still gave the guidelines legal effect by considering them as evidence of whether the officials' decisions were reasonable. The second example is the courts' apparent willingness to subject policies to *Charter* scrutiny. In *Little Sisters Book and Arts Emporium v. Canada (Ministry of Justice)*,²⁷ which involved an equality challenge to customs agents' targeted seizure of books and magazines imported by a bookstore specialized in gay and lesbian material, the Supreme Court refused to subject the guidelines and policy manuals followed by customs agents to *Charter* scrutiny because they were "internal administrative aides" to administrators and thus "not law". The Court has since indicated that it would be prepared to invalidate or order changes to policy guidelines that violated the *Charter*.²⁸ In the authors' view, these developments show that courts are gradually recognizing that agencies that choose to formulate guidelines to shape and constrain the exercise of their discretionary powers may create norms that have legal effect. This recognition of agencies' lawmaking abilities presents a challenge to the conventional view of the separation of powers which limits the role of the executive branch (and its agencies) to the execution of laws. While courts will eventually have to resolve this tension, acknowledging its existence is preferable to maintaining an impoverished "binding/non-binding" approach to the role of policies, which makes "a coherent, principled and pragmatic approach tribunal policy-making ... an elusive goal."²⁹

26 [1999], 2 S.C.R. 817 [*Baker*].

27 [2000], 2 S.C.R. 1120 [*Little Sisters*].

28 *Supra* note 1 at 127-8; see *New Brunswick (Minister of Health and Community Services) v. G (J)*, [1999] 3 S.C.R. 46. See also *Glasgow v. Nova Scotia*, [1999] N.S.J. No. 256 (N.S.S.C.) (QL).

29 Dialogue, *supra* note 1 at 128. But see *Greater Vancouver Transportation Authority v. Canadian*

In "Consistency in Tribunal Decision Making: What Really Goes On Behind Closed Doors," Kevin Whitaker, Michael Gottheil and Michael Uhlmann describe from an agency perspective³⁰ the challenges faced by tribunals seeking to enhance the consistency of their decision-making, ensuring that similarly situated litigants before a tribunal receive similar treatments and outcomes, while protecting the independence and impartiality of individual adjudicators and upholding the principle of procedural fairness that the adjudicator who hears a case must decide it. In their experience, "tribunals achieve consistency through the creation of an internal culture which places value on both consistency and the free and unhindered expression of individual views."³¹ This culture is established in many ways, through adjudicator recruitment and reappointment strategies, adjudicator training, knowledge and sensitivity to the expectations of the community regulated by the tribunal, internal discussions (such as the full board meetings made famous in *Consolidated Bathurst*, *supra*), the issuance of guidelines, case management schemes, reconsideration of tribunal decisions and judicial review. For tribunal outsiders, the idea of an internal tribunal culture is somewhat mysterious. What are the features of internal tribunal cultures? How are they measured? How does one go about changing internal tribunal cultures? The authors suggest, for example, that in order to achieve a greater measure of consistency, tribunals can identify and recommend the appointment of individuals who "share the same set of understandings and values which in turn permit the tribunal to achieve internal consistency."³² What are these understandings and values? Based on the author's discussion, I would suspect that these desired values relate less to a particular view of what the appropriate policy direction of the tribunal should be than to an attitude, characterized first by an ability and desire to fulfill one's function in a collegial manner by sharing one's perspectives and views on policy and legal issues and by listening to those of tribunal colleagues, including the tribunal chair, and second, by one's willingness and ability to justify, through sufficient reasons, a decision to depart from "the range of what might be normally anticipated" in a specific case.³³ The authors

Federation of Students – British Columbia Component, 2009 SCC 31 at para. 64 where, in a case focusing on the constitutionality of a transportation authority's advertising policies, the Supreme Court distinguishes between "administrative policies" focused on "indoor management" and "policies of a legislative nature": "Where a policy is not administrative in nature, it may be "law" provided that it meets certain requirements. In order to be legislative in nature, the policy must establish a norm or standard of general application that has been enacted by a government entity pursuant to a rule-making authority."

30 Kevin Whitaker is chair of the Ontario Labor Relations Board. Michael Gottheil is chair of the Ontario Human Rights Tribunal. Michael Uhlmann is a Senior Project Consultant on the Agency Cluster Project, an initiative of the Ontario government to work with tribunals in the municipal, environment and land planning sectors to improve services through cross-agency cooperation and coordination.

31 *Supra* note 1 at 358.

32 *Ibid.* at 359.

33 The authors do not address in much depth how this range is to be determined. Presumably, one could refer back to a tribunal's prior jurisprudence to identify areas of settled law and policy. The Supreme Court has frowned upon institutional processes designed to hammer out a tribunal consensus on the appropriate interpretation or application of a legal provision or policy in a specific case: *Tremblay v. Québec (Commission des affaires sociales)*, [1992] 1 S.C.R. 962.

describe this culture of “ongoing discussion” as a system of “assertive collegiality,” where “there can be vigorous debate internally within the complement of adjudicators, but once the discussion is complete, the person hearing the case is free to make their own decision.”³⁴ The authors provide the reader a glimpse into what the Ontario Human Rights Tribunal perceives to be desirable “understandings and values.” The Tribunal’s job description for vice-chairs, annexed to the essay, states in a paragraph appearing under the title “consistency of tribunal decision-making,” that vice-chairs are expected to attend regular meetings to discuss issues of *Code* interpretation, without attempting to come to consensus on the interpretation of the law nor establish a tribunal-wide position on how to decide a particular case, participate in the development of rules of procedure and policies which will guide the tribunal, have regard to the tribunal’s policies and keep informed of leading case law from the tribunal, the courts and other Canadian jurisdictions. One can only hope that this essay is a prelude to more detailed contributions from tribunal chairs (as well as other empirical research) regarding tribunal cultures and their impact on consistency in decision making, tribunal independence and the delivery of administrative justice.

Philip Bryden’s and William Black’s essay on “Designing Mediation Systems for Use in Administrative Agencies and Tribunals – The B.C. Human Rights Experience” is a “must read” for tribunal chairs and policymakers involved in the design or re-design of an agency or tribunal and considering the inclusion of mediation services. Their contribution also stands out as the only fully empirical study in the collection. It is a wonderful illustration of the kind of quantitative and qualitative evaluation of what agencies and tribunals do - work that is so necessary to our understanding of administrative justice and still relatively infrequent in the Canadian administrative law literature. Bryden and Black conducted their empirical study of mediation at the British Columbia Human Rights Tribunal in an effort to measure whether providing mediation serves the interests of the tribunal (by, for example, reducing the need for full adjudication of complaints by facilitating full or partial settlements), the interests of the parties (in terms of their satisfaction with the outcomes and the process of mediation) and the broader public interest (whether the results achieved are consistent with the broader objectives of human rights legislation, including addressing broad patterns of inequality, eliminating the societal harms caused by discrimination and educating the public about human rights). As well as describing the thought-provoking results of their study, the authors provide a very useful list of criteria meant to guide policy-makers and tribunal chairs in deciding whether or not mediation services are appropriate for their tribunal, and if so, how these services should be structured. While the authors focus their study on mediation at a human rights tribunal (a cross between an agency designed to resolve bi-party disputes and a complaint-based regulatory enforcement agency), they also address the pros and cons of mediation in agencies that decide individuals’ eligibility for benefits and agencies involved in regulation mainly through policy-making or rule-making. The authors canvass a wide range of mediation system design issues: whether a particular tribunal has the statutory authority to

34 *Supra* note 1 at 362.

engage in mediation; how tribunals can craft a process to facilitate the design of a mediation system by, for example, building support among internal and external stakeholders; how tribunals should assess whether to make mediation mandatory or voluntary; whether to use external mediators or in-house mediators, and if the latter, how to ensure they are appropriately trained; how to frame the parties' involvement in mediation, including the use of mediation agreements; and how to measure the results of a mediation service in order to determine whether the tribunal's goals are being met.

The British Columbia Human Rights Tribunal offers voluntary mediation carried out by trained tribunal members, staff lawyers and outside mediators, at two stages in its handling of discrimination complaints: before a response is filed by the respondent (early settlement) and after the response is filed but before the hearing (regular settlement). Close to 20% of all complaints filed at the Tribunal are settled through Tribunal mediation. Between July and December 31, 2004, mediators provided a questionnaire to complainants and respondents who engaged in mediation in an effort to measure their satisfaction with the process and the outcome. The authors' study was somewhat similar to their earlier examination of mediation at the (now defunct) British Columbia Human Rights Commission. Their findings raise some very interesting questions for human rights tribunals and commissions offering mediation services, and, more generally, for other adjudicatory tribunals and complaint-based regulatory agencies. In assessing whether mediation was worthwhile from the Tribunal's perspective, the authors noted that close to two thirds of mediations examined resulted in a settlement, and that this rate did not change markedly depending on whether early or regular mediation was selected. Though there was insufficient data to quantify the net savings to the Tribunal generated by the mediation process, interviews with Tribunal members and advocates suggested that "failed" Tribunal settlement meetings frequently spurred parties to achieve a settlement outside the tribunal process, and thus substantially reduced adjudicative workload.³⁵ Some of the authors' most fascinating (and worrisome) findings concern their measurement of party satisfaction with the mediation process and its outcomes. For instance, unrepresented parties were markedly less satisfied with the mediation process than represented parties, and, on average, garnered smaller monetary settlements.³⁶ Women were more likely to settle than men, raising the spectre of a possible power imbalance that could call into question the appropriateness of mediation. However, the authors found that women appeared to be more satisfied than men with the results of their mediation even though average monetary settlements for men were higher by 7%.³⁷ While average settlements rose at best to 71% of the monetary awards from Tribunal hearings (as might be expected of parties who factor into their settlement discussions the risk of loss at the hearing), the settlement amounts were higher than settlements obtained when mediation was conducted by the British Columbia Human Rights Com-

³⁵ *Supra* note 1 at 186.

³⁶ *Ibid.* at 189.

³⁷ *Ibid.* at 191 *et seq.*

mission.³⁸ Finally, the study showed no great difference between tribunal orders and settlements in terms of providing mechanisms for the prevention of future discrimination, a result that tends to support the use of mediation in the human rights context albeit with safeguards to ensure that mediators can discontinue their efforts if they judge that mediation could undermine broader human rights objectives.

As Mullan observes, the articles cover “a wide swath” of current topics in administrative law and process and “common themes in organizing principles do not come readily to mind.”³⁹ However, I believe that the essays in this collection do share at least one common feature. All of the authors, in their own way, reinforce the importance of attention to context in giving meaning to and applying the many principles of administrative law. They address this message primarily to reviewing judges. The questions raised in these essays – the appropriate stance of reviewing courts towards the decisions of officials and tribunals (Jacobs and Kuttner, Jones), the appropriate role of these decision-makers in the hearing of a judicial review application (Jacobs and Kuttner), the safeguards required to preserve their independence and preserve the public’s confidence in administrative justice (Jacobs), the extent of their power to make law through the issuance of policies and guidelines (Houle and Sossin) or to interpret and apply human rights codes and other statutes of general application (Chatterjee) – are not adequately resolved by bright line tests or classifications or by one-size-fits-all generalizations. Rather, they can only be answered through an understanding of what each particular administrative decision-maker does, how it operates, how it is structured, how it relates to the executive and how its members relate to one another. Each essay thus emphasizes empirical research as the proper foundation on which to approach the study and elaboration of administrative law. This lesson is not solely of value to judges. Bryden and Black convincingly demonstrate the value of empirical research in the design of administrative processes, and particularly mediation services. Their study of mediation at the B.C. Human Rights Tribunal does not provide all of the answers to the tribunal chair or government policy-makers involved in the design of mediation services, but the data and analysis it has generated raises important questions (the role of legal representation, gender differences in process and outcomes) that must be answered through further inquiry in order to ensure that parties’ interests and the public interest are upheld, as the legislature intended. In their discussion of the role of tribunal culture as a determinant of decision making consistency, Whitaker, Gottheil and Uhlmann reveal that the collective wisdom of tribunal chairs and members and their experience on the front lines of the delivery of administrative justice are an important source of empirical knowledge – one that should be tapped more deeply and more often. This is one of the main ideas animating the creation of the roundtables – and it should come as no surprise that it is reflected

38 *Ibid.* at 194. Policy makers comparing the advantages of a gatekeeping model of human rights adjudication, where Commissions investigate complaints and control complainants’ access to adjudication before a tribunal, and the direct access model should factor this finding into their deliberations.

39 *Supra* note 1 at 373.

so clearly in this collection of essays. I would say that, based on my experience as a participant in two recent CIAJ roundtables, only one ingredient is missing from this collection: the wide-ranging and often lively discussions and debates between tribunal members, judges, practitioners and academics triggered by these topical and thoughtful essays. For their next collection of roundtable essays, the editors may wish to consider how they might capture in print and share with a wider audience more of the flavour of this important dialogue which has made the roundtables such a rich and enriching experience. But this is a small complaint about what is clearly an excellent, and possibly essential, collection of essays on the workings of Canadian administrative justice.