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Access to Administrative Justice as an Administrative Law Value: Designing an Inclusive and Accessible Administrative Justice System

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Aller au sommaire du numéro

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Résumé de l'article

Le présent article s'intéresse aux motifs historiques pour lesquels l'accès à la justice est une source de préoccupations chez les communautés en quête d'égalité. Il introduit l'utilisation du principe de l'équité sociale dans l'administration publique comme élément clé pour comprendre les façons d'améliorer l'accès à la justice pour les communautés en quête d'égalité dans le système de justice administrative. Il détaille les cinq principes qui sous-tendent une valeur nouvelle qui doit être accordée à l'accès à la justice administrative, en plus de citer des exemples de projets récents de réforme tribunaire au Canada qui illustrent de possibles pistes de solutions. Enfin, il décrit de manière générale les façons dont les outils provenant de la conception institutionnelle et de la culture tribunaire peuvent contribuer à rehausser la valeur de l'accès à la justice administrative pour des groupes en quête d'égalité dans le contexte plus large des différents acteurs administratifs. En somme, l'article offre une analyse de l'interaction dynamique entre les populations marginalisées et vulnérables et l'accès à la justice dans la fonction administrative pour permettre l'avancement des discussions juridiques et contemporaines concernant l'accès à la justice administrative et la définition que nous devrions lui donner.

Access to Administrative Justice as an Administrative Law Value: Designing an Inclusive and Accessible Administrative Justice System

Laverne Jacobs[*]

The constantly developing norm of access to justice is moving to occupy a central place in the administrative justice system, prompting a need to rethink the values that should serve to animate the system. This article offers a framework for the administrative justice system in Canada, one that firmly and explicitly entrenches the value of access to administrative justice within it. It reflects on the requirements to achieve access for a significant population of its users – namely, equality-deserving communities. The author looks at the historical reasons why access to justice has been a concern for equality-deserving communities, and introduces the concept of social equity from the discipline of public administration as a tool to assist in addressing some of the structural and systemic access-to-administrative-justice challenges experienced. The author rearticulates the foundational values of administrative law in Canada to incorporate access to administrative justice as a distinct value, one that engages with access-to-justice barriers relating to structural and systemic inequality. In doing so, she details five core principles that underpin the new value of access to administrative justice and cites examples of recent tribunal reform projects in Canada that illustrate promising innovations in that direction. Finally, the author describes briefly the ways in which institutional design and tribunal culture can contribute to enhancing the value of access to administrative justice within the broad, on-the-ground context of different administrative actors. Overall, this article presents an analysis of the dynamic interaction between marginalized populations and the administrative state in order to move forward judicial and other contemporary discussions about access to administrative justice and how it should be defined.

Le présent article s'intéresse aux motifs historiques pour lesquels l'accès à la justice est une source de préoccupations chez les communautés en quête d'égalité. Il introduit l'utilisation du principe de l'équité sociale dans l'administration publique comme élément clé pour comprendre les façons d'améliorer l'accès à la justice pour les communautés en quête d'égalité dans le système de justice administrative. Il détaille les cinq principes qui sous-tendent une valeur nouvelle qui doit être accordée à l'accès à la justice administrative, en plus de citer des exemples de projets récents de réforme tribunaire au Canada qui illustrent de possibles pistes de solutions. Enfin, il décrit de manière générale

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les façons dont les outils provenant de la conception institutionnelle et de la culture tribunaire peuvent contribuer à rehausser la valeur de l'accès à la justice administrative pour des groupes en quête d'égalité dans le contexte plus large des différents acteurs administratifs. En somme, l'article offre une analyse de l'interaction dynamique entre les populations marginalisées et vulnérables et l'accès à la justice dans la fonction administrative pour permettre l'avancement des discussions juridiques et contemporaines concernant l'accès à la justice administrative et la définition que nous devrions lui donner.

I. INTRODUCTION

There is a shift occurring in the Canadian administrative justice system with respect to the values that uphold it. The constantly developing norm of access to justice is moving to occupy a central place in the administrative justice system. As a consequence, it has prompted a need to rethink the values that should serve to animate the system. This article offers a framework for administrative justice in Canada, one that firmly and explicitly entrenches the value of access to administrative justice within it. Access to justice should exist for all users of the administrative justice system, and this article reflects on the requirements to achieve access for a significant population of its users – namely, equality-deserving communities. It relies on the public administration concept of social equity and considers it an important lens for understanding and addressing many structural and systemic access-to-administrative justice challenges experienced by marginalized communities and other equality-deserving groups. Finally, it rearticulates the foundational values of administrative law in Canada to incorporate access to administrative justice as a distinct value, one that engages with access-to-justice barriers relating to structural and systemic inequality.

Administrative justice has acquired a number of different definitions around the world.[1] In this article, the term "administrative justice" is used to denote the procedures, processes, and systems employed by and within administrative bodies prior to the stage of judicial review or statutory appeal to a court. The term "procedures" is used to refer to the procedures followed in hearings. "Processes" and "systems," by comparison, refer to institutional design and the much broader array of practices, requirements, forms, and other tools that engage the public in the processing of their files outside of a hearing, such as those that are employed during intake, screening interviews, form filling and caseworker meetings. The administrative justice sphere therefore encompasses front-line decision making (whether found in government departments, tribunals, or other public-facing contexts in which public programs are administered), internal reconsideration mechanisms, and internal appeal structures.[2] It is the space in which members of the public most often encounter and resolve a variety of disputes relating to delegated authority administered through statutes and other forms of public power.[3] As discussed in this article, it is

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1 Marc Hertogh et al, "Administrative justice as a field of study" in Marc Hertogh et al, eds, *The Oxford Handbook of Administrative Justice* (Oxford: Oxford University Press, 2021) xv.

2 This article does not deal with models of adjudication. On the topic of models of adjudication, see e.g. Peter Cane, *Administrative Tribunals and Adjudication* (Portland, OR: Hart Publishing, 2010); Jeffrey Lubbers, "Administrative Adjudication: The United States is the Outlier" in Hertogh et al, *supra* note 1, 45.

3 Other forms of public power include Crown prerogative. See *McDonald v Anishinabek Police Services* (2006), 53 CCEL (3d) 126, 153 ACWS (3d) 224; *Attawapiskat First Nation v Canada*, 2012 FC 948. On the use of non-statutory sources of administrative action and its impact on Indigenous peoples in Canada, see also Naomi Metallic, "Deference and Legal Frameworks Not Designed by, for or with Us" (27 February 2018), online: *Administrative Law Matters* <www.administrativelawmatters.com/blog/2018/02/27/deference-and-legal-frameworks-not-designed-by-for-or-with-us-naiomi-metallic/> [https://perma.cc/V7NR-JJGS].

also a space that is used regularly by marginalized and vulnerable communities and, more broadly, by equality-deserving groups.

In Canada, there has been little academic scholarship focused on defining administrative justice and few academic attempts to theorize about the conditions required for access to justice to be successfully delivered within the administrative justice context.[4] Moreover, tribunal design literature has largely been written without regard to the specific needs of the equality-deserving communities that use the administrative justice system, nor of those who are not using it (whether by choice or otherwise).[5] The concept of social equity, from the discipline of public administration, is often overlooked in discussions of access to administrative justice despite its value for appreciating the access needs of marginalized communities and its potential for helping to reduce systemic and structural inequality in the administrative state.[6] There is therefore an absence of sustained and integrated theoretical, historical, and practical analysis of the avenues needed to ensure access to justice for marginalized and other equality-deserving groups in the administrative justice context. This article aims to help fill this gap in the administrative law and justice scholarship. It does so by articulating principles necessary for designing the value of access to administrative justice in order to assist with ensuring that the administrative justice system is fair, equitable, and inclusive of users from marginalized and other equality-deserving communities. More generally, this article presents an academic reflection on the dynamic interaction between marginalized populations and the administrative state in order to move forward judicial and other contemporary discussions surrounding access to administrative justice and how it should be defined.

Part II of this article provides a historical overview of how access to justice in the administrative justice system achieved critical importance for marginalized communities and other equality-deserving groups. It sets out the four traditional values of the administrative state and discusses the access-to-justice gaps that exist, with particular attention to the time period between the 1970s and the 2000s. It also defines the concept of social equity and articulates the importance of social equity in designing administrative justice systems that are attentive and responsive to the access needs of individuals from marginalized communities and other equality-deserving groups. Part III proposes access to administrative justice as an essential and contemporary value of the administrative justice system. Five core principles of this new value of access to administrative justice require administrative bodies and actors to be user-centric, inclusive, accessible, trauma-informed, and accountable, and these five principles are described in detail. Part IV discusses two instruments that can be used to ensure access to administrative justice within administrative bodies on the ground: institutional design and tribunal culture. Overall, this conceptual framework for administrative justice has the potential to create a meaningful new ethos for users of the administrative justice system, one that signals the necessity and importance of a multidimensional and socially equitable form of access. The principles supporting the value of access to administrative justice

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4 Jennifer Raso discusses the administrative justice literature in Canada. See Jennifer Raso, "Much Ado About Quite a Bit: Administrative Agencies" in Colleen Flood & Paul Daly, eds, *Administrative Law in Context* (Toronto: Emond, 2022) 493.

5 See e.g. Lorne Sossin, "Designing Administrative Justice" (2017) 34:1 Windsor YB Access Just 87. In this article, to respect to the diversity of administrative bodies in the Canadian administrative justice system, and the divergences in their typology, the terms administrative actors, agencies, bodies, decision-makers and tribunals will be used interchangeably.

6 Within the discipline of law, substantive equality, which is defined later in this article, shares some of the features of social equity and is also invoked infrequently in discussions on access to administrative justice. The purpose of this article, however, is to introduce the public administration concept of social equity – a concept that is close to the work of the administrative state and which derives from a cognate discipline – and to discuss its potential contributions to advancing our understanding of access to administrative justice.

will also contribute generatively by helping to shape effective tools of access for a diversity of users within the varied assortment of public bodies that make up the Canadian administrative justice system.

II. ACCESS TO JUSTICE IN THE ADMINISTRATIVE LAW CONTEXT: A BRIEF HISTORICAL OVERVIEW

This Part presents a historical overview of how access to administrative justice has become increasingly important for marginalized communities. It focuses on the period between the late 1970s and the early 2000s, which was an era of active foundational development in Canadian administrative law. This history serves as a backdrop for understanding the utility of a social equity lens in the administrative justice system as well as the principles that should inform the value of access to administrative justice, both of which are discussed below. Between the late 1970s and the early 2000s, Canadian administrative law jurisprudence and theory championed four values in the administrative state: expertise, fairness, expediency, and efficiency. The Supreme Court of Canada's jurisprudence placed significant emphasis on respecting the expertise of administrative actors, guaranteeing appropriate procedural fairness, discouraging delay, and ensuring that efficiency was gained in tribunal operations without compromising fair, quality decisions.[7] Viewed within a broader context, the Supreme Court's administrative law jurisprudence throughout this time was dominated by debates about how to determine and apply appropriate amounts of deference to administrative decision-makers on judicial review.[8] It was a burgeoning era in relation to curial deference and standard of review. With respect to administrative law theory, the four values of expertise, fairness, expediency, and efficiency implicitly shaped the administrative law literature and teaching of that time.[9] Furthermore, these values have had a dominant presence in government policy work relating to tribunal

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[7] The championing of these four values can be seen through some of the most significant Supreme Court of Canada decisions from this time period, including the decisions that aimed to respect the expertise of administrative actors by determining appropriate degrees of deference, first through the pragmatic and functional approach (see e.g. *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048, 24 QAC 244; *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, 11 DLR (4th) 641) and, later through the standard of review analysis (see e.g. *Dunsmuir v New Brunswick*, 2008 SCC 9). Illustrative decisions from the Supreme Court of Canada during this time frame have also laid out lasting principles for: evaluating requisite degrees of fairness (i.e. *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 SCR 311, 23 NR 410; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699, [1999] 2 SCR 817 [*Baker*]); determining extraordinary delay (i.e. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307), and drawing distinctions between collegial discussion and pressure in reviewing draft decisions (i.e. *IWA v Consolidated-Bathurst Packaging Ltd*, [1990] 1 SCR 282, 68 DLR (4th) 524).

[8] In this regard, one might also consider accountability through judicial review as a notable value during this time period. This article focuses, however, on administrative justice at the tribunal level. On deference to administrative decision-makers, see, most recently, *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[9] For example, while the leading administrative law textbooks from that period did not organize their material around these four values, they discussed at length the Supreme Court of Canada jurisprudence that engaged with them. See e.g. JM Evans et al, *Administrative Law: Cases, Text, and Materials*, 3rd ed (Toronto: Emond Publishing, 1989); David J Mullan et al, *Administrative Law: Cases, Text, and Materials*, 7th ed (Toronto: Emond Publishing, 2003); Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context* (Toronto: Emond Publishing, 2008).

establishment, design, and operations in Canada.[10] Through to contemporary times, this focus on the four traditional values has continued to be prevalent.[11]

The four traditional values find their origins in the functionalist approach to tribunal creation that dominated the development of the administrative state.[12] Through the functionalist approach, administrative bodies were created so that decision-makers with expert knowledge could resolve disputes in specialized areas of the law such as workers' compensation claims.[13] As a result, matters could be diverted away from slowing down the regular generalist court system, and disputes in these specialized areas could be concluded with greater speed, skilfulness and efficiency.[14] Moreover, efforts were made to ensure that decision-making bodies were established at arm's length from government departments and ministries, with appointed decision-makers who were independent of government. The appointment of independent decision-makers sought to inculcate a greater degree of fairness for matters that involved the government as a party.[15] One finds these ideals, which reflect the four traditional values, deeply engrained in the development of the administrative state.

While the four values of expertise, fairness, expediency, and efficiency have not always operated optimally,[16] they continue to guide much of the practical development of administrative tribunals in Canada.[17] In addition, although the Supreme Court has mentioned access to justice in its administrative law jurisprudence, it has conceived of access to justice in relation to one or more of these four values and has not fully delineated its scope and content as a distinct administrative law value.[18]

Yet, through the late 1970s to current times, there was a second important phenomenon emerging alongside these developments. This phenomenon was a growth in the significant role that the administrative justice system played in the lives of individuals from marginalized communities. During

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10 This can be traced through government reports and studies published during this period. See e.g. Law Reform Commission of Canada, *Report 26: Independent Administrative Agencies* (Ottawa: Minister of Supply and Services Canada, 1985) at 5, 8-9 [Law Reform Commission of Canada, *Report 26: Independent Administrative Agencies*]; Ontario, Management Board of Cabinet, *Directions: Review of Ontario's Regulatory Agencies*, by Robert Macaulay (Toronto: Queen's Printer for Ontario, 1989) at 2-9 - 2-11 [Ontario, Management Board of Cabinet, *Directions*].

11 Tribunals Ontario, "Executive Chair's Message" in *Annual Report 2019–2020* (Toronto: Queen's Printer for Ontario, 2020) at 7 [*Tribunals Ontario Report*].

12 See John Willis, "Three Approaches to Administrative Law: The Judicial, the Conceptual and the Functional" (1935) 1:1 UTLJ 53 [Willis, "Three Approaches"]; John Willis, ed, *Canadian Boards at Work* (Toronto: MacMillan, 1941). This is not to say that there was a specific blueprint for the creation of the wide variety of administrative tribunals and other administrative actors that were established. It is largely agreed that the administrative state was created in an ad hoc fashion. See Law Reform Commission of Canada, *Report 26: Independent Administrative Agencies*, *supra* note 10 at 5. See also the discussion of the establishment of administrative tribunals in Canada in Laverne Jacobs, *Fashioning Administrative Independence at the "Tribunal" Level: An Ethnographic Study of Access to Information and Privacy Commissions in Canada* (PhD dissertation, Osgoode Hall Law School, York University, 2009) at 30–38.

13 Willis, "Three Approaches," *supra* note 12 at 75.

14 Law Reform Commission of Canada, *Report 26: Independent Administrative Agencies*, *supra* note 10 at 5, 9; Ontario, Management Board of Cabinet, *Directions*, *supra* note 10 at 2-9 – 2-10.

15 See the discussion in Law Reform Commission of Canada, *Working Paper 25: Independent Administrative Agencies* (Ottawa: Minister of Supply and Services Canada, 1985) at 75.

16 See e.g. "*Administrative Justice Delayed, Fairness Denied*" (May 2023), online: *Ombudsman of Ontario* <www.ombudsman.on.ca/resources/reports,-cases-and-submissions/reports-on-investigations/2023/administrative-justice-delayed,-fairness-denied>. [https://perma.cc/EJ8Z-NDQP][*Ombudsman of Ontario*, "Administrative Justice Delayed"] (reporting on delays at the Ontario Landlord and Tenant Board).

17 See e.g. *Tribunals Ontario Report*, *supra* note 11.

18 See e.g. *Vavilov*, *supra* note 8 at para 140.

this time period, the administrative justice system served as a central tool of the welfare state.[19] In addition, expanded tribunal jurisdiction in the early 2000s opened the door to the possibility of more human rights claims being brought before administrative tribunals for resolution. One can best appreciate the significance of the administrative state for marginalized communities through learning of their common lived experiences and access to justice needs, while maintaining an understanding that these experiences and needs can vary among individuals. After defining the term "marginalized communities," the next section considers some of the legal and access issues experienced by individuals from marginalized communities who resolve their disputes before administrative tribunals, and it sets them against the ways in which access to justice has been understood in relation to the administrative state in order to illustrate the access-to-justice gaps.

A. Marginalized Communities and Access to Administrative Justice

What are marginalized communities? Scholars in the field of human rights have noted that marginalized communities commonly face consistent and systemic disadvantage due to social inequalities and structural violence.[20] Marginalized populations experience that "their existence is often neglected and their needs remain unheard."[21] Some of the largest marginalized communities in North America are made up of racialized individuals; religious and ethnic minorities; Indigenous peoples; women, migrants, and refugees; persons with disabilities; older persons; members of trans and 2SLGBTQ+ communities; and people who are homeless, unhoused, or living in precarious housing conditions.[22] These communities are far from mutually exclusive, and experiences of discrimination may also be intersectional.[23] Individuals with multiple marginalized social identities often have distinct lived experiences of socio-economic oppression as well as specific access-to-justice needs.

Individuals from marginalized communities may be vulnerable in the sense of being susceptible to harm without protection. These harms include physical and/or psychological harm, undue influence, and/or the experience of a fragmented set of legal protections.[24] However, marginalization does not necessarily or automatically connote vulnerability.[25] References to "marginalized communities,"

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19 The administrative justice system's connection to the welfare state is widely recognized, particularly by political scientists. An example of such recognition during the time frame in question can be found in Keith Banting, *The Welfare State and Canadian Federalism*, 2nd ed (Montreal and Kingston: McGill-Queens University Press, 1987) at 2.

20 Tina Kempin Reuter, "Human Rights and the City: Including Marginalized Communities in Urban Development and Smart Cities" (2019) 18:4 J Human Rights 382 at 386.

21 *Ibid*. See also the definition of "marginalized groups" used in "Building Understanding: The First Report of the National Advisory Council on Poverty" (2020) at 14, online: *Employment and Social Development Canada* <www.canada.ca/content/dam/esdc-edsc/documents/programs/poverty-reduction/national-advisory-council/reports/2020-annual/Building_understanding_FINAL_Jan_15.pdf> ["Building Understanding"]. [perma.cc/EYH2-FYYQ].

22 *Reuter*, *supra* note 20; "Building Understanding," *supra* note 21.

23 Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1989:1 U Chicago Legal F 139 at 140.

24 See Janet E Mosher, "Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by Their Intimate Partners" (2015) 32 Windsor YB Access Just 149; Margaret Isabel Hall, "Mental Capacity in the (Civil) Law: Capacity, Autonomy, and Vulnerability" (2012) 58:1 McGill LJ 1; Ani B Satz, "Overcoming Fragmentation in Disability and Health Law" (2010) 60 Emory LJ 277. Martha Fineman puts forward a slightly different conception of vulnerability that sees vulnerability as affecting everyone and points to an uneven distribution of tools of resilience and response (such as the development of appropriate societal institutions) by the state. See Martha Albertson Fineman, "The Vulnerable Subject and the Responsive State" (2010) 60 Emory LJ 251.

25 For example, although persons with disabilities are marginalized in many countries around the world, they are also found across the spectrum of independence. The disability rights movement, and one of its contemporary outcomes, the United

"vulnerable communities," and those who live at the intersection of marginalization and vulnerability are sometimes encompassed in the broader expression of "equality-deserving groups," a term that recognizes substantive equality (or "the need to treat groups differently in some contexts to secure equal outcomes") as an imperative, and that prompts us to think about ways of achieving this goal.[26]

Individuals from equality-deserving groups frequently seek to resolve a myriad of disputes through the administrative justice system.[27] Research conducted by community organizations in collaboration with the Government of Canada has found that equality-deserving groups encounter several issues that could bring them to administrative actors for resolution.[28] For example, participants from various distinct communities of marginalization have experienced problems with social housing and workplace matters as well as issues that occur as a result of police racial profiling and/or more general forms of discrimination.[29] Some communities experience these and other issues regularly, seeing them as common everyday occurrences as opposed to rare but serious legal problems.[30]

In Canada, those from equality-deserving communities are also more likely to live in poverty[31] and, therefore, to encounter legal and access issues in interaction with income-related challenges. The frequent interaction between lower income, equality-deserving communities and the administrative justice system is a fact that is reflected in the existence of the legal clinic system. Legal Aid Ontario's clinic system, for example, was established primarily to serve low-income communities in Ontario.[32] Its clinics provide legal services to clients in many areas of law regulated by administrative tribunals such as the Landlord and Tenant Board, the Social Security Tribunal, and the Social Benefits Tribunal.[33]

Nations (UN) *Convention on the Rights of Persons with Disabilities* 30 March 2007, 44910 UNTS 2515 (entered into force 3 May 2008) [*CRPD*], emphasizes, moreover, the need to respect the dignity, autonomy, and right to make choices of persons with disabilities, as opposed to a protectionist approach.

26 Language concerning equity and diversity is constantly evolving. See e.g. Office of Equity, Diversity and Inclusion, "Employment Equity Census FAQs and the Importance of Language," online: *University of Calgary* <www.ucalgary.ca/equity-diversity-inclusion/equity-survey-faq≥ [perma.cc/W66Q-REW5], citing Wisdom Tettey, vice-president and principal of the University of Toronto Scarborough Campus. Principal Tettey used the term "equity-deserving groups" in his 2019 speech. Wisdom Tettey, "Inspiring Inclusive Excellence," online: *University of Toronto Scarborough Campus* <utsc.utoronto.ca/news-events/inspiring-inclusive-excellence-professor-wisdom-tetteys-installation-address> [perma.cc/C468-5GZE]. However, it is arguably not equity but substantive equality that we all deserve. On the definition of substantive equality reproduced above, see Colleen Sheppard, *Inclusive Equality* (Montreal and Kingston: McGill-Queen's University Press, 2015) at 38,

27 See "Legal Clinics," online: *Legal Aid Ontario* <www.legalaid.on.ca/services/legal-clinics/> [perma.cc/3BM8-NJJJ].

28 See e.g. Department of Justice Canada, *Voices Matter: The Impact of Serious Legal Problems on 16- to 30-Year-Olds in the Black Community*, by Meredith Brown et al (Ottawa: Government of Canada, 2021) at 22–25, online: <www.justice.gc.ca/eng/rp-pr/jr/ybc-jcn/docs/RSD_RR2021_Black_Youth_Ottawa_and_Toronto_EN.pdf> [perma.cc/L8D4-4JKS]; Department of Justice Canada, *A Qualitative Look at Serious Legal Problems for People with Disabilities in Central Canada*, by Jihan Abbas & Sonia Alimi (DAWN-RAFH Canada), (Ottawa: Government of Canada, 2021) at 10–11, online:<www.justice.gc.ca/eng/rp-pr/jr/pwdcc-phcc/docs/RSD_RR2021_Persons-with-Disability-Central-Canada-EN.pdf> [perma.cc/P4JZ-6AGT] [*DAWN Report*].

29 *DAWN Report*, *supra* note 28.

30 See e.g. *ibid* at 4.

31 See "Building Understanding," *supra* note 21 at 16.

32 See "Legal Aid Ontario's Statement of Principles," online: *Legal Aid Ontario* <www.legalaid.on.ca/more/corporate/about-lao-landing-page/legal-aid-ontarios-statement-of-principles/≥ [perma.cc/W4KU-AABD] (which states that its mandate includes being "responsive to the needs of low-income individuals and disadvantaged communities in Ontario"). But see also Gemma Smyth, Dusty Johnstone & Jillian Rogin, "Trauma-Informed Lawyering in the Student Legal Clinic Setting: Increasing Competence in Trauma Informed Practice" (2021) 28:1 Intl J Clinical Leg Education 149 (where the authors assert that these legal structures themselves constitute sites of traumatic violence).

33 See "Legal Clinics," *supra* note 27.

Access to administrative justice is fundamental for many from marginalized communities. Moreover, as scholar Patricia Hughes has noted, "[a]ccess to justice requires both removing barriers that limit access by disadvantaged groups and proactive policies and actions that make access easier or more effective."[34] The constitutive tools of access to administrative justice therefore require particular attention to the experiences of individuals from marginalized communities. Currently, however, there are gaps to be filled when it comes to reconciling the history of access-to-justice initiatives in Canada with the lived experiences and access-to-justice needs of marginalized communities. Attempts to rectify access-to-justice barriers developed through several waves between the late 1970s and the 2000s. They began with addressing barriers to accessing the courts, with considerable attention to obstacles related to procedure, costs, and legal representation.[35] By the beginning of the twenty-first century, access-to-justice discourse had also become preoccupied with family and criminal law matters as well as with barriers experienced by middle-income litigants.[36]

By contrast, initiatives to address access-to-justice barriers have not engaged as deeply with the experiences of marginalized communities and even less so within the context of the administrative justice system. By the twenty-first century, the literature critiquing access to justice in Canada incorporated important commentary on the need to ameliorate the access of historically marginalized communities to courts and other legal institutions.[37] As Constance Backhouse explains, historically, discriminatory actions by government, legislatures, courts, and judges had resulted in the exclusion of marginalized communities from all aspects of the justice system.[38] Recognition of the administrative justice system's relevance to marginalized individuals should therefore address patterns of historical exclusion and disadvantage. To date, however, the access to justice movement has generally positioned the administrative justice system as a tool for alleviating the procedural and cost barriers to dispute resolution in the courts. It does so by portraying administrative tribunals as an additional system of redress for designated disputes.[39] More could be done to address the access-to-justice barriers that exist within the everyday operational context of the administrative state. The expansion of administrative tribunal jurisdiction, established through

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34 Patricia Hughes, "Advancing Access to Justice through Generic Solutions: The Risk of Perpetuating Exclusion" (2013) 31 Windsor YB Access Just 1 at 7.

35 See Marc Galanter, "Access to Justice as a Moving Frontier" in Julia H Bass, WA Bogart & Frederick H Zemans, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 147. See also Mauro Cappelletti & Bryant Garth, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective" (1978) 27 Buff L Rev 182.

36 Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012).

37 See Constance Backhouse, "What Is Access to Justice?" in Bass, Bogart & Zemans*, supra* note 35, 113. For more on access to justice and the omission of marginalized communities generally, see also Hughes, *supra* note 34.

38 Backhouse, *supra* note 37.

39 Unfortunately, delays persist within the administrative justice system, causing procedural barriers. See, for example, *Ombudsman of Ontario*, "Administrative Justice Delayed" *supra* note 16. Insufficient timeliness in appointing tribunal members has also contributed to delays in matters being heard at a number of Ontario tribunals, including the Human Rights Tribunal of Ontario. See e.g. Democracy Watch, "Notice of Application filed in the Ontario Superior Court" (8 July 2020) online: <https://democracywatch.ca/wpcontent/uploads/FinalNoticeOfApplicOntTribunalConstCaseJuly082020.pdf> [https://perma.cc/MHT6-9P6V] (regarding the Government of Ontario's tribunal appointment and re-appointment policies). Moreover, cost barriers plagued users of the administrative justice system as processes became increasingly judicialized over time, requiring tribunal users to seek representation and weakening a defining aspect of a system initially designed not to require legal representation. See Rosalie S Abella, "Canadian Administrative Tribunals: Towards Judicialization or Dejudicialization", (1988) 2 Can J Admin L & Prac 9 (describing the concept of judicialization and its impact on tribunals and tribunal users).

Supreme Court of Canada jurisprudence in the early 2000s, further illustrates that, in the jurisprudence also, the value of access to justice could be better articulated to engage more fully with the experiences of marginalized communities who rely on the administrative justice system.

B. Expanded Tribunal Jurisdiction, Marginalized Communities, and Access to Administrative Justice

Social movements have been increasingly concerned with social and economic rights,[40] and they have broadened their strategies to include challenges before administrative decision-makers as well as the courts.[41] Concerns over environmental health,[42] inadequate housing,[43] food and income insecurity,[44] disability inequality,[45] and several other socio-economic and human rights matters affecting marginalized and vulnerable populations have been brought before administrative tribunals. These cases, which have been argued primarily under statutory human rights legislation, began to appear sporadically in the first decade of the 2000s, expanding and arising more frequently into and beyond the decades that followed.[46]

Particularly noteworthy concerning the increased use of the tribunal system in Canada by equality-deserving groups is that it has coincided with a judicial expansion of administrative decision-making jurisdiction. Supreme Court of Canada decisions in the 2000s expanded the jurisdiction of administrative actors to decide matters under statutory human rights legislation and the *Canadian Charter of Rights and Freedoms*.[47] The Supreme Court directed that issues raised under statutory human rights legislation should

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40 Bruce Porter, "International Human Rights in Anti-poverty and Housing Strategies: Making the Connection" in Martha Jackman & Bruce Porter, eds, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) 33 at 35–36, 58-63.

41 Lorne Sossin & Andrea Hill, "Social Rights and Administrative Justice" in Jackman & Porter, *supra* note 40, 343 at 347–49.

42 For a decision relating to housing and environmental health brought before an administrative tribunal, see *Noe v Ranee Management*, 2014 HRTO 746 [*Noe*] (regarding multiple chemical sensitivity). On the environmental health social movement generally, see Michael Orsini, "Health Social Movements: The Next Wave in Contentious Politics?" in Miriam Smith, ed, *Group Politics and Social Movements in Canada* (Toronto: University of Toronto Press, 2014) 333.

43 See *Noe*, *supra* note 42; *Disability Rights Coalition v Nova Scotia (Attorney General)*, 2021 NSCA 70. On the issue of homelessness, see also *Bamberger v Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49, 502 CRR (2d) 168 (a judicial review decision that engaged section 7 of the *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Notable cases from the social movement pushing for adequate housing, more broadly, have generally been brought before the courts. See e.g. *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852, 123 OR (3d) 161; *Victoria (City) v Adams*, 2009 BCCA 563, 100 BCLR (4th) 28; and, in the context of the COVID-19 pandemic, the decision of *Black et al v City of Toronto*, 2020 ONSC 6398, 152 OR (3d) 529 (dealing with the adequacy of safe city shelters in Toronto during the COVID-19 pandemic).

44 See e.g. *Ball v Ontario (Community and Social Services)*, 2010 HRTO 360 (CanLII), 69 CHRR 300.

45 In the context of persons with disabilities and transportation, for example, see *Council of Canadians with Disabilities v Via Rail Canada Inc*, 2007 SCC 15, [2007] 1 SCR 650 (which commenced before the Canadian Transportation Agency).

46 Cases concerning food and income security continued as well through the 2010s, expanding into the realm of tribunals other than human rights tribunals. For example, concern about special diet allowances and the Ontario Disability Support Program were brought before the Social Benefits Tribunal in 2014. See the factum by counsel at the Income Security Advocacy Centre and Legal Assistance of Windsor, *JD v Director (ODSP)* (18 December 2014), online: <incomesecurity.org/wp-content/uploads/2020/04/JD-v-Director-of-ODSP.pdf> [https://perma.cc/5VZ7-6HY7]. For a decision showing the use of the administrative justice system to pursue disability equality in education, see *Longueépée v University of Waterloo*, 2020 ONCA 830, 153 OR (3d) 641.

47 *Charter*, *supra* note 43. The Supreme Court of Canada rendered a set of significant decisions in this regard, including (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (Attorney General)*, [2004] 2 SCR 185, 240 DLR 577 [*Morin*]; *Quebec (Attorney General) v Quebec (Human Rights Tribunal)*, [2004] 2 SCR 223, 240 DLR (4th) 609 [*Charette*]; *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1

be adjudicated by administrative actors dedicated to the subject matter constituting the essential character of the dispute.[48] The Court further justified this approach with the rationale that an administrative decision-maker who can decide questions of law should address all the issues of law in one file, including those relating to human rights legislation, as it is fundamental, quasi-constitutional law.[49] The consequence of these decisions is that administrative decision-makers in all subject areas who have the power to decide questions of law – including tribunals in social justice areas such as social benefits and workers' compensation as well as many others beyond this social justice purview – have been deemed suitable to decide matters under human rights legislation. In later decisions, the Supreme Court of Canada held further that practical considerations should not excuse an administrative tribunal from engaging in matters brought before it in which rights guaranteed under statutory human rights legislation or the *Charter* were alleged to have been violated.[50] As a result, tribunals are also able to determine whether *Charter* rights have been violated as well as to decide not to apply provisions of their enabling legislation due to inconsistency with the *Charter*.[51]

An inherent tension regarding access to justice has become apparent from the Supreme Court of Canada jurisprudence on human rights and *Charter* jurisdiction. On the one hand, some Supreme Court judges have considered the ability to have all matters decided in one forum, where the statute permits, to be an important means of ensuring access to justice to tribunal users.[52] Others, by contrast, have found access to justice to be impoverished if it does not coincide with the desired forum and offer the potential remedies sought by the claimant.[53] In these early decisions about exclusive and concurrent jurisdiction, we therefore see an attempt to define access to justice for marginalized and vulnerable populations.[54] Although access to justice is not defined extensively, the majority of judges who turned their mind to the matter were concerned with efficiency and expediency as well as with the litigant obtaining adequate decisions without having to incur costs in more than one forum. The factor of costs refers to the financial burden borne by the litigant as well as to the need for judicial economy.

The impact of expanded tribunal jurisdiction has been threefold within the on-the-ground work of administrative tribunals. First, the confluence of increased demands for equity and expanded administrative jurisdiction has required administrative decision-makers to grapple with rights-based arguments more frequently. Second, on an institutional level, administrative bodies have needed to understand and design ways in which to respond to a different, emerging, and complex concept – that of access to administrative justice, particularly for the diverse, marginalized, and vulnerable populations who used their administrative tribunals and agencies. Third, administrative decision-makers have needed to consider how access to justice should fit with the traditional values of the administrative justice system.

Finally, several additional forces have also inspired the need for a more robust understanding of the concept of access to administrative justice. These forces have recently brought even greater attention to the challenges faced by marginalized communities in their cases before administrative tribunals. They are:

SCR 513 [*Tranchemontagne*]; *R v Conway*, 2010 SCC 22, [2010] 1 SCR 765 [*Conway*]. See also generally Lorne Sossin & Andrea Hill, "Social Rights and Administrative Justice" in Jackman & Porter, *supra* note 40, 343.

48 See *Morin*, *supra* note 47; *Charette*, *supra* note 47.

49 See *Charette*, *supra* note 47 at para 28; *Tranchemontagne*, *supra* note 47 at para 14.

50 See *Tranchemontagne*, *supra* note 47; *Conway*, *supra* note 47.

51 See *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395; *Martin v Nova Scotia (Workers' Compensation Board)*, 2003 SCC 54, [2003] 2 SCR 504.

52 See e.g. the reasons of Justice Michel Bastarache in *Charette*, *supra* note 47 at para 28.

53 See e.g. the majority reasons of Chief Justice Beverley McLachlin in *Morin*, *supra* note 47.

54 See also the later Supreme Court of Canada decision in *Northern Regional Health Authority v Horrocks*, 2021 SCC 42, 462 DLR (4th) 585.

(1) the heightened use of technology by tribunals, including during the COVID-19 pandemic;[55] (2) the increase in self-represented litigants;[56] (3) an increased recognition of the need to respect the multifaceted human rights of tribunal users, especially to avoid the traumatization or re-traumatization of participants in administrative processes;[57] and (4) the implementation of broader legal norms, both domestic and international.[58] These forces serve as vectors, the magnitudes of which point to the need for a deep, rich, and complex value of access to administrative justice. They highlight the need for well-designed systems of access to justice within administrative decision-making bodies.

However, despite a growing need for a foundational concept of access to justice to guide administrative law matters, particularly where the access interests of marginalized and vulnerable communities are concerned, the Supreme Court of Canada has not yet spent more than a cursory amount of time defining the notion of access to justice as it should exist in the administrative decision-making context. The Supreme Court has recently noted the impact that administrative law decisions may have on vulnerable users of the system[59] and has made periodic references to the concept of access to justice in its administrative law decisions commencing in the early 2000s.[60] For the most part, when the notion of access to justice has been evoked, it has been equated with avoiding the costs of litigation that would arise if certain doctrinal issues were left unresolved (such as the methodologies for determining the most appropriate forum (in light of expertise, efficiency etc.) or the standard of review).[61]

Moreover, the concept of access to justice contains symbolic and substantive dimensions to its meaning. Symbolically, access to justice instills a reason to have or maintain confidence in the legal system. When members or segments of society, including equality-deserving communities encounter legal systems that fail to make accountable those who act inappropriately or that otherwise provide unjust outcomes, the system becomes symbolically ineffective.[62] Substantively, a legal system, whether based in statute or common law, should provide for the possibility of outcomes that are not only correct or

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55 See e.g. Ruby Dhand et al, "Litigating in the Time of Coronavirus: Mental Health Tribunals' Response to COVID-19" (2020) 37 Windsor YB Access Just 132; "Digital Evictions: The Landlord and Tenant Board's Experiment in Online Hearings" (no date), online: *Advocacy Centre for Tenants Ontario* <www.acto.ca/production/wp-content/uploads/2021/06/Digital-Evictions-ACTO.pdf> [https://perma.cc/X38L-BNGY].

56 See Michelle Flaherty, "Self-Represented Litigants: A Sea Change in Adjudication" in Graham Mayeda & Peter Oliver, eds, *Principles and Pragmatism: Essays in Honour of Louise Charron* (Toronto: LexisNexis, 2014) 323; Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants" (2013), online: *Representing Yourself Canada* <representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf> [https://perma.cc/724B-NJHT].

57 See e.g. Canada, House of Commons, Standing Committee on Citizenship and Immigration (CIMM), *Responding to Public Complaints: A Review of the Appointment, Training and Complaint Processes of The Immigration and Refugee Board* (September 2018) (Chair Robert Oliphant) [*CIMM Standing Committee Report*]. See also Brian Hill & Andrew Russell, "Lawyers Allege 'Sexist,' 'Aggressive' Behaviour by Powerful Immigration, Refugee Judges," *Global News* (29 January 2018), online: <globalnews.ca/news/3978869/incompetence-sexist-refugee-canada/> [https://perma.cc/8ZV2-9SGH].

58 See *Baker*, *supra* note 7. For an example of broad domestic legal norms, see the *Accessibility for Ontarians with Disabilities Act*, SO 2005, c 1.

59 *Vavilov*, *supra* note 8 at para 135. See also Lorne Sossin, "The Impact of *Vavilov*: Reasonableness and Vulnerability" (2021) 100:1 SCLR 100, online: <digitalcommons.osgoode.yorku.ca/sclr/vol100/iss1/12> [https://perma.cc/UQS8-LENQ].

60 Some of the early references were in *Morin*, *supra* note 47; *Charette*, *supra* note 47.

61 See e.g. *Tranchemontagne*, *supra* note 47, paras 47–50 (on the most accessible forum to ensure access to human rights legislation). See e.g. *Vavilov*, *supra* note 8 at para 21 (on the need to ensure a substantive standard of review methodology to avoid costly litigation for parties on issues preceding review on the merits).

62 See Roderick A Macdonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Bass, Bogart & Zemans, *supra* note 35, 19 at 106.

reasonable in the sense of being justifiable, transparent, and intelligible[63] but which are also socially equitable. I turn next to describe the concept of social equity and its utility.

C. Social Equity

The concept of social equity provides a useful guide for ensuring access to administrative justice. It originates in the field of public administration, a cognate discipline to administrative law. A primary goal of social equity is to eliminate inequalities in the development, implementation, and evaluation of public policies.[64] In the public administration literature, social equity has been upheld as a foundational anchor of the discipline. In the United States, it was recognized as a pillar of the field of public administration after the passage of civil rights legislation, during a period when scholars in the field were reflecting on the implications of tumultuous social and cultural change for their discipline.[65] In 1968, social equity was adopted as a pillar of public administration at the Minnowbrook conference, joining a list of values similar to those guiding administrative law in Canada.[66] Social equity is emerging steadily in the field of US public administration.[67] It has been discussed more widely in the United States than in Canada, and, consequently, the description below draws primarily on American academic literature.

Scholars have related the concepts of service, distribution, and implementation to define social equity as "pursuing fairness in public services in terms of access; outcomes; quality; and processes."[68] These scholars emphasize that pursuing fairness in these contexts also involves recognizing "that administrators and policymakers are culpable in systemic injustices faced by marginalized communities."[69] They envisage the role of social equity as being to correct such injustices or to prevent them from occurring.[70] Furthermore, as a fundamental pillar, social equity should permeate all aspects of public administration and not be siloed as an independent goal.[71] Social equity is to be achieved through a commitment to "structural, institutional changes and deep personal work on behalf of public administration scholars and

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63 See *Vavilov*, *supra* note 8 at para 99.

64 Blessett et al, "Social Equity in Public Administration: A Call to Action" (2019) 2:4 Perspectives on Public Management and Governance 283 at 296. See also the definition of social equity put forward by the National Academy of Public Administration which defined "social equity" in 2005 as the "fair, just and equitable management of all institutions serving the public directly or by contract; and the fair and equitable distribution of public services, and implementation of public policy; and the commitment to promote fairness, justice, and equity in the formulation of public policy." See National Academy of Public Administration, *Sounding the Call to the Public Administration Community: The Social Equity Challenge in the US* (Washington, DC: National Academy of Public Administration, Research Committee on Social Equity, 2005).

65 See Blessett et al, *ibid* at 283. See also Brian N Williams, "At the Juncture of Administrative Evil and Administrative Racism: The Obstacles and Opportunities for Public Administrators in the United States to Uphold Civil Rights in the Twenty-First Century" (2020) 80:4 Public Administration Rev 1038 at 1040.

66 The three values in the United States are efficiency, effectiveness, and economy. See Williams, *ibid* at 1040.

67 This is particularly the case in the twenty-first century as evidenced by the regular meetings of the Standing Panel on Social Equity of the National Academy of Public Administration, which was established in 2000. The panel has held monthly meetings and yearly sessions as well as other activities. See Norman J Johnson & James H Savara, eds, *Justice for All: Promoting Social Equity in Public Administration* (New York: Routledge, 2015) at xiii.

68 John McCandless & John C Ronquillo, "Social Equity in Professional Codes of Ethics" (2019) 22:5 Public Integrity 470 at 470.

69 *Ibid*.

70 McCandless & Ronquillo, *supra* note 68 at 473, 479.

71 Blessett et al, *supra* note 64 at 296.

practitioners."[72] Structural and institutional changes should take place throughout public administration to ensure social equity with respect to access, outcomes, quality, and processes.[73]

Social equity is a useful concept for anchoring access to justice in the administrative justice context because it invites administrative decision-makers to work from a starting point of inclusive design. In other words, a socially equitable approach to access to justice should first aim to identify institutional design solutions that are inclusive of marginalized communities, realizing that many of the solutions will also be workable for majority populations. It should then move further outwards to incorporate as many individuals as possible.[74]

One can develop a socially equitable approach in the context of administrative justice by noting that, instead of a formal equality approach to institutional design – one where processes and procedures are the same for everyone – it will be more helpful to endeavour to understand litigants' differing needs and support them meaningfully. While the full support of the many diverse communities may never be perfect, the effort to engage as many as feasible will promote substantive equality as a foundation for administrative processes, procedures, systems and institutional design. Socially equitable approaches have the potential to penetrate deeply enough to address structural and systemic barriers experienced by equality-deserving groups. Social equity is therefore an important lens through which to understand and deliver access to justice when designing the institutional processes, procedures, systems and structures of administrative bodies.

III. ACCESS TO ADMINISTRATIVE JUSTICE AS AN ADMINISTRATIVE LAW VALUE

The relationship between equality-deserving groups, access to justice, and the administrative state has primarily been discussed within the context of advocacy for specific substantive issues. By contrast, I wish to connect the discussion to the realm of administrative justice and, more precisely, to the systems, processes, and procedural work of administrative bodies. To do this, I propose an administrative justice framework that rests on modernized values that are both access-to-justice-centred and state-centred. Central among these values is a new reinvigorated value of access to administrative justice.

In the literature relating to philosophy and ethics, values serve as guiding principles that assist individuals and organizations with making choices by providing foundations for attitudes and bases for action. By offering a system that can be used to prioritize beliefs and norms, values help individuals to make judgments about fairness, right and wrong behaviour, and the appropriateness of the treatment of others.[75]As noted in Part II, Canadian administrative law jurisprudence and theory has championed four values in the administrative state: expertise, fairness, expediency, and efficiency. These traditional values have emerged and worked within a time period of Supreme Court of Canada jurisprudence that was predominantly focused on calibrating deference to administrative decision-makers. What values can be of assistance within a context that aims, equally, to preserve access to justice for marginalized communities and, more broadly, equality-deserving groups? The traditional, foundational values of administrative law need to be reconceptualized so that access to justice for marginalized communities and other equality-deserving groups has a clear and well-defined place.

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72 Blessett et al, *ibid* at 296.

73 *Ibid*.

74 See Adana Protonentis et al, "Centering the Margins: Restorative and Transformative Justice as Our Path to Social Equity" (2021) 43:3 Administrative Theory & Praxis 333.

75 See Marshall Schminke, Anke Arnaud & Regina Taylor, "Ethics, Values, and Organizational Justice: Individuals, Organizations, and Beyond" (2015) 130 J Business Ethics 727 at 730.

The entire collection of forces discussed above compels the inclusion of an additional value of access to administrative justice in the machinery of the administrative state. I propose that the value of access to administrative justice should incorporate five core principles. These principles require individual administrative decision-makers and the administrative body as an institution to ensure that they are: (1) user-centric; (2) inclusive; (3) trauma-informed; (4) accessible; and (5) accountable. This will lead to enhancing access to justice, particularly for marginalized communities and other equality-deserving groups. In this part of the article, I elaborate on the nature, scope, and content of each of these principles. Following this, in Part IV, I discuss briefly how these access-to-administrative-justice principles may be achieved by tribunals and other administrative actors.

A. User-centricity

Generally speaking, the term "user-centric" (or "user-centred") refers to the idea that systems should be designed for those who use them. Those designing or improving a system will work to understand its related environment(s) and tasks, as well as the characteristics of the users and their experiences within it. Designers rely on user evaluations of the system and this forms the heart of all processes aimed to achieve user-centricity. As design justice theorist Sasha Costanza-Chock has observed, "[o]ver time, UCD [user-centred design] has become the recommended design approach within many firms, government bodies, and other institutions."[76]

Within the administrative justice context, user-centricity means taking stock of who the users of administrative tribunals and agencies are and making sure that they have access to the decision-making bodies in ways that work for them. Understanding user needs and experiences is typically done through tools such as user surveys, focus groups, interviews, and consultation, all of which may be conducted internally or by expert consultants.[77] Innovative methodologies, such as active-sensemaking, have also been used by administrative bodies to understand the stories of users with an emphasis placed on their own self-constructed narratives.[78]

User-centricity involves recognizing and working with the diversity of a tribunal's users to establish pathways for their successful access to the system and use of it. The process can lead to a variety of outcomes. For example, user-centricity may result in initiatives to ensure the availability of plain language information and communications. "Plain language" is defined as communication whose "wording, structure and design are so clear that the intended readers can easily find what they need, understand what they find, and use that information."[79] A small but growing number of administrative tribunals in Canada are working to ensure that plain language material is available to their users. The Social Security Tribunal, for example, led a series of widespread user-centred tribunal reforms after an external report noted that

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76 Sasha Costanza-Chock, *Design Justice: Community-Led Practices to Build the Worlds We Need* (Cambridge, MA: MIT Press, 2020) at 77.

77 See e.g. Laverne Jacobs & Sule Tomkinson, "Examining the Social Security Tribunal's Navigator Service: Access to Administrative Justice for Marginalized Communities" (2022), online: *University of Windsor* <scholar.uwindsor.ca/lawpub/133> [https://web.archive.org/web/20230703180834/https://scholar.uwindsor.ca/lawpub/133/].

78 See Emily C Drown, "Active-Sensemaking: How Do I Find Out What Users and Stakeholders Really Think about My Tribunal's Services?" (2023) 36:1 Can J Admin L & Prac 19 (discussing the experience of the BC Employment and Assistance Tribunal [EAAT]).

79 "What Is Plain Language?" online: *International Plain Language Federation* <www.iplfederation.org/plain-language/> [perma.cc/3XQH-77F6].

the tribunal system was difficult to navigate, in part, due to legalese.[80] One of its reforms was to train members to write decisions in plain language and to support them in doing so.[81] After its reforms, the Social Security Tribunal conducted an evaluation of its users to determine user satisfaction with its plain language decision-writing efforts.[82] It further engaged a consultant to evaluate the readability of its website content and other material from the perspective of self-represented litigants.[83] User-centricity can also take the shape of providing information and communications in multiple languages.[84] One of the most progressive steps in developing user-centricity is to conceive of how rules of procedure can be revised to ensure access to individuals, including parties to a case, who are experiencing different procedural needs. Asymmetry in procedure uses a socially equitable lens. It is a manifestation of substantive equality in the procedural realm that can lead to all parties having a fairer chance of a just outcome.[85]

To this point, the discussion of user-centricity has presumed that user issues and outcomes are posited on an axis of a single dimension. For example, providing material in plain language and multiple languages serves to assist users experiencing barriers relating to literacy or to an absence of multilingualism. However, intersectional barriers equally exist among tribunal users. Access-to-justice barriers may be more debilitating for those who are multiply marginalized. Therefore, a commitment to user-centricity

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80 The Social Security Tribunal notes this historical information in the section titled, "Background" in "An Evaluation of How Easy It Is to Read Decisions of the Social Security Tribunal" (no date) online: *Social Security Tribunal* <sst-tss.gc.ca/en/our-work-our-people/evaluation-easy-it-read-decisions-social-security-tribunal> [https://web.archive.org/web/20230517080459/https://sst-tss.gc.ca/en/our-work-our-people/evaluation-easy-it-read-decisions-social-security-tribunal] ["How Easy It Is to Read Decisions"]. See also KPMG LLP, "Review of the Social Security Tribunal of Canada for Employment and Social Development Canada" (October 2017), online: *Government of Canada* <www.canada.ca/en/employment-social-development/corporate/reports/evaluations/social-security-tribunal-review.html> [https://web.archive.org/web/20240210235947/https://www.canada.ca/en/employment-social-development/corporate/reports/evaluations/social-security-tribunal-review.html] (which is the external review that prompted the Social Security Tribunal to adopt a client-centred model).

81 "How Easy It Is to Read Decisions," *supra* note 80, "Background."

82 See "Evaluation of Plain Language Decision Writing" (2023), online: *Social Security Tribunal* <sst-tss.gc.ca/en/our-work-our-people/evaluation-plain-language-decision-writing> [https://web.archive.org/web/20240201154128/https://sst-tss.gc.ca/en/our-work-our-people/evaluation-plain-language-decision-writing].

83 See Julie Macfarlane, "Enhancing Accessibility in Written Communications: A Review of Forms and Letters for the Social Security Tribunal" (17 June 2021), online: *Social Security Tribunal* <sst-tss.gc.ca/en/our-work-our-people/enhancing-accessibility-written-communications-review-forms-and-letters-social-security-tribunal> [https://web.archive.org/web/20230517080949/https://sst-tss.gc.ca/en/our-work-our-people/enhancing-accessibility-written-communications-review-forms-and-letters-social-security-tribunal].

84 Further to its active-sensemaking evaluation, the BC EAAT anticipated translating, into multiple languages, the FAQ section of its website on how to appeal . See Drown, *supra* note 78 at 27. Similarly, in response to an evaluation conducted of the Social Security Tribunal's Navigator Service, which found that a number of appellants faced language barriers, the Social Security Tribunal committed to communicating the existence of language barriers to an appellant's decision-maker so that interpreters could be brought in as necessary. See "Management Response and Action Plan: Examining the Social Security Tribunal's Navigator Service – Access to Administrative Justice for Marginalized Communities" (2022) online: *Social Security Tribunal* < sst-tss.gc.ca/en/our-work-our-people/management-response-and-action-plan-examining-social-security-tribunals-navigator-service > [perma.cc/2N5H-CEZL].

85 In December 2022, the Social Security Tribunal introduced new rules of procedure that afford discretion to decision-makers so that asymmetrical means for securing access to justice can exist in hearings. The new rules offers excellent examples of asymmetry in procedure. For example, the rules provide for a party to obtain an accommodation (s 10) and a support person (s 15). They also empower the tribunal to use active adjudication (s 17), to provide a party with an extension of time to file an appeal on receipt of a reasonable explanation (s 27(2)), and to interpret and apply the rules of procedure in ways that considers each party's particular circumstances (s 6(b)). See *Social Security Tribunal Rules of Procedure*, SOR/2022-256 (2022).

also requires learning how to recognize access-to-justice barriers of an intersectional nature. This may mean focusing evaluation efforts on the experiences of users who simultaneously identify with different demographic groups in order to identify the multiple barriers they face and to find ways to reduce them.

Access-to-justice barriers for users of an administrative agency may also be multidimensional as a result of the impact of barriers experienced earlier in the administrative justice system, prior to their arrival at the agency that is conducting the user evaluation. For example, historically and currently, the Black community has had a fraught relationship with the police due to systemic racism.[86] Requiring engagement with the police, such as the filing of a police report as a preliminary step to receiving services from another agency, could have a negative impact on a member of this community and/or on the outcome. Another example may be to consider whether the police authorities have been appropriately trained to deal with persons with disabilities. A final illustration concerns the history of gender bias in healthcare, which has often caused women to experience challenges in pursuing diagnoses for medical conditions prevalent among women, such as chronic fatigue syndrome.[87] User evaluations need to have space for these longer, complex, and sometimes historically grounded issues to come through and be understood. They need to find and understand the barriers that may be lurking in the background and affecting users of a tribunal so that the tribunal can assist with avoiding, alleviating, or eradicating them in its processes. The methodologies of user evaluations should therefore be designed with these types of issues in mind.

Moreover, outcomes responsive to multidimensional access-to-justice barriers may require engagement with other agencies, officials, professionals, or community organizations. A tribunal can assist by ensuring that its users from equality-deserving communities are at least aware of officials and services that are appropriately trained to help, or it may consider having a roster of professionals who understand the dynamics of discrimination that a community regularly experiences. The BC Workers' Compensation Appeal Tribunal, for example, has recruited Indigenous independent health professionals to help remedy "a historical lack of access to and equivalent medical care for Indigenous peoples including treatment, tests, or medication."[88] The Indigenous independent health professionals may be selected by appellants obtaining medical diagnoses to support their claims. Such engagement can render responses to multidimensional barriers much more dynamic and impactful.[89]

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[86] See e.g. "Public Inquiry into Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service" (December 2023), online: *Ontario Human Rights Commission* <www.ohrc.on.ca/en/public-inquiry-racial-profiling-and-racial-discrimination-black-persons-toronto-police-service#>. [https://web.archive.org/web/20240211003833/https://www.ohrc.on.ca/en/public-inquiry-racial-profiling-and-racial-discrimination-black-persons-toronto-police-service].

[87] See Cary S Yates et al, "Women's Experiences of Accessing Individualized Disability Supports: Gender Inequality and Australia's National Disability Insurance Scheme" (2021) 20:1 Intl J Equity Health 243. The general issue of delayed diagnosis and repeated misdiagnosis among users of an administrative tribunal has arisen in the Canadian context. See the study, "Access to Administrative Justice for Marginalized Communities," evaluating user experiences with the Social Security Tribunal's Navigator Service. Jacobs & Tomkinson, *supra* note 77 at 15.

[88] D Sigurdson et al, "WCAT's Response to the Truth and Reconciliation Commission's Calls to Action" (25 May 2022) at 15 [on file with author].

[89] There are responses to access to administrative justice issues that can be fashioned to serve both single axis and multidimensional barriers equally well. Navigator services, for example, provide staff members who assist individual users through the process of their file. While they usually do not provide advice or accompany tribunal users to hearings, they do assist by providing information on how the process works. Navigator services may address barriers faced by self-represented parties by explaining matters in plain language. The Social Security Tribunal's Navigator Service, as it existed in 2021, is an example. See "Your Appeal: Navigators" (no date), online: *Social Security Tribunal* <sst-tss.gc.ca/en/your-appeal/navigators> [https://web.archive.org/save/https://sst-tss.gc.ca/en/your-appeal/navigators]. At the same time, navigator services may be stepped up to address multidimensional access to administrative justice issues by involving navigators from particular marginalized communities who have experienced similar barriers, by connecting

The desire to move to a user-centred culture is often prompted by practical and laudable concerns about providing better service to users of an administrative agency. However, even if worded in practical terms, user-centred reform practices connect to broader issues identified by access-to-justice and social-equity theories, including alleviating barriers experienced historically and contemporaneously by equality-deserving groups. Through the lens of social equity, which reminds us of the need to eradicate structural inequality in the implementation of public policies, the principle of user-centricity serves not only to alleviate widespread, general user barriers but also to address barriers that stem from social inequalities and replicate themselves within the administrative justice system.

Finally, while user-centricity has strong merits, it cannot fully provide access to administrative justice for equality-deserving communities when it is working alone. This is because user-centricity does not capture the reasons why individuals and communities may be prevented or excluded from using a specific administrative body or the administrative justice system more generally. Focusing only on users can result in perpetuating social exclusion. In this regard, tools are also needed that centre the principle of inclusion.

B. Inclusion

Whereas user-centricity seeks to address the concerns of those who are using an administrative agency, the principle of inclusion deals with the questions of who is not using the agency and why. Avoiding social exclusion and ensuring that all members of the public feel welcome to use the legal system are two key ideas that form part of the historical critique of access to justice in Canada.[90] These ideas also reinforce social equity concerns about pursuing the fair, just, and equitable distribution, management, and implementation of public policies and recognizing the role that administrators can play in removing barriers for equality-deserving communities that are based on systemic or structural inequalities.

Studies conducted in Canada on the absence of marginalized communities from tribunal use are newly emerging. The clearest example is *Expanding Our Vision: Cultural Equality and Indigenous Peoples' Human Rights* by Justice Ardith Walpetko We'dalx Walkem, QC, now a justice of the Supreme Court of British Columbia.[91] This study, which was commissioned by the BC Human Rights Tribunal (BC HRT), engaged with members of Indigenous communities in British Columbia to explore why Indigenous peoples were not using the BC HRT. While its findings are not exhaustive of all situations, they provide useful insights into why absences occur and some of the ways to rectify those absences.

From the perspective of designing inclusive and accessible administrative justice, the principle of inclusion encompasses at least three requirements. The first is for the administrative body to appreciate how key legal concepts that underlie the administrative regime are understood by non-user communities. Is there dissonance between the ways in which these concepts are regularly interpreted by the agency and how they are experienced by those in the non-user communities? If so, does this disconnect render

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navigational systems to outreach services such as community organizations that can also assist in more culturally competent ways, and/or by training navigators to be culturally competent by involving members of marginalized communities in the training. The BC Worker's Compensation Appeal Tribunal's Navigator Service, created in response to the Truth and Reconciliation Commission of Canada's calls to action, is an example. It includes navigators trained by Indigenous peoples. See "Work with a Navigator to Tell Your Story" (2021), online: *BC Worker's Compensation Appeal Tribunal* <www.wcat.bc.ca/app/uploads/sites/638/2021/10/work-with-a-navigator-info-sheet.pdf>. [https://web.archive.org/web/20220809170822/https://www.wcat.bc.ca/app/uploads/sites/638/2021/10/work-with-a-navigator-info-sheet.pdf].

90 See Backhouse, *supra* note 37; Macdonald, *supra* note 62 at 99-100, 107.

91 See Ardith Walpetko We'dalx Walkem, QC, "Expanding Our Vision: Cultural Equality and Indigenous Peoples' Human Rights" (15 January 2020), online: <clebc.wpenginepowered.com/wp-content/uploads/2020/01/Expanding-Our-Vision-Report.pdf> [https://perma.cc/J767-SLMY] (which was commissioned by the BC Human Rights Tribunal as part of an investigation into why Indigenous Peoples in British Columbia were not using the BC Human Rights Tribunal).

recourse to the agency futile in the view of those in the absent community? In such cases, administrative agencies should explore what specifically causes this dissonance and how can it be rectified.

The *Expanding Our Vision* study found, among other things, that there was a distinct experience of discrimination faced by many Indigenous peoples that was not reflected in the wording of the BC *Human Rights Code*.[92] Respondents to the survey indicated that Indigenous identity was central to the discrimination that they experienced. Yet, Indigenous identity was not a ground of discrimination listed under the BC *Human Rights Code*.[93] It was therefore not possible to pursue claims on the ground of Indigenous identity discrimination, only on listed grounds such as race, which did not quite capture the experiences of Indigenous respondents. Survey participants also noted that many Indigenous human rights that are recognized at an international level are not recognized in domestic human rights law, such as the rights to protect Indigenous territories, language, and laws. These approaches to human rights are collective (as opposed to individual) in nature, engage positive as opposed to negative rights, and often protect cultural equality. This difference constituted another disconnect between the ways that the concept of human rights was interpreted by the BC HRT and understood by Indigenous peoples. Finally, respondents indicated that the lack of basic needs, such as water and housing for Indigenous peoples, rendered hollow the promise of ensuring their human rights through a domestic institution. These and other forms of dissonance made the human rights tribunal process irrelevant in the view of several survey respondents.

In terms of the nature of the discrimination experienced frequently by Indigenous peoples, respondents indicated that their experiences were very different than those typically pursued under domestic human rights law. Multiple micro-aggressions (or "micro-discriminations") were one of the major discriminatory incidents experienced by Indigenous peoples.[94] These micro-aggressions existed pervasively across many spheres of life and were often intersectional. Survey respondents reported being profiled while shopping, subjected to condescending treatment by healthcare providers and to inappropriate comments and behaviour by coworkers.[95] Many survey respondents felt, however, that it was too much effort to chase down all the micro-aggressions they experienced in any given life context in order to make a human rights claim. *Expanding Our Vision* reports that "[m]any respondents said that their experiences of racism based on their Indigenous identity were so pervasive that they did not believe it would make any difference to report individual instances."[96]

The second requirement of the principle of inclusion is that barriers specific to marginalized communities be identified and removed. As in the case of user-centricity, the reasons that a population does not use an administrative agency may be single axis or multidimensional. Furthermore, once the reasons that a community does not use an administrative agency have been discovered, the responses needed to address them will also be wide-ranging and may require engagement with other groups such as related agencies, officials, professionals, and community organizations. Community outreach by the agency, which is the intentional connection with key stakeholders in the community (including community organizations and members of the community itself) in order to provide information about what it does and to establish trust over time, will be particularly important. In the context of Indigenous peoples' use

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92 RSBC 1996, c 210 [BC *Human Rights Code*].

93 See Recommendation 1.2 in Walpetko We'dalx Walkem, *supra* note 91 at 7. The respondents and report are referring to the wording of the BC *Human Rights Code* as it existed at the time of collecting the data for the survey.

94 See the definition and use of "micro-discriminations" in Walpetko We'dalx Walkem, *supra* note 91 at 20–21.

95 The complete list of areas in which respondents to the study reported experiencing discrimination can be found in Walpetko We'dalx Walkem, *supra* note 91 at 20–29.

96 *Ibid* at 46.

of the BC HRT, for example, more than half of the respondents to the *Expanding Our Vision* study indicated that they were unaware of the human rights tribunal's processes.[97] The study recommended community outreach to Indigenous communities in British Columbia that would share how the tribunal functions and how to file complaints, with illustrations of what successful complaints look like. The community outreach would also assist the tribunal in getting to know the types of discrimination faced regularly by Indigenous peoples and to help raise awareness of these types of discrimination through public education.

New access pathways should be specific to the barriers encountered and therefore may contain a variety of responses. Recommendations for change can be gathered from consultations with the communities affected. In the case of the BC HRT, respondents from Indigenous communities suggested various reforms to the tribunal. The suggested reforms included structural change to incorporate Indigenous definitions of human rights as well as to consider Indigenous laws and mechanisms.[98] Respondents were interested in decolonizing human rights law and process by considering human rights law through the lens of the *United Nations Declaration on the Rights of Indigenous Peoples* and with the incorporation of Indigenous law.[99] The report therefore recommended a renewed human rights process that would incorporate Indigenous approaches to protecting human rights.[100] *Expanding Our Vision* also recommended that Indigenous peoples familiar with the types of experiences faced by those in the non-user community be employed or appointed at all levels in the BC HRT. This would include intake staff and decision-making tribunal members.[101] Finally, a recommendation was made to ensure that legal aid and other types of support be made available to address procedural barriers and to help lower the high percentage of claims by Indigenous persons that were rejected at a preliminary stage.[102]

Process concerns may be integrated with the substantive aspects of determining a matter brought before an administrative actor. Recognizing these connections and their implications is the third requirement of the principle of inclusion. As an administrative tribunal or agency determines the best approach to regulating an access-to-justice issue, it may need to reflect on what it means for fairness to exist in a way that also promotes substantive equality. Addressing access-to-justice issues through the lens of social equity is a means to support these reflections and can result in positive uses of discretion. The *Expanding Our Vision* report illustrates how the line between process and substantive issues can be blurred in the context of access to justice for equality-deserving groups. On the subject of reducing procedural barriers, the report notes that "[t]he way that Indigenous Peoples' credibility is assessed, the determination of what is a valid complaint, or of what is enough information to ground a complaint, can reflect unacknowledged biases."[103] The report recommends ensuring that there is a baseline of evidence from which judicial notice can be taken.[104] This is similar to the Supreme Court of Canada's recommendations in the criminal law

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97 *Ibid* at 18.

98 *Ibid* at 14.

99 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/49 (13 September 2007).

100 See Recommendation 3.1 in Walpetko We'dalx Walkem, *supra* note 91 at 14.

101 See 4.0 Recommendations: Increase Indigenous Involvement within the BC HRT in *ibid* at 17.

102 See Recommendation 18.2 in *ibid* at 45.

103 *Ibid* at 32.

104 The report notes: "8.1 Develop a baseline of information and understanding of the racism that Indigenous Peoples experience so that individual complainants are not put to a process of proof again and again. Advance research or statements about common areas of discrimination experienced by Indigenous Peoples. This would operate similar to judicial notice of facts that are beyond dispute, as encouraged by the Supreme Court of Canada in cases such as *Williams*, *Gladue* and *Ipeelee*" [footnotes omitted].

case of *R. v Gladue*.[105] It therefore proposes a solution to procedural barriers that incorporates substantive decision-making. The proposed solution has been used in another legal context and may be adaptable to the tribunal concerned.

Considering the relevant perspectives of access to justice and social equity theories, coupled with empirical findings, the principle of inclusion provides guidance for addressing social exclusion within the administrative justice system. Use of its three main elements can lead not only to creative solutions but also to ones that capture and further the philosophy of design justice. Design justice focuses on how design distributes benefits and burdens among various groups of people as well as on the ways in which design reproduces and/or challenges structural inequalities such as settler colonialism, racism, heteropatriarchy, capitalism, and ableism.[106]

C. A Trauma-Informed Approach

The third principle of access to administrative justice relates to being trauma-informed. Recent situations have drawn attention to the need for sensitivity and respect for those who bring their matters to public officials, highlighting the importance of trauma-informed approaches. In the context of the Immigration and Refugee Board (IRB), for example, concerns raised about insensitive decision-maker conduct towards asylum-seeking litigants – particularly, those who are female and/or fleeing various forms of persecution[107] – led to an investigation by a House of Commons Committee.[108] As a result of the committee's report, the IRB introduced efforts to strengthen adjudicator training and its public complaint process.[109] In the IRB situation, changes were made pursuant to the escalation that engendered review by a parliamentary committee. By contrast, there exist more immediate ways that administrative bodies and public officials can incorporate a trauma-informed lens into their daily work of serving the public. Making a clear place for trauma-informed approaches within the values underlying the administrative justice system can avoid the need for harm to occur before litigants who have experienced trauma are treated with the appropriate sensitivity.

Research suggests that minorities and people from marginalized and vulnerable communities tend to experience the most trauma.[110] In light of the regular use of the administrative justice system by these communities, the number of administrative justice system users from equality-deserving groups who are affected by trauma can be high. It is important for tribunal staff and adjudicators to take the lead in completing their jobs with a trauma-informed perspective to avoid having tribunal users relive that trauma.

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105 [1999] 1 SCR 688, 133 CCC (3d) 385.

106 Costanza-Chock, *supra* note 76 at 23.

107 See e.g. Hill & Russell, *supra* note 57. Additional reports on this topic include Peter Small, "Refugee Board Judge Sought Sex, Court Told," *Toronto Star* (23 February 2010), online: <www.thestar.com/news/gta/2010/02/23/refugee_board_judge_sought_sex_court_told.html>; Nicholas Keung, "Woman's Asylum Claim Rejected Because She Didn't Seek Help after Multiple Beatings," *Toronto Star* (29 August 2014), online: <www.thestar.com/news/immigration/2014/08/29/womans_asylum_claim_rejected_because_she_didnt_seek_help_after_multiple_beatings.html> .

108 *CIMM Standing Committee Report*, *supra* note 57.

109 See "Evaluation of the IRB Process for Making a Complaint About a Member: Final Report" (2 March 2021), online: *Immigration and Refugee Board* <irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/eval-process-making-complaint-member.aspx> [https://web.archive.org/web/20240211012124/https://irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/eval-process-making-complaint-member.aspx] (which indicates at s 1.1 that it stems from the *CIMM Standing Committee Report*, *supra* note 57).

110 Melanie Randall & Lori Haskell, "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping" (2013) Dalhousie LJ 501 at 508.

Furthermore, having a trauma-informed perspective corelates to the major ideas of social equity theory, including the idea that harm can be caused by administrators in the implementation of public policy. As Melanie Randall and Lori Haskell assert, the term "trauma-informed" describes "a commitment to providing human services and the institutional contexts which recognize and understand the extent and impact of trauma in people's lives, aim to uncover and understand the complex root causes of violence and abuse, and strive to provide programs and services which avoid retraumatizing people while supporting their movement towards resilience, recovery and wellness."[111] Randall and Haskell assert further that "a trauma-informed perspective uses that understanding to develop responses and processes that take into consideration the vulnerabilities and needs of survivors of traumatic events."[112]

Within the administrative justice context, trauma-informed approaches were discussed in *Re Bronstein*, a decision of the Law Society of British Columbia.[113] In *Bronstein*, a lawyer hired an individual on parole, without investigating his background, to supervise Indigenous clients seeking settlements under the *Indian Residential Schools Settlement Agreement* process.[114] The employee conducted a number of unethical activities while under the lawyer's supervision, such as asking clients to sign forms that they had not read. In response to the threat of disbarment, the lawyer proposed that his licence be suspended instead. The majority of the Law Society Tribunal agreed, but there was a very vigorous dissent by Karen Snowshoe, an adjudicator of Indigenous background. The dissenting reasons are valuable for outlining some fundamental ideas regarding the implementation of a trauma-informed approach. Adjudicator Snowshoe pointed out that trauma-informed practice was required by the Law Society and involved taking the time to develop a rapport of trust and care with the person with the traumatic background. This could entail, for example, numerous meetings with the client. Trauma-informed practice also required offering supports – for example, to complete forms – and referring individuals to other types of support as needed, such as psychological support. Finally, a trauma-informed approach required recognizing that there may be a lack of trust in the legal system on the part of those who need to use it.[115]

All these requirements of a trauma-informed approach extend beyond the situation of residential school traumatization and legal practice to offer guidance that can be adapted more broadly within the administrative justice system and for a diversity of marginalized communities. These requirements are also foundational in the sense that they can be developed and built upon in consultation with the marginalized communities that are involved. The BC Workers' Compensation Appeal Tribunal [BC WCAT] provides two examples. The BC WCAT has designed a navigator service to support self-identifying Indigenous appellants pursuing benefits who wish to use it. The service has the potential to develop trust and support for Indigenous appellants with traumatic backgrounds.[116] It was established in consultation with advisory council members from Indigenous communities to help respond to the Truth and Reconciliation Commission of Canada's calls to action.[117] A second example is the BC WCAT's use of trauma-informed approaches at hearings, particularly in assessing or weighing Indigenous workers'

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111 *Ibid* at 517.

112 *Ibid* at 518.

113 2021 LSBC 19 [*Bronstein*].

114 *Ibid* at paras 6-9. See also *Indian Residential Schools Settlement Agreement*, Schedule N (8 May 2006), reprinted in TRC, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Montreal and Kingston: McGill-Queen's University Press, 2015), Appendix 1.

115 *Bronstein*, *supra* note 113 at paras 349ff.

116 Sigurdson et al, *supra* note 88 at 11.

117 See "Responding to the Truth and Reconciliation Commission Calls to Action" (2020), online: *BC Worker's Compensation Appeal Tribunal* <www.wcat.bc.ca/app/uploads/sites/638/2020/12/Calls_to_Action_Recommendations.pdf> [https://perma.cc/F3HQ-ZL6S]. See also note 89 above and accompanying text.

evidence.[118] As administrative decision-makers and tribunals become more aware of the need for trauma-informed approaches, adjustments are being made within the administrative justice system; nonetheless, many more opportunities exist.

D. Accessibility

Accessibility can be defined as supporting the access-to-justice rights of persons with disabilities. While accessibility can form part of the principle of inclusion, there are notable reasons why it deserves to stand as its own separate principle. First, it is frequently observed within everyday parlance, in discussions relating to advancing equity, diversity and inclusion (EDI), and in disability scholarship and discourse, that disability is often overlooked within EDI work.[119] Second, identifying accessibility as an independent principle recognizes that the administrative justice system is often used by persons with disabilities. Issues relating to workplace accommodation, income support, workers' compensation, and disability discrimination, among others, are issues routinely encountered by persons with disabilities and that a large swath of Canadian administrative tribunals were designed to address.

Legal and practical guiding principles for ensuring accessibility stem from domestic and international law. Within Canada, tribunals are obligated to respect human rights law and jurisprudence and their attendant principles relating to reasonable accommodation. The applicable constitutional and human rights law and jurisprudence emanate from the *Charter* and statutory human rights legislation enacted in the provinces, territories, and at the federal level. This law and jurisprudence generally focus on individualized accommodation as opposed to the development of broader approaches to support the access-to-justice rights of disabled people. Accessibility legislation, which, since 2005, has been enacted in several provinces and at the federal level is also relevant. [120] It proactively sets standards for achieving accessibility for persons with disabilities in a range of social areas.[121]

Accessibility legislation usually applies to administrative tribunals.[122] Standards for accessibility are established through regulations created under the statute.[123] In Ontario, which is the first province to have enacted accessibility legislation, standards for customer service have guided the design of administrative tribunal processes in ways that aim to eradicate or reduce barriers for persons with disabilities. For example, regulations under the 2005 *Accessibility for Ontarians with Disabilities Act* [*AODA*] require administrative bodies to create accessibility plans, train staff and members in interacting with disabled persons, and design their services with principles of accessibility in mind (such as respect for the dignity of persons with disabilities).[124] Some tribunals have used accessibility planning not only for receiving the public but also as guidance for ensuring accessibility for their members.[125]

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118 Sigurdson et al, *supra* note 88 at 18.

119 See e.g. Andrew Pulrang, "3 Mistakes to Avoid When Including Disability in Your DEI Programs," *Forbes* (27 August 2021), online <www.forbes.com/sites/andrewpulrang/2021/08/27/3-mistakes-to-avoid-when-including-disability-in-your-dei-programs/?sh=51c27a4129aa> [perma.cc/GB44-G5LQ].

120 See Laverne Jacobs et al, *Law and Disability in Canada: Cases and Materials* (Toronto: LexisNexis, 2021), ch 1.

121 See e.g. *Accessibility for Ontarians with Disabilities Act*, SO 2005 c 11 [*AODA*].

122 See e.g. *AODA*, *supra* note 117, s 2 (which defines "organization" to mean "any organization in the public or private sector" and to include "(b) any agency, board, commission, authority, corporation or other entity established under an Act." Similarly, the *Accessible British Columbia Act*, SBC 2021, c 19, applies to a number of administrative bodies in the province of British Columbia. See BC Reg 105/2022, s 3.

123 See Laverne Jacobs, "'Humanizing' Disability Law: Citizen Participation in the Development of Accessibility Regulations in Canada" (2016) 3 Revue Internationale des Gouvernements Ouverts, 93.

124 *AODA*, *supra* note 117; *AODA Customer Service Regulations*, O Reg 191/11, s 80.46.

125 See e.g. "Accessibility Member Practices and Procedures" (2010), online: *Health Professions and Health Services Appeal and Review Board* <www.hsarb.on.ca/english/docs/accessibility/Practices_Procedures_Members.pdf>

Broader legal norms can also be found in international law.[126] For example, international law offers norms and guidance for ensuring access to justice for persons with disabilities. In this regard, the United Nations' [UN] *International Principles and Guidelines on Access to Justice for Persons with Disabilities* provides guidance on how to make many aspects of the justice system more accessible for persons with disabilities.[127] The *International Principles and Guidelines* work to further Article 13 of the UN *Convention on the Rights of Persons with Disabilities* [*CRPD*], which focuses on ensuring access to justice for persons with disabilities on an equal basis with others.[128] Both the *CRPD* and the *International Principles and Guidelines* aim to support all persons with disabilities who find themselves in the justice system, including lawyers, clients, and witnesses. Jurisprudence emanating from the Committee on the Rights of Persons with Disabilities that interprets Article 13 can also provide helpful guidance.

One issue that has become significant in the context of supporting the access-to-justice rights of persons with disabilities deals with safeguarding the privacy of persons with disabilities in the context of hearings. Problems have arisen when courts and administrative tribunals have asked that medical information to support requests for stays of proceedings or accommodations for a party, witness, or lawyer be placed into the record. While common law principles of fairness would dictate the sharing of information across all parties, placing sensitive medical information in the record can have a significant impact on the privacy, dignity, and reputation of the individual involved.[129] Systemic issues of this type may be addressed by an accessibility coordinator tasked with facilitating the resolution of matters that could have privacy implications before they reach the hearing room. Regardless of the resolution chosen, however, it will be important to consult with persons with disabilities in developing an appropriate approach.[130]

In summary, both individualized accommodation and broader norms of access to justice need to be pursued in supporting the equality rights of persons with disabilities in the context of the administrative justice system. Commitment to consulting with persons with disabilities in order to determine how best to address the challenges that exist will be essential.

E. Accountability

The principle of accountability contains two interconnected ideas, both of which support the other principles of access to administrative justice. The first is that it is necessary for administrative bodies to make a public commitment to being user-centric, inclusive, trauma-informed, accessible, and accountable and to taking steps to make their processes stronger in order to respect these principles. Such a public commitment to access to administrative justice may be part of a mission, vision, and values statement, but, regardless of where it is located, the commitment should be articulated clearly and explicitly. In this way, equality-deserving communities will be able to raise questions about whether the administrative body is living up to it, if necessary.

[https://web.archive.org/web/20230710233748/http://www.hsarb.on.ca/english/docs/accessibility/Practices_Procedures_Members.pdf].

126 The Supreme Court of Canada has endorsed the use of ratified treaties as an interpretive tool as "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review." See *Baker*, *supra* note 7 at para 70.

127 United Nations, *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (2020), online: <https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/SR_Disability/GoodPractices/Access-to-Justice-EN.pdf > [https://perma.cc/7XV7-ZJKH].

128 *CRPD*, *supra* note 25, art 13. Canada ratified the *CRPD* on 11 March 2010.

129 See *Complainant v Canadian National Railway Company*, 2022 CHRT 16.

130 *CRPD*, *supra* note 25, art 4(3).

Self-reflexivity is the second idea inherent in the principle of accountability. Self-reflexivity requires developing tools for reviewing progress. Tools such as consultations and user surveys may be used. Other more creative mechanisms may also be designed in consultation with the communities that use an administrative agency (or are absent from its users). Self-reflexivity also requires working together as an organization and in consultation with stakeholders to think through access-to-justice barriers and conscientiously determine new approaches.

IV. INSTRUMENTS OF ACCESS TO ADMINISTRATIVE JUSTICE: BEYOND STATUTORY FRAMEWORKS

The five principles of access to administrative justice presented in this article are not easy to implement. Budgetary resourcing can be a challenge to overcome. Balancing the interests of many equally valid user requests also poses a sensitive challenge. It takes a considerable amount of attention to detail to extend support to those who require it, especially in different ways at once. For example, balancing interests may mean that a tribunal is simultaneously pursuing the goals of providing support to under-represented litigants, offering online processes for litigants who need them as an accommodation and finding ways in which to keep traditional processes open and maximally available to tribunal users who experience barriers to accessing online processes. Moreover, in the case of disability access, one issue may require a variety of solutions in order to accommodate individual needs – revealing universal design to be simply a starting place. As a tribunal, one needs a commitment to social equity and an understanding of fairness that goes beyond similarity of treatment to embrace substantive equal access.

Statutory frameworks are a common way to pursue the goal of change within the everyday work of an administrative body. Legislation provides distinct parameters that guide administrative actors in the design of their processes. While legislation can be helpful, other instruments play a significant role as well in ensuring that access to justice is robustly pursued and achieved. In this final Part, I expand briefly on two useful non-legislative instruments that can place administrative actors (tribunal staff, decision-makers, and leadership teams) in a position to deliver access to administrative justice. These instruments are: institutional design and tribunal culture.

A. Institutional Design

Many administrative bodies organize their institutions into departments that allow for the logical and effective completion of their work.[131] The arrangements chosen will typically include staff dedicated to interacting with public users; the processing of intake files (a registrar or registry); a department dedicated to the early resolution of files (which may also be dedicated to alternative dispute resolution such as mediation, case management, and so on); adjudication; and treatment of any post-resolution matters such as the processing and distribution of decisions. Enabling legislation normally does not structure the internal design of an administrative agency. Administrative agencies use their discretion to effect their own institutional design.[132] They are empowered to organize in ways that they find to be effective – both through an entrenched common law doctrine that administrative bodies are masters of their own

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131 See Laverne Jacobs, "Reconciling Tribunal Independence and Expertise: Empirical Observations" (Paper delivered at the Future of Administrative Justice conference, Faculty of Law, University of Toronto (18 January 2008), online: <https://web.archive.org/web/20080205105333/https://www.law.utoronto.ca/documents/conferences/adminjustice08_Jacobs.pdf >.

132 *Ibid*.

process,[133] and also through a general understanding that administrative agencies are organizations that need to function efficiently and effectively while also implementing their mandates in reasonable, expert, and procedurally fair ways.

The ways in which a tribunal is divided up to perform its work (or the "fragmentation of the tribunal unit") are sometimes not intuitive.[134] This can be due to the existence of competing understandings (within the tribunal or between the tribunal and society) of how the tribunal should function or of how specific administrative law values such as fairness should be interpreted.[135] Ensuring access to justice is a responsibility that everyone within the administrative body should bear. Access to administrative justice is a value that should ideally thread its way through the various departments of institutional design chosen by the agency. Its five core principles of user-centricity, inclusion, a trauma-informed approach, accessibility, and accountability can fit with the processes generally related to public interaction, intake, the resolution of files (early or otherwise) and post-resolution matters. The most challenging aspect of integrating the principles of access to administrative justice may be to reconcile competing understandings of how best to ensure access for a variety of users including those from equality-deserving communities. This aspect can equally serve as an animating factor, however, in the institutional design of an administrative body and the division of its work.

B. Tribunal Culture

One of the most important instruments of access to administrative justice is tribunal culture. The workplace culture of an administrative tribunal is valuable. Tribunal culture is an essential vehicle for ensuring that the value of access to administrative justice works with the traditional administrative law values to guide exercises of discretion in positive ways. If the tribunal is a workplace of individuals who are collectively interested in pursuing access to justice and substantive equality, this will help lay a healthy foundation for implementing the value of access to administrative justice. This is not to say that everyone who works at a tribunal must agree on all elements of the path to take to achieve the implementation of this value. Respectful discussions from varying perspectives can also lead to reasonable outcomes. At the same time, institutional cultures that run contrary to achieving access to justice should be kept in check.

Examining the functioning of an administrative body through a social equity lens means being willing to do such things as identifying and confronting unconscious biases and the contemporary effects of historical disadvantage that may have an impact on the body's work. For members of an administrative body, this can involve dissenting from the dominant views of colleagues in discussions about the administration of the tribunal. Given the diversity of lived experience that hopefully exists within the decision-making bodies of our administrative justice system, this can mean a significant divergence of views at times. Applying a social equity lens will also require a tribunal leader (or leaders) at the helm who will stay on a path that positively supports marginalized communities and, given the diversity of these communities and needs, will be willing to work on discerning, in consultation with affected communities, steps that are beneficial or detrimental to achieving this goal.

More generally, administrative bodies should engage in consultations with stakeholders and absent communities. They should also rely on expert consultants and reviews conducted by individuals who are supportive of both the community and the law and have lived experience of the access-to-justice issues concerned. In conclusion, the tools of institutional design and tribunal culture have the power to contribute

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133 See *Prassad v Canada (Minister of Employment and Immigration)* [1989] 1 SCR 560 at 568-69, [1989] 1 SCJ No 25 at para 16.

134 Jacobs, *supra* note 131 at 3–4.

135 *Ibid*.

generatively to cultivating the value of access to administrative justice for equality-deserving groups across the broad spectrum of administrative bodies.

V. CONCLUSION

The access to justice movement has not deeply engaged with the needs of marginalized communities who rely on the administrative justice system. Canadian administrative law jurisprudence and theory has traditionally championed four values in the administrative state: expertise, fairness, expediency, and efficiency. This article has presented a new value of access to administrative justice and delineated the five core principles on which it rests. The value of access to administrative justice is essential for designing an accessible and inclusive administrative justice system, particularly for the equality-deserving communities that comprise a significant proportion of the system's user population. The value of access to administrative justice relies on the public administration concept of social equity. This article has introduced social equity to Canadian administrative law theory as a lens to view and understand the access-to-justice needs of those from equality-deserving groups who experience structural and systemic inequalities that may be perpetuated by the administrative justice system.

Five core principles should be respected in any project that aims to advance access to administrative justice. These principles are user-centricity, inclusion, a trauma-informed approach, accessibility, and accountability. They inform the value of access to administrative justice with perspectives that are alert to possible structural inequalities that may face members of equality-deserving communities and are attentive to finding ways to remove them. Some Canadian administrative bodies have started to develop access to justice tools that reflect several of these principles, and a number of notable examples have been documented in this article. Instruments such as institutional design and tribunal culture are also particularly useful in implementing the value of access to administrative justice within administrative bodies.

Finally, the value of access to administrative justice is designed to occupy an equal place alongside the four traditional values of expertise, fairness, expediency, and efficiency that currently guide the Canadian administrative state. In this way, the value of access to administrative justice contributes to an administrative justice system that rests on modernized values that are both access-to-justice-centred and state-centred. Ultimately, the value of access to administrative justice has the potential to contribute to designing an administrative justice system that responds meaningfully to communities affected by structural and systemic inequality.