Cultivating an Administrative Justice Community: Tribunal Leaders and Public Value Co-Creation[1]

Forthcoming in *Public Law*, as part of thematic section

"Government outsourcing in the modern administrative state".

Introduction

There is a growing interest in empirical examination of administrative justice systems and values.[2] This article proposes that this scholarship can benefit from public value theory that demonstrates the engagement of public sector leaders in deliberation and collaboration-oriented efforts to create value for society. Public value proceeds from such efforts, first, through the conception of a public with shared concerns, and second, by promoting solutions through the available networks and resources. Adopting a case study approach, this article examines how administrative tribunal leaders in Canada's Ontario province responded to a fragmented and poorly coordinated tribunal landscape. It documents how they worked in concert for over twenty years to establish a training program for new tribunal members deployed outside of the state. Based on data collected from targeted interviews and archival material, this article argues that by mobilizing actors and resources across organizations and sectors, the tribunal leaders transformed administrative adjudication training from an insular, legalistic, and tribunal-based practice to a peer-led, professionally designed and coordinated program. They exercised public sector leadership within existing forms of governance by cultivating a community of administrative justice practitioners. This study makes the case for the relevance of conventionally private sector models in assessing such projects by examining the co-creation process between the not-for-profit and public sectors. This article contributes to the scholarship on administrative justice in two ways: it illustrates the importance of paying attention to actors and time in empirical analyses, and documents how public value can be informally negotiated and created.

Section I introduces public value theory (PVT) and its promises regarding public sector leadership for change and innovation. Section II explains the problems experienced in the tribunal sector in Ontario and the tribunal leaders' initial informal efforts to build community. In Section III, the analysis moves to their advocacy and innovation efforts serving the community. The last section explains the limitations of the study, makes future research suggestions and concludes with its contributions to the study of administrative justice.

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[1] This article was possible thanks to funding from the Social Sciences and Humanities Research Council (#430-2019-00574), and the feedback from the reviewers, Joe Tomlinson and Janina Boughey.

[2] M. Doyle and N. O'Brien, *Reimagining Administrative Justice: Human Rights in Small Places*. (Cham: Springer, 2020). N. Creutzfeldt and R. Kirkham, "Understanding how and when change occurs in the administrative justice system: the ombudsman/ tribunal partnership as a catalyst for reform?" (2020) 42(2) *Journal of Social Welfare and Family Law* 253; R. Ellis, *Unjust by design: Canada's Administrative Justice System* (Vancouver: UBC Press, 2013).

I Public Value Theory and Its Potential for the Study of Administrative Justice

More than two decades ago, Martin Partington argued that administrative justice comprised two distinct aspects: (1) the institutional framework, or the system that encompasses all tiers of decision-making that determine the rights and entitlements of individuals; and (2) competing values and principles that underpin the administrative justice system, such as fairness and efficiency.[3] Both aspects are contested in different ways.[4] The distinction and relationship between the system and values of administrative justice are analytically important for its study and practice. One ongoing challenge for administrative justice is in defining these values and, relevantly for this article, *who* defines those values and *how*. Sarah Nason raises the possibility of public sector leadership in administrative justice in her analysis of oversight in administrative justice systems, noting, "a culture of administrative justice values may best develop from the ground up, though this in turn requires awareness and leadership in many sectors"[5]. This article posits that Public Value Theory (PVT) may be a useful analytical framework.

The idea of measuring value is familiar in the private sector context. Businesses produce goods and services for purchase and consumption, the value of which can be measured in monetary terms. Public value theory posits that, although more complex, the public sector also produces 'value', and that this is a helpful way of thinking about, understanding, and measuring the work of governments. While there are various definitions of what constitutes public value(s), broadly the concept refers "to an appraisal of what is created and sustained by government on behalf of the public"[6] such as due process, equity, integrity, and responsiveness. There is strong emphasis, therefore, on what the public needs and how their demands can be met. PVT research developed through two streams. The first followed Mark Moore's initial purpose in *Creating Public Value*, which focused on strategic management to help public sector leaders improve the performance of their organizations.[7] The second stream was concerned with articulating and enacting public values through the involvement of politicians, administrators, citizens, and actors in the non-profit and business sectors.[8]

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[3] M. Partington, "Restructuring Administrative Justice? The Redress of Citizens' Grievances" (1999) 52(1) *Current Legal Problems*, 52(1) 173.

[4] On the contestation of systemic aspects see, S. Nason "Oversight of Administrative Justice Systems" in *The Oxford Handbook of Administrative Justice* (Online: Oxford University Press, 2021), pp. 155-176; N. O'Brien, "Administrative Justice in the Wake of I, Daniel Blake" (2018) 89(1) *The Political Quarterly* 82; L. Sossin, "Designing Administrative Justice" (2017) 34(1) *Windsor Yearbook of Access to Justice* 87. On the lack of precision regarding values see J. Tomlinson, "The grammar of administrative justice values" (2017) 39(4) J*ournal of Social Welfare and Family Law* pp. 525, 524.

[5] Nason, "Oversight of Administrative Justice Systems", pp. 159.

[6] T. Nabatchi, "Public Values Frames in Administration and Governance" *Perspectives on Public Management and Governance*, (2017) 1(1), pp. 60, 59.

[7] M. H. Moore, *Creating Public Value: Strategic Management in Government* (Cambridge: Harvard University Press, 1995).

[8] E. Fukumoto and B. Bozeman, "Public Values Theory: What Is Missing?" (2019) 49(6) *The American Review of Public Administration*, 635. B. Bozeman, *Public Values and Public Interest: Counterbalancing Economic Individualism* (Georgetown: University Press, 2007)

Until recently, public administration scholars saw public value as being derived only from government efforts and maintained that the power to define what constitutes public value was controlled by *elected* public officials.[9] Now, there are a more diverse range of views. Some researchers challenge the capacity PVT attributes to public sector leaders for finding solutions to public problems and claim that *unelected* public managers in Westminster model of parliamentary government do not have the authority to arbitrate what is in the public interest.[10] Others argue that the greater value to society proceeds from the collaborative efforts of diverse actors such as administrators, civil society organizations, and business entrepreneurs. There is increasing evidence on how public leaders organise, deliberate, and act to create public value.[11]

The popularity of PVT can be linked to the normative belief that it can reconcile contradictory public governance paradigms, namely traditional public administration that sees the state as the only legitimate actor within the public sector, and New Public Management (NPM), which promotes marketization and corporate management. Further, for some researchers, this approach derives from the unfilled promises of NPM reforms, such as rendering government more efficient and effective.[12] Seeking to integrate rationality and economic efficiency, as well as democratic concerns, PVT advances a theory of public administration that is neither strictly bureaucratic nor market-based, but collaborative. The latest studies look at what this possibility of co-creation might imply, especially from the perspective of public sector leaders, since public value is defined and redefined through multi-actor and multi-sector negotiations and articulations.[13]

This article examines the process through which tribunal leaders in Ontario responded to a muddled, fragmented, poorly coordinated, and under-resourced administrative justice system.[14] They worked together to establish a training program which mobilized actors and resources across organizations and sectors, to transform administrative adjudication training from an insular, legalistic, and tribunal-based practice to a peer-led, professionally designed and coordinated program. The article examines this process from a public value perspective, to demonstrate the utility of PVT to evaluating changes in administrative justice.

It adopts a tripartite framework, namely: the identification of, motivation for and instrumentation towards public values, which constitute the major obstacles to the

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[9] J. Bryson, A. Sancino, J. Benington, and E. Sørensen, "Towards a multi-actor theory of public value co-creation" (2017) 19(5) *Public Management Review*, 640.
[10] R. A. W. Rhodes and J. Wanna, "The Limits to Public Value, or Rescuing Responsible Government from the Platonic Guardians" (2007) 66(4) *Australian Journal of Public Administration*, 406.
[11] For an example see Y. Chandra and A. Paras, "Social entrepreneurship in the context of disaster recovery: Organizing for public value creation" (2021) 23(12) 1856.
[12] J. Torfing, J., E. Sørensen, and A. Røiseland, "Transforming the Public Sector Into an Arena for Co-Creation: Barriers, Drivers, Benefits, and Ways Forward" (2019) 51(5) *Administration & Society* 51(5) 795.
[13] E. Sørensen, E., J. Bryson and B. Crosby, "How public leaders can promote public value through co-creation"(2021) 49(2) *Policy & Politics* 267.
[14] Sossin, "Designing Administrative Justice", pp. 88.

advancement of PVT scholarship.[15] Identification and motivation direct researchers to the contexts and reasoning behind public values, while instrumentation refers to concrete means and tools for realizing them. The analysis illustrates how tribunal leaders, through informal and collective efforts, promoted a community of practitioners by emphasizing cohesiveness, continuity, and consistency in administrative justice. They endorsed the idea that training was not only important for enabling tribunal members to do their jobs properly, but also for the broader community of administrative justice, they sought different means for realizing it, and settled on a co-created instrument.

II Problems in Ontario's Tribunal Sector and The Responses of Tribunal Leaders

Administrative regulatory tribunals have been a regular part of the government in Canada since the late 19th century.[16] While tribunals are supervised by the judiciary in some jurisdictions, such as the United Kingdom, in Canada tribunals are a part of the executive branch of government and created by statute to advance a policy goal.[17] For as long as tribunals have been a part of federal and provincial government structures in Canada, critics have expressed concern over their ad hoc and varied nature; with different combinations of powers and procedures to carry out various mandates in a range of areas of administration. Reviews confirmed the impression that governments lost control over their agency landscape, with difficulties in how to count and classify tribunals.[18] While legislatures have insisted on the benefits tribunals provide in delivering justice, historically, the courts have intervened regularly and repeatedly in tribunal decisions. Until the mid-1970s, the relationship between tribunals and courts can be characterized as confrontational.[19] In Ontario, since the 1960s there have been several legislative efforts to restructure the public sector as well administrative agencies.[20] Chief Justice McRuer, in his inquiry into civil rights in Ontario, insisted on the importance of protecting individual rights in dealings with the public administration, which had two important consequences for administrative justice in the province. These were the codification of the minimum rules of natural justice to govern administrative proceedings in 1971[21], and the creation of various appeal tribunals.[22] According to a Ron Ellis, chair of the Worker's Compensation

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[15] Fukumoto and Bozeman, "Public Values Theory: What Is Missing?".
[16] D. C. MacDonald, "Ontario's agencies, boards, and commissions come of age" (1993) 36(3) *Canadian Public Administration* pp. 351, 349.
[17] Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch), [2001] 2 S.C.R. 781, 2001 SCC 52 at paras 21–24.
[18] See, for example, Law Reform Commission of Canada, *Independent Administrative Agencies*, Working Paper 25 (Ottawa: Law Reform Commission of Canada, 1980), https://publications.gc.ca/collections/collection_2022/jus/j32-1/J32-1-25-1980-eng.pdf
[19] McLachlin, "Administrative Tribunals and the Courts: An Evolutionary Relationship".
[20] MacDonald, "Ontario's agencies, boards, and commissions come of age".
[21] *The Statutory Powers Procedure Act*, S.O. 1990, c. S.22 (as amended), first enacted in 1971.
[22] R. G. Atkey, "The Statutory Powers Procedure Act, 1971" (1972) 10(1) *Osgoode Hall Law Journal* 10(1), 155-175.

Appeal Board in Ontario from 1985, in early days there was little sense of an administrative justice community:

> "At that time, every tribunal was an island unto itself, with zero communications between tribunals or their members. There was no organization of tribunals of any kind, no training programs, no one to talk to about tribunal issues, no journal publishing articles relating to tribunal structures and practice, no sense of there being any administrative justice issues. Nothing – a desert."[23]

A former vice-chair of the same tribunal corroborated the silo culture, lack of training and professional development opportunities beyond the tribunal where the member was appointed.[24] Others reported that provincial governments showed no eagerness for funding or organizing training programs for tribunal members.[25] A review of Ontario's public agency landscape by Robert Macaulay, discussed the impact of this lack of training on the delivery of administrative justice.[26] He noted that tribunals in Ontario functioned in a court-like fashion, while the courts had increasingly adopted a deferential approach to tribunals. Indicating a need to train tribunal members for a competent tribunal and effective justice delivery, he wrote that:

> We have a great opportunity as we enter the 1990's to take some important steps in coordinating and improving the performance of all agencies. Judges and lawyers are offered courses of interest and concern, almost every day of the week somewhere, but there is nothing for agency members.[27]

During this period, the Liberal government appointed women chairs to the Pay Equity Hearings Tribunal (Beth Symes), Rent Review Hearing Tribunal (Ratna Ray), and Social Assistance Review Board (Joanne Campbell). Ron Ellis explained how an informal lunch between him and these three chairs turned into a regular event known as the "Circle of Chairs," with up to fifteen attendees in a few years.[28] These informal meetings were a first step toward realizing that despite the differences in the policy arenas in which their tribunals operated, they faced similar challenges, such as approaches to fairness, case management, active adjudication, self-represented parties, access, inclusion, and privacy. In other words, the Circle of Chairs offered an opportunity for tribunal leaders to consider themselves as part of an administrative justice community and to cultivate it deliberately. This self-identification as a community enabled more formal collaboration among tribunal leaders as they developed an extensive submission to Macaulay, responding to his review,

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[23] Ron Ellis speaking notes, "SOAR Annual Conference Opening Plenary - 25 Years: Time to Celebrate or Time to Renovate?", (November 7, 2013), Toronto, Shared with the author.
[24] Virtual interview, 16 January 2020.
[25] MacDonald, "Ontario's agencies, boards, and commissions come of age".
[26] R. Macaulay, *Directions - Report on a Review of Ontario's Regulatory Agencies*. (Toronto: Queen's Printer for Ontario, 1989), pp. 1-2.
[27] Macaulay, *Directions*, pp. 5-12.
[28] Virtual interview, 25 March 2020.

on the challenges they faced as tribunal chairs. The Circle of Chairs organized its first public forum in 1988, with the annual Conference of Ontario Board and Agencies, and in 1992, they formally established The Society of Ontario Adjudicators and Regulators (SOAR).

While a major recommendation of Macaulay's report was the establishment of a Council of Administrative Agencies, like the ones in the UK and Australia, with consultative, coordinating, and evaluative functions to act as an umbrella organization for all Ontario agencies, this recommendation was never implemented. For Macaulay, the establishment of such a Council would not only facilitate the other recommendations, but it would also bring coherence to the administrative agency landscape. SOAR, therefore, had an important role to fulfil.

After its establishment, SOAR engaged in various efforts of advocacy, oversight and education through its working committees. The members of the education committee were tasked with organizing volunteer-driven education for SOAR members, More importantly, the Working Committee on First Principles was mandated with developing "a long-term vision of administrative justice in Ontario" which "would describe the fundamental characteristics and the governing principles of the administrative justice to which in SOAR's opinion, the Province of Ontario ought to aspire".[29] Committee members, through formulation and definition of administrative justice values such as accessibility, transparency, independence and expeditiousness, were motivated to construct a cohesive administrative justice system. All interviewed tribunal leaders saw cohesiveness as a key public value that they wanted to promote for citizens. They identified citizens as a target beneficiary of education initiatives. For example:

> I thought at the time, every member of the public should feel comfortable, knowing that whatever tribunal they go to they'll be treated fairly, and their case will be adjudicated according to a common, accepted set of principles and procedures that have been tested over time through the courts, that are acceptable, that they won't be subject to individual adjudicator, or individual tribunals' inflection. That they can expect a fair hearing, a well written decision by tribunal members who are well versed in the applicable law and principles and who will treat them in a way that's fair and respectful and give them a fair hearing. If we can't do that, you know, we're failing the public.[30]

In identifying public values, tribunal leaders were motivated by public interest. As section III will explain, they also wanted to promote cohesiveness in the community of tribunal members. As one vice-chair who regularly teaches decision-writing explained, "When I train new tribunal members I tell them, you are not just a labor board or discipline

[29] SOAR. "Principles of Administrative Justice: A Proposal" (March 6, 1995), *https://soar.on.ca/sites/default/files/principles-of-administrative-justice.pdf*
[30] Interview, Toronto, 12 December 2019.

committee member, you are an administrative justice practitioner".[31] Thus, through their collective efforts, tribunal leaders came to define and promote administrative justice as a unique field of practice with its own values.

III Tribunal leaders' advocacy and innovative efforts in training

PVT proposes that "the same public values may be realized by different instruments, which potentially lead to different ways of public values realization."[32] While tribunal leaders created capacity for volunteer-based administrative adjudication training through SOAR, within a few years they recognized its limitations and sought different means for improving it. At the heart of this initiative lies the public values of consistency and continuity in administrative justice and the importance of promoting them in training courses.

While the SOAR has offered its training program since the late 1990s, before it combined forces with Osgoode Professional Development, "it was a clunky enterprise," according to a tribunal vice-chair in the mid-2000s.[33] Other tribunal leaders in the SOAR education committee also mentioned that while its commitment to peer education was an essential strength, the organization was not built to be a large education provider and training was offered on a voluntary basis without much focus on pedagogy, infrastructure or technology assists.[34] The interview excerpt below illustrates issues with consistency and continuity:

> The training had always been volunteer based, and I thought that that was a wonderful idea, but it inhibited progress in the sense that we were not able to make use of the best practices, because it was somewhat random, depending upon who decided to take part in the process.[35]

Furthermore, tribunal leaders keenly observed judicial and political developments in Ontario and Canada. By the mid 2000s, not only had the antagonism between tribunals and courts ended[36] but in December 2009, the Legislative Assembly of Ontario enacted the Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009 [ATAGAA]. Tribunal leaders believed that this legislation, with its objectives of ensuring transparent, accountable, and efficient tribunal governance, offered an opportunity to obtain a funding pledge from the government. Yet, despite several meetings with the Public Appointment Secretariat "about whether funds could be allocated for funding", they found that they could not rely on the government for this purpose.[37] Another leader added that "we spent some time looking for potential funders, and that was really quite unsuccessful. We thought maybe the Law Foundation of Ontario would have some funds for us; they did

[31] Virtual interview, 6 January 2020.
[32] Fukumoto and Bozeman, "Public Values Theory: What Is Missing?", pp. 643.
[33] Virtual interview, 8 June 2022.
[34] Interviews: Toronto, 12-13 December 2019.
[35] Virtual interview: 16 January 2020.
[36] McLachlin, "Administrative Tribunals and the Courts: An Evolutionary Relationship".
[37] Interview, Toronto, 12 December 2019.

not".[38] After this, they reached out to the National Judicial Institute (NJI), which provided experiential and active learning programs for judges, developed on adult and continuous education principles.[39] The NJI invited SOAR education committee members to attend some of their training sessions for new judges. This experience convinced SOAR of the benefits of a professionally designed and coordinated training program for tribunal members.

In 2010, they turned to Osgoode Professional Development, the main provider of continuous legal education in Ontario, as a part of Osgoode Hall Law School at York University. Ensuring that both parties were "committed to genuine negotiation", they worked from the strengths of both organizations, with Osgoode's established infrastructure in professional education and the SOAR's content and commitment to peer education.[40] They focused on a hands-on approach, learning by doing, and community building. Hiring a coordinator also contributed to consistency and continuity within the program.[41]

The fact that both organizations were part of the broader public sector facilitated their cooperation. As an Osgoode administrator noted, "when you try to bring a government body together with a private sector body, the culture clash can be quite dramatic at times. This was not the case for us".[42] The new program offered a certificate in adjudication upon completion. Osgoode had experience with Law Societies' continuing professional development requirements and could integrate required hours into the program. The Certificate Program was first offered in 2011 and is delivered annually. One tribunal leader explained the benefits of the collaboration:

> You know, we're lucky that we became partners with Osgoode because it enables the course to be delivered several times a year and new courses are being developed, so that support is really important because it's self-funded. We're getting no government support other then what comes indirectly to the universitiesp and tribunals who contribute with their expertise.[43]

This case study illustrates precisely a point made by Fukumoto and Bozeman: that "realization of public values may require long-standing continuing efforts and mechanisms".[44] It also highlights Nason's suggestion of the important role of public sector leadership. By cultivating a community and insisting on cohesiveness, tribunal leaders strengthened the capacity of the tribunal sector for consistency and continuity of training through the strategic use of co-creation. Ultimately, the focus on public value co-creation

[38] Virtual interview, 16 January 2020.
[39] Virtual interviews, 10 February 2020 and 23 March 2020.
[40] Ibid.
[41] Interview, Toronto, 13 December 2019.
[42] Virtual interview, 23 March 2020.
[43] Virtual interview, 16 January 2020.
[44] Fukumoto and Bozeman, "Public Values Theory: What Is Missing?", pp. 643.

illustrated the processes through which public leaders attempt to solve shared problems by exchanging ideas, knowledge, and resources that alter the understanding of the issue and lead to new approaches.[45] Even while, for sceptics who claim, "the public value approach is flawed when applied to the Westminster system",[46] this study shows that tribunal leaders are in a unique position to solve public problems by creating new and more collaborative forms of governance.

Conclusion

This article introduced PVT as an essential theoretical perspective for the study of administrative justice, with its focus on the role of public sector leadership in finding solutions to policy problems. By taking seriously tribunal members' investment in administrative adjudication and citizens' interest in the delivery of administrative justice, tribunal leaders in Ontario were able to think beyond the existing governance structures. Through social relations and face-to-face interactions, they analysed the problems Ontarian tribunals faced, cultivated a community, and promoted actions to advance administrative justice.

This study comes with some limitations, however. First, the perspectives of the intended beneficiaries—tribunal members and individuals seeking administrative justice—are not explored. While tribunal leaders had a strong influence as public problem solvers of what they saw as the public interest, their experience cannot supplant that of the beneficiaries. Focussing on leaders should not result in disregard for the target beneficiaries. Relatedly, the author cannot speculate on whether the administrative justice system in Ontario became more effective due to the public value co-creation work of tribunal leaders. More in-depth analyses to understand these effects must be undertaken. Finally, the article briefly hints at the pivotal role played by women tribunal chairs in launching the connection among tribunal leaders, suggesting that a more systematic examination of gender in administrative justice is necessary.

Despite these limitations, this article contributes to administrative justice scholarship by emphasizing the importance of paying attention to officials' informal, relational, and flexible long-term efforts outside the immediate frontiers of the public sphere to achieve positive change. Its use of PVT illustrates how the study of administrative justice can be advanced using public administration theories. As there is increasing consensus on the inclusion of first-instance bureaucratic decision making as a part of the administrative justice system, public administration theories have much to offer for the analysis of law, politics, and public policy.[47]

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[45] Torfing, Sørensen, and Røiseland, "Transforming the Public Sector Into an Arena for Co-Creation".
[46] Rhodes and Wanna, "The Limits to Public Value", pp. 407.
[47] M. Hertogh, R. Kirkham, R. Thomas and J. Tomlinson (eds.) *The Oxford Handbook of Administrative Justice* (Online: Oxford University Press, 2021).