Enough of Skills and Process – Let's Talk *Obligations*

An Adjudicator's Professional and Ethical Responsibilities

by

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Introduction

My presentation this morning is based on a lecture that I gave in Ontario during the three Adjudicator Training Courses (ATC) that were presented by the Society of Ontario Adjudicators and Regulators (SOAR) in the year 2000. The audience I had in view when I wrote that lecture was a room full of new appointees – of newly minted tribunal adjudicators. Given, that origin, this audience, which I understand will be comprised of mainly experienced adjudicators, may find the tone of the presentation a bit too didactic for their taste. However, the saving thing is that we will have sufficient time for discussion, and you will an ample opportunity to challenge the views that I will be lobbing your way in this lecture-style presentation.

In a justice system committed to the rule of law, an individual's acceptance of an appointment to a statutory adjudicative position constitutes an agreement to become one of the select group who our society entrusts with the power to decide other people's legal rights. By agreeing to assume that trust one implicitly accepts a set of unique and imperative, ethical and professional obligations that are the keystone of our justice system.

Experience suggests that few adjudicators will have had occasion to consciously consider the specifics of an adjudicator's professional and ethical responsibilities before accepting their appointment. And, in agency environments, the occasion to examine the nature of those responsibilities rarely arises. It is a commonly shared perception that these responsibilities are so axiomatic that no discussion should be necessary.

And, no doubt, it is true that, by and large, at an intuitive level these responsibilities are well understood – at least in general terms. However, in the

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Ontario training course for which this lecture was devised and which was principally designed for the orientation of newly appointed adjudicators, and mainly devoted to the enhancement of adjudicative skills and knowledge, it seemed not inappropriate to devote a moment or two to reflection on an adjudicator's obligations. And it is that same reflection that I thought it appropriate to provoke in this seminar.

In recent years, there have been efforts to codify the professional and ethical responsibilities of adjudicators. In Ontario, the most prominent of these attempts may now be found in SOAR's *Model Code of Professional and Ethical Responsibilities for Members of Adjudicative Tribunals*. This code, commonly referred to as the *SOAR Model Code*, was published in 1996, and will be found in your course materials. It has been widely accepted within the agency community in Ontario as a useful and practical description of the professional and ethical responsibilities of adjudicators, and may now well be regarded by Ontario tribunals as the standard in this field. In this province, you do not, as I understand it, have a model code per se. What you do have, however, is BCCAT's Practical Guide to Developing Tribunal Conduct Codes, which is an extremely useful compilation of several, extant ethical codes for adjudicators from different sources, and amongst the codes contained in that Guide you will find SOAR's Model Code.

We are all aware of course that each tribunal has its own unique, professional and ethical environment, and it is expected that individual tribunals will need to do some adapting of any code or codes that they might select for their model in order to reflect appropriately that agency's own particular circumstances. And, increasingly, one finds that individual tribunals have developed their own particular codes of conduct.

In Ontario, there are also Management Board of Cabinet rules respecting order-in-council (OIC) appointees to "agencies, boards and commissions". The Conflict of Interest policy to be found in Appendix A to the SOAR Model Code is, perhaps, the most pertinent example. And, no doubt there is something similar in British Columbia. Adjudicators should appreciate, however, that, at least to date, no government has attempted to provide a written prescription covering the special responsibilities of persons appointed as adjudicators. The government rules for appointees to agencies boards and commissions are designed to apply to all government appointees, only some of whom are adjudicators. And, of course, an adjudicator's responsibilities differ from those of non-adjudicative appointees. Accordingly, while adjudicators are governed by government policies concerning the duties of government appointees generally, those policies do not address the special responsibilities unique to the adjudicative role of adjudicator appointees. The government rules are, as they say, necessary but not sufficient.

This lecture is not intended to be a full exposition of an adjudicator's professional responsibilities. The various precedent codes set out in the Practical Guide will provide all the detail in that respect that one would need, and that Code will be the principal focus of course discussions. This lecture addresses the special aspects of an adjudicator's responsibilities that, in the author's view, are deserving of a new adjudicator's particular attention.

Integrity

The paramount responsibility of an adjudicator is, of course, to perform the adjudicative role with integrity. If one were to envisage the rule of law as being upheld by a supporting arch comprised of blocks of various adjudicator responsibilities – an image that would, indeed, be apt – the expectation that adjudicators will act with integrity – intellectual integrity and otherwise – would naturally be seen to be the keystone.

While an adjudicator without integrity is unthinkable – a viper, as it were, in the bosom of the justice system – there is not much to be said about integrity. It is commonly believed that it cannot be taught. One has it, it seems, or not. I mention it here because, in my view, in the interest of a healthy justice system, the fact that the ultimate prerequisite of justice is having adjudicators who act with integrity is not something that should always be allowed to go without saying. Moreover, there is something to be learned about the implications of integrity for people exercising the powers of a rights decider.

Independent Decision-Making

Beyond the *sine qua non* responsibility to act with integrity, the most important of the responsibilities of an adjudicator is clearly the responsibility to be *independent* in one's decision-making.

In a speech to the Conference of Ontario Boards and Agencies in November 1997, the Chief Justice of Ontario, the Honourable Roy McMurtry, described independence in decision-making as "undoubtedly the most important principle in the [administrative] justice system". (One may be sure that, in this, the Chief Justice *was* accepting the integrity of adjudicators as, indeed, something that does go without saying.)

In the author's view, the last sentence of Article 51 of the *SOAR Model Code* captures the obligation of independent decision-making perfectly. "Adjudicators", that Code says, "must be prepared to go where the evidence and law fairly takes them"[2].

[2] The original source of this elegant and succinct rendering of an administrative justice adjudicator's obligation to be independent and unbiased in his or her decision-making is an

Note that the reference here is to an adjudicator's responsibility for making independent decisions. This is not to be confused with an adjudicator being actually independent. One cannot be personally responsible for being independent. You cannot make yourself independent, it is something you are, or are not. In the administrative justice system, it is a status that is principally a function of re-appointment policies. Arguably, in the absence of a judge-like, tenured appointment, no administrative justice adjudicator can be said to be actually independent.

In recent judicial decisions in which the essential criteria of independence for administrative justice adjudicators have been examined, the courts have turned a Nelsonian blind eye to this reality. They have, indeed, held that adjudicators must be independent – that is, have an independent status. And they have recognized that adjudicators cannot be seen to have the status of independence unless they enjoy a "tenured" appointment. But they have decided that for that criteria to be satisfied, all that is required is an appointment for an immutable fixed term. The problem is that fixed terms come to an end, and adjudicators will be making the same difficult and contentious decisions in the last month of their fixed term as they were in the first month. Thus, for the courts, at least at the moment, the status of independence is seen to exist even when, at the time a difficult decision is being made, adjudicators know that only one month, one week, one day, after the decision issues, their government will be exercising its untrammeled discretion to renew or not to renew their appointment.

It is apparent, therefore, that independent decision-making on publicly contentious issues may intrinsically require more fortitude if one is a government-appointed, fixed term, administrative-justice adjudicator, than it would if one were a judge. However, as an administrative-justice adjudicator, the professional and ethical obligation to be independent in one's decision-making is nevertheless not qualitatively different.

Experience suggests that most administrative justice adjudicators will find from time to time that it is impossible in contemplating a potentially contentious decision not to notice the unwitting intrusion into one's thought processes of nagging little worries about where one's personal interest in the outcome of a particular adjudication might lie – how will this impact on my prospects for re-appointment, would be the typical little worry. But, of course, an adjudicator's ethical and professional responsibility is to resolutely ignore such intrusions – to cast those impure thoughts out of the adjudicative temple, as it were – and to make the decision on its true merits. One must be prepared to go, as Article 51 says, wherever the law and the evidence is fairly taking one, regardless of how personally uncomfortable that destination seems to be shaping up to be.

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unreported speech to a Conference of Ontario Boards and Agencies by Superior Court Justice Archie Campbell, circa, 1990.

An American judge had an occasion a few years ago to address this obligation directly. The occasion arose in the strange circumstances where the judge was aware of severe public pressure on him to go where the law and the evidence was fairly taking him in any event.

I am referring to the November 11, 1997, unreported judgment of Judge Hiller B. Zobel of the Massachusetts, Middlesex Superior Court, in *Commonwealth of Massachusetts* v. *Woodward*.

Judge Zobel was the trial judge in the Louise Woodward case. Louise Woodward was a U.K. nanny convicted by a Massachusetts jury of the murder of an infant left in her care. Before the sentencing, counsel for Woodward applied to the trial judge to set the conviction aside. While judge Zobel was considering that application, media coverage of the widespread, highly charged criticism of the murder conviction ran rampant.

Apparently concerned about the implications for the public perception of the integrity of the court of a decision that might be seen to have been responsive to this outside pressure, Judge Zobel considered it necessary to remind his audience of a judge's responsibility for independent decision-making. Recalling the words of John Adams addressing a Massachusets jury in the defence of a British citizen on trial for murder in 1740, Judge Zobel fashioned what struck me as an eloquent and admirable statement of the quality of the independence required of any adjudicator in his or her decision-making. It is a statement that, in my opinion, is worthy of any adjudicator's attention. Judge Zobel said this:

> The law, John Adams told a Massachusetts jury while defending British citizens on trial for murder, is inflexible, inexorable, and deaf: inexorable to the cries of the defendant; "deaf as an adder to the clamors of the populace". His words ring true, 227 years later. Elected officials may consider popular urging and sway to public opinion polls. Judges must follow their oaths and do their duty, heedless of editorials, letters, telegrams, picketers, threats, petitions, panelists, and talk shows. In this country we do not administer justice by plebiscite. A judge in short, is a public servant who must follow his conscience, whether or not he counters the manifest wishes of those he serves; indeed, whether or not his decision seems a surrender to the prevalent demands.

This statement pertains to adjudicative decision-making – to the legally authorized determination of people's legal rights. And it pertains, in my view, whether the adjudicator is a fully tenured judge or a member of an administrative justice agency appointed to a renewable, three-year term.

It might, however, occur to some adjudicators to think to ask, how is this responsibility for independent decision-making to be squared with the fact that

one has been appointed by the government of the day to a tribunal that is commonly described as a *government* agency. As a member of that agency, if one is aware of a significant government interest, does one not have an obligation to make, if possible, a decision that best serves or promotes that interest?

To ask the question is, hopefully, to answer it. In the adjudication of the legal rights and obligations of private citizens and corporations, a bias in favour of the government-of-the-day's views is, like any other bias, intrinsically incompatible with the rule of law.

This is not to say, however, that in any adjudication of statutory rights or obligations, government policy is not inescapably a pervasive presence. For example, to the extent that the interests of the government of the day and of the Legislature that enacted the statute in question coincide, those are the interests that will have informed the original choice of the statutory language that defines the rights or obligations in question.

An adjudicator may also find that the government of the day is itself a party to the proceedings, and its view as to the appropriate interpretation of the statute and assessment of the evidence may be the subject of explicit, in-hearing submissions from counsel representing that government. Of course, the arguments of governments participating as parties to adjudicative proceedings before government agencies are entitled to no more - or no less – intrinsic weight or respect that that which is owed to the submission of any party. And, where the government is a party, an adjudicator will at least be authoritatively informed as to the government-of-the-day's views on the matter.

There are also some agencies that are specifically mandated to decide some issues on the basis of making judgements about broad questions of public policy. Their constituent statues may explicitly require their adjudicators in some cases to decide, for instance, which decision would be in the "public's best interest", or what, in the circumstances, is "fair and reasonable" from the public's perspective. These are questions of policy on which the views of the government-of-the-day may be seen to be clearly relevant, and the government's resort to informal policy guidelines respecting the resolution of such issues which agencies are expected to consider is, in these special circumstances, not unknown. The issue as to the degree of deference owed by agency adjudicators to such guidelines is a matter of some debate. Your own agency will, no doubt, have an institutional perspective on that debate.

In the statutes of some agencies, one may also find express authority for direct policy intervention by a responsible Minister through a statute-authorized Ministerial policy *direction*, and, of course, in virtually every statute there will be

provision for the government to make "Regulations" that are intended to flesh out various aspects of the statutory provisions[3].

However, the common characteristic for each of these various channels of government influence over rights determinations is that they are specifically mandated – and structured – by law. Apart from information provided through authorized channels such as these, what an adjudicator may *think* he or she knows – from whatever source, whether it be a statement of the responsible Minister in the Legislature, or media speculation – about where a government-of-the-day's interests may lie in how the issues in a particular case are decided is not relevant. The principles of natural justice – the obligation to be independent and unbiased in one's decision-making and to have regard for only what has been presented in the hearing – prevents one from allowing such "knowledge" to influence one's decision-making.

In a society governed by the rule of law, the legal rights of individuals based on statute are required to be determined by an independent and unbiased interpretation of the actual words used in that statue in accordance with established cannons of statutory interpretation and legal reasoning. That, in important measure, is what is meant by the rule of law.

The principles of statutory interpretation do, of course, make the legislative goals – as those goals are determined from the statutory wording or from such legislative history as may be admissible – an important factor in the interpretation of unclear wording. However, such "legislative goals" are a technical construct defined by the principles of statutory interpretation. And, while no doubt on most occasions adjudicators will find themselves in the comfortable role of giving effect to legislative goals that appear to coincide with the goals of the government of the day, the fact remains that it is only the legislative goals as derived from the legislation itself that are a legitimate, operative influence.

An Open Mind

The next professional and ethical responsibility that, in the author's opinion, warrants an adjudicator's particular attention is the responsibility to approach every hearing with an open mind.

This responsibility has frequently been the subject of some mild disparagement. It has been famously noted, for instance, that, while one wants, no doubt, a mind that is *open,* one does not want – nor can one be expected to have – a mind that is *vacant.* And, of course, it is obvious that, as a practical

[3] The scope of such regulations are confined, however, by the limits of the regulation making power set out in the particular statute, and by the common-law understanding that the statute remains the primary source of the law. Regulations that conflict with the statute under which they are made are not enforceable.

matter, adjudicators do, in point of fact, rarely come to a hearing without preconceived opinions about the legal issues and/or about the probabilities respecting the alleged facts.

However, it is important to appreciate that the reference to an adjudicator's obligation to have an open mind is not a reference to the mind's content. The reference is to attitude and technique; to the need to approach a hearing with one's mind truly held open to being persuaded to a different opinion by the actual evidence and by the quality of a party's or counsel's submissions on the facts and law. Note the reference to the mind being *held* open.

A few years ago, now, I had occasion to find myself browsing in Bertrand Russell's *History of Western Philosophy*. You may put this somewhat radical behavior for a lawyer down to the morbid curiosity of one educated originally as an engineer and then as a lawyer contemplating what a real education might have been like. In any event, in the course of perusing the Introduction chapter of Russell's History, I experienced what can only be described as an epiphany of insight into the judging process. I discovered Russell's concept of "hypothetical sympathy". You should write that down – hypothetical sympathy.

In writing his history of philosophy, Russell was attempting to understand and evaluate – if you will, to judge – the theories of a large number of philosophers. And, like most adjudicators approaching a hearing room, his mind was in fact far from open. He was an accomplished philosopher in his own right, with decided views. Furthermore, his preconceived notions about the theories of a number of the philosophers he felt obliged to include in his book were less than flattering. However, as a scientist, he understood the importance of bringing to a judging process an open mind. What was required, he said, was an attitude of "<u>hypothetical sympathy</u>".

The relevant passage from the Introduction chapter (page 39 in the Simon & Shuster edition) reads as follows:

> In studying a philosopher the right attitude is neither reverence nor contempt, but first a kind of *hypothetical sympathy*, until it is possible to know what it feels like to believe in his theories, and only then a revival of the critical attitude… [This attitude of hypothetical sympathy]… should resemble, as far as possible, the state of mind of a person abandoning opinions which he has hitherto held.

During my years as Chair of the Ontario Workers' Compensation Appeals Tribunal, I had periodic occasions in lectures and public addresses to attempt to describe the judging process, and on those occasions frequently talked about the *respect* an adjudicator must have – and show – during the hearing for the arguments of both parties and their counsel. (An open mind is, of course, an

integral aspect of that concept of respect.) And, in recognition of the reality that sometimes respect proves, as a practical matter, difficult to muster, the author would often say that, if, try as one might, one could not actually engender the necessary respect, then one must *pretend* to have done so.

This was always an unsatisfactory expression of the thought, since it suggested the adoption in the hearing of a non-genuine posture. Russell's elegant concept of deliberately adopting at the beginning of a judging exercise the *professional* attitude of *hypothetical sympathy,* and maintaining that attitude until one truly knows what "it feels like" to believe in a party's case, and only then reverting to the critical attitude, seems to me to capture perfectly this part of the judging process for which, in the past, I had struggled to find appropriate words. It is a concept that seasoned adjudicators will find resonating with their own experience.

Without an adjudicator bringing to the hearing that attitude of hypothetical sympathy – or whatever else one might choose to call it (perhaps, just an "actively open mind") – parties who come to a hearing with arguments that are, on first impression, at odds with the adjudicator's own preconceived views will not have, in fact, a fair opportunity to persuade, nor will they receive an objective consideration of their positions. Thus, in those circumstances, two principal tenets of the principles of natural justice law will have been subverted.

Objective Judgement

Making an objective judgement is different from keeping an open mind.

I will begin by focusing on the latter part of my definition (item 4) – that is, that for a hearing to be seen to be fair there should be no substantial doubt that the adjudicators were at all times in fact committed to going wherever a genuine attempt at objectively assessing the evidence and law might take them.

You will note the nod to the reality of the human experience in the phrase a "genuine *attempt* … at objectively assessing the evidence and law". It is fashionable to disparage even the possibility of objective adjudication. And it is certainly true that with respect to issues of importance, adjudicators will inevitably bring to the adjudication pre-conceived views and biases rooted in their own innate nature and developed through their personal and/or professional life experiences.

Objectivity in the pure sense of the concept is, in reality, impossible to attain, if indeed there is such a thing at all. As has been said, one wants an adjudicator's mind to be open but one cannot expect it to be empty, nor, of course, does one want it to be vacant. However, when we understand the rule of law as requiring an objective assessment of the law and evidence as part of the prerequisites for a fair hearing, we do know what is meant.

On legal issues, the assessment we have in mind is one in which adjudicators acknowledge a professional duty to suppress personal policy preferences as to outcome, and to search assiduously for, and be bound by, the intent of the legislature or the effect of established doctrines of common law, as those are determined by a genuine, best-effort adherence to established cannons of legal reasoning. We also expect that that loyal adherence to the cannons of legal reasoning will be informed by an open-minded consideration of all competing arguments.

To knowingly strive to achieve a personally preferred policy outcome through a clever manipulation of the rules of legal reasoning is the proper business of advocacy. Adjudicators who indulge themselves in a similar exercise are, in my view, acting in a manner that is incompatible with the rule of law and that subverts the integrity of our legal system.

A few years ago, I had a personal occasion to experience what such an approach by an adjudicator would be like. I was present at a private meeting of a tribunal's executive council when an experienced, private bar lawyer retained to act for the tribunal spoke to the council on the issue of the legality of a particularly contentious, proposed interpretation of the tribunal's legislation. The lawyer advised the council that the interpretation in question was open to the tribunal, i.e., was legal, not because it was a reasonable interpretation but because it was not so unreasonable that it would be considered patently unreasonable by the Divisional Court.

The lawyer's advice was, effectively, that it was legal and appropriate for a tribunal to adopt whatever interpretation it could reasonably hope to get away with - that is, whatever interpretation fell short of being patently unreasonable – even if that interpretation flew in the face of the intent of the legislature as most reasonably interpreted.

I was shocked to find that view of an adjudicator's role being espoused by experienced counsel, and I am hopeful that I would not be alone in that reaction. It is a way of looking at an adjudicator's role that, in my opinion, is flatly incompatible with the rule of law. Under established precepts of legal reasoning, the bright-line question for tribunals and their adjudicators – and I would suggest for government bureaucracies as well – must surely be this:

What is the principled legal reasoning we honestly find most persuasive as to the intent of the Legislature?

So much for what constitutes an objective assessment of the law. What do we expect from the rule-of-law's requirement that there be an objective assessment of the evidence?

What we expect is that adjudicators will be attuned to their own prejudices, biases and cultural pre-dispositions and will be professionally committed to a genuine and informed attempt to push those aside in a personal best effort attempt at a fair assessment of the evidence – to be committed, in a word, to ignoring factors that are not fairly relevant to that assessment.

No one would suggest, for instance, that adjudicators who consciously allowed their own stereotypical thinking about unfamiliar cultures or race to influence their assessment of the credibility of witnesses would be acting legitimately.

The system's aspirations of objectivity as far as the assessment of evidence is concerned may be seen in the attention now being paid in adjudicator training courses to the problem in a multicultural society of assessing credibility across cultural differences between adjudicators and witnesses. Another example is the prudent skepticism by which modern adjudicators now believe the factor of their intuitive "read" of a witness's demeanor in the witness box should be viewed.