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Article

The Corporate Responsibility of Tribunal Members - CCAT 2008

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The author examines, in prosaic detail, what members of adjudicative tribunals actually do (they make findings and formulate opinions) and how that impacts on the tribunal's institutional interests. He argues that the operational context in which these functions are carried out differs in seminal ways from the operational context in which civil-court trial judges carry out the same functions. These differences in context are structurally determined and present both unique institutional risks and unique institutional opportunities. If these risks and opportunities are to be appropriately and effectively managed and harvested, an institutional or "team" approach to adjudication is essential. This institutionally compelled team approach rules out "islander" or "lone ranger" members, and makes tribunals especially vulnerable to patronage or political abuse of appointments or re-appointments.

Mypanel presentation this morning on the subject of the corporate responsibility of tribunal members is designed to provide the contextual backdrop for the panel discussion to follow.

Two years ago, this conference's theme was the integrated tribunal, or, as Frank Falzon described it that year, the fully realized tribunal. *2¹ And when I address in this paper the subject of the corporate responsibilities of tribunal members -- which I take to mean their responsibilities to their tribunal -- I have in mind the responsibilities of members inherent in any fully realized tribunal.

To begin, let me define what I mean when I speak in this context of a "tribunal". My focus in this paper is on adjudicative tribunals whose predominant statutory function is the judicial function of authoritatively adjudicating justiciable disputes between parties (one of which may be the government) in the course of which, following a fair hearing, *existing* law and regulations are interpreted and applied to factual findings based on admissible evidence. I have in mind tribunals like the Canadian Human Rights Tribunal that are at the high end of the spectrum of administrative tribunals as described by the SCC in its *Bell Canada* decision;² tribunals that are not, as that Court

noted, engaged in the “crafting of policy”; tribunals to whom subordinate legislative powers have not been delegated and who are not empowered to exercise any statutory *discretion*.

In *Bell*, the Supreme Court labeled such tribunals “quasi-judicial”, but, with respect, a more descriptive label -- the one that was suggested by Professor Ratushny 18 years ago in his Canadian Bar Association Report on the federal tribunals³ -- is “adjudicative” and in this paper I will refer to tribunals in that category as “adjudicative tribunals”.⁴

No one knows what proportion of the administrative tribunals in this country fall into the adjudicative category, but I believe it is a large proportion. A contemporary indicator is the current Ontario Ministry of Government Services classification of tribunals.⁵ Amongst the 61 “regulatory and adjudicative” Ontario agencies that the Ministry classifies, nearly 70 per cent are classified as “adjudicative” and *not* as “regulatory”.⁶

***3** In this paper, I conceive the so-called corporate responsibility of a tribunal member to be that of performing with commitment and competence all that a tribunal requires of its members if the *tribunal* is to become, be, and remain, fully realized in the pursuit of its own institutional responsibilities. The institutional responsibilities to which I refer are those that are innate in an adjudicative tribunal's role as the judicial arm of a statutory enterprise whose purpose is the vindication or delivery of important legal rights.

Thus, in the exploration of a member's corporate responsibilities, one must begin with a good understanding of the institutional responsibilities of the tribunal to which he or she has been appointed.

Those responsibilities are most obviously influenced by the nature of the tribunal's assignment -- by what the tribunal has been asked to do; by its role in its statutory enterprise -- and I will begin my exploration of a tribunal's institutional responsibilities with a rather prosaic account of what adjudicators of all stripes -- judges and adjudicative tribunal members -- actually do.

At one level, adjudicators may be said to do only two things. They make findings of fact and they formulate legal opinions. Findings are a simple and familiar concept. They are the decisions about the facts that are in dispute in the case. Findings are decisions that are based on judgments about evidence -- eyewitness evidence, expert evidence, and real evidence. These findings emerge from the judgments adjudicators make about the credibility and weight of the evidence they have admitted, heard and seen. Findings are properly only the business of the adjudicator who has heard and seen the evidence.

When I say that the only other thing that adjudicators do is to formulate legal opinions, I am referring to the opinions they formulate in ***4** the course of making decisions other than findings. An adjudicator's legal opinion becomes a decision once he or she decides in a final way that it is

in the circumstances the most persuasive opinion. At its root, every decision that is not a finding is first, and most importantly, the adjudicator's opinion about what the law is and what the law permits or requires.

I appreciate, of course, that it is not usual to refer to adjudicators formulating legal opinions. But in the course of making their decisions that is what they do, and, for the purposes of this paper, it is helpful to focus on the opinion behind the decision in order to make plainer the intellectual, academic, analytical -- and personal -- content of an adjudicator's decision-making.

There are many different categories of legal opinions to be formulated and decisions made in the course of determining and disposing of a dispute about rights. Most obviously, there is the opinion the adjudicator formulates about how the substantive statutory provisions applicable to the case are most convincingly interpreted -- the interpretation opinion.

The opinion that is perhaps of uncommon interest in a tribunal context, and one we often overlook, is the opinion about what issues have to be decided; what the issue agenda is to be -- has to be -- in each particular case. Tribunal adjudicative proceedings are significantly different from court proceedings with respect to issue agendas. In tribunal proceedings, issue agendas are not typically structured by the parties' definition of issues, as they are in the formal pleadings in a civil law suit. This is not a distinction that is much noted, but it is a significant distinction. In each tribunal case, a tribunal adjudicator has to formulate an opinion about what issues are relevant and necessary to be dealt with in the circumstances of the case before him or her: what are the factual issues and what are the legal issues that this case necessarily and fairly presents?

Of course, frequently, perhaps most often, the issue agenda is implicitly understood by all parties and by the tribunal and nothing needs to be said about it. But the question is always there, and the nature of the proceedings are fundamentally governed by the adjudicator's opinion, implicit or not, as to what issues--legal and factual--have to be decided in the particular case under consideration if it is to be disposed of appropriately.

Along the same lines, are the opinions about burdens of proof and standards of proof. Who has the burden of proof? Does the burden shift and, if so, when? And, to what standard must the case, or a particular allegation in the case, be proved?

***5** Then there are the opinions concerning the evidence that is to be admitted. To what extent is the admissibility of evidence to be determined under a different standard than the usual rules of evidence applicable in court proceedings? What is the effect of the rules that are deemed applicable? What is relevant? What is irrelevant?

And closely related to the admissibility issues are the judicial notice issues -- of what facts, and sometimes of what law, is the adjudicator entitled or required to take judicial notice? Judicial notice opinions do not typically play a large role in court proceedings, but in tribunal proceedings, where

specialized expertise is a hallmark, there is arguably a much greater potential role for judicial notice; a potential role to which, in my view, sufficient attention has yet to be paid.

And, then, of course, there are the opinions formulated as to what the principles of natural justice require in various circumstances during the course of the hearing of a case. And here, too, there is often a significant difference between tribunals and courts--not always, but almost always, the process and procedure in a tribunal proceeding is not governed by detailed rules of procedure, and certainly not by centuries of tradition--and there is greater room for flexibility and innovation than what is typically thought to be available to judges.⁷

And, always of great importance is the adjudicator's formulation of his or her opinion about remedies: what should be done, what can be done, in the way of crafting an effective remedy, given the result and the circumstances of the case?

On the subject of the corporate responsibilities of tribunal adjudicative members, the pertinent question is, of course, the potential impact of a member's decision-making on the tribunal's institutional responsibilities.

The decision that comes first to mind in that respect is the interpretation decision: the formulation and adoption of an opinion concerning the proper interpretation of substantive provisions of the statute for which the tribunal is responsible.

The substantive statutory law that adjudicative tribunals are typically responsible for applying is a set of rules that at some level are, like all laws, rules of general application intended to govern particular circumstances. Thus, for example, in a workers' compensation statute there is typically the general rule that workers are entitled to be compensated for injuries if those injuries *arise out of and in the course of employment*. *6 Those are the defining words of the system's principal rule of general application.

A typical particular circumstance to which that general rule would obviously be taken to apply would be a worker claiming compensation for a broken leg, broken when he fell off the loading dock at his place of employment.

Now, as with all laws of general application, the general rule that injuries that arise out of and in the course of employment are to be compensated will have what H.L.A Hart has classically described as a "core of certainty" surrounded by a "penumbra of doubt".⁸ For cases that fall within the core of certainty, it is possible to say with certainty that the general rule applies, but within the penumbra of doubt one finds, as Hart says, cases in respect of which there are reasons for both asserting and denying that the general rule applies.

Thus the broken leg case, as I have described it, clearly falls within the core of certainty of a workers' compensation system's general rule of compensability. But if I add the fact that the worker

fell off the loading dock while being chased by a fellow-employee in a bit of horseplay, then suddenly we have reasons for both asserting and denying that the rule applies. If it appears that the accident happened during an unpaid lunch break, then we have another reason for questioning whether the general rule that injuries arising out of and in the course of *employment* are to be compensated applies or not.

The significant interpretative opinions formulated by adjudicative tribunal members will be inevitably opinions about cases that fall within some general rule's penumbra of doubt. There will be no need for cases that fall within a rule's core of certainty to be presented to an adjudicative tribunal except in the context of a dispute about factual issues. And the opinions of a tribunal's adjudicators about the applicability of general rules to cases within the rule's penumbra of doubt will, as they accumulate, eventually define the outer margins of applicability of the policy for which the statutory enterprise of which the tribunal is the judicial arm is responsible for administering, and the quality and content of that policy within those margins.

In the field of workers' compensation, the decisions of tribunal adjudicators will eventually determine the generic questions of whether injuries occurring during the course of unpaid lunch breaks are compensable; under what circumstances injuries caused by "accidents" arising out of horseplay will be seen as "arising out of and in the course of *7 employment"; whether injuries caused by a fight between employees are covered; whether there is compensation entitlement for injuries suffered in an employer's parking lot when the injured worker is hit by a delivery van while walking to his car on his way home, after his shift is over; or whether an injury should be seen as arising out of and in the course of employment if a worker is hit by a private car while crossing a public street on her way to her car in the employer's parking lot located across that street. At a more general level, those decisions will also determine whether entitlement to compensation will be seen to depend on the injury arising *solely* from employment, or on the employment being the dominant cause, or will it be enough that the employment made *a significant contribution* to the injury? And so on and so forth.

And so it is with every tribunal: the accumulated interpretation opinions of its members with respect to interpretation questions about substantive statutory provisions that fall within a general rule's penumbra of doubt will ultimately determine the outer margins and the practical content of the policy for which the statutory enterprise of which the tribunal is the judicial arm is responsible.

But what is true for interpretation opinions also holds for the accumulated opinions formulated by a tribunal's members in making the various other kinds of legal decisions required in determining and disposing of the rights disputes within the tribunal's jurisdiction. All such decisions have comparable institutional implications.

Thus, the issue agenda opinions will determine the nature--the character--and the extent of the tribunal's role in aspects of its operation not necessarily made clear in its constituent statute. For

example, is the issue before an appeal tribunal the *correctness* of the decision at the lower level or the *reasonableness* of that decision? The statute does not specify. May the issue agenda -- must the issue agenda -- include issues that were not decided by the lower-level decision-maker? If a party has not raised an issue, may it -- in some circumstances must it -- nevertheless be included in the tribunal's issue agenda? Does the tribunal's role require that, in the public interest, it deal with issues of its own, irrespective of the parties' wishes?

The members' accumulating opinions on burden of proof issues, standard of proof issues, and, admissibility issues, will markedly influence the nature and efficiency of the tribunal's proceedings. And, where the tribunal's operational context typically includes a marked power and resources imbalance between the disputing parties, which in a tribunal context is often the case -- indeed the existence of such imbalances is often why the tribunal was created in the first place--those accumulated *8 opinions will ultimately determine the practical accessibility of the tribunal's proceedings. Are the proceedings to be court-like and technical, or relaxed and informal? Will a party to be able to function without a lawyer? And so on.

The accumulating opinions on principles of natural justice issues will, in due course, determine, amongst other things, the extent to which unsophisticated parties come away from their hearing confident of having been heard, and whether an appropriate balance is typically struck between fairness and effectiveness, between fairness and efficiency.

And, finally, the accumulated remedy opinions of tribunal members will, in the long run, determine the practical efficacy of the underlying policy.

Of course, in terms of *what* they do, adjudicators do not differ much from trial-court judges. Judges, too, typically only decide legal issues that fall within a general rule's penumbra of doubt and their decisions also determine the limits and practical content of the policy behind the statutory provisions that come to them to be interpreted and applied. The occasions for the formulation of some of the opinions -- such as the issue agenda opinions and fair hearing opinions -- may arise more frequently for tribunal adjudicators than would be typically true for judges, and the formulation of some of the opinions, such as the admissibility and fair-hearing opinions, will be more free-form, if you will, than is typically true for judges, but they both will make findings and formulate opinions and make decisions in the categories of issues to which I have referred.

However, where tribunal adjudicators differ markedly -- and I would argue seminal -- from civil, trial-court judges, is with respect to the context in which they do their work; context that is determined by the unique operational environments in which tribunals function. And those contextual differences present, for tribunals and their members, risks and responsibilities -- and opportunities -- in the implementation of the policy encompassed in rules of general application that judges do not share. And I turn now to consider those contextual differences.

There are three, particular, structural characteristics of the operational environment in which tribunal adjudication typically occurs that are major determinants of the nature of a tribunal member's corporate responsibilities and which are unique to tribunals as compared to civil courts. (It should be noted that criminal courts are different and are not included in this discussion.)

First of all, the field of rights for which an adjudicative tribunal is typically responsible, while often a deep field, is typically a relatively ***9** narrow one: human rights, workers' compensation, labour relations, property assessment, municipal planning, mental competency, landlord and tenant disputes, etc.

Secondly, the tribunal has been accorded a monopoly over the resolution of legal issues arising in that narrow field of specialization. In that field, its jurisdiction as the final decision-maker is exclusive. The law prohibits any other body dealing with these issues comprehensively, on their merits, in a final way, and people who face those issues, and need them to be addressed, have no choice but to bring them to that tribunal.

(This is no longer true, in part, for human rights tribunals,⁹ but that, in my respectful view, is something of an anomaly.)

Thirdly, while the field of rights for which a tribunal is responsible is narrow, at least for major tribunals the number of disputes arising from that field is typically very large.¹⁰ The reasons a high volume of disputes arise from the narrow fields of rights for which major tribunals are typically responsible, as compared to what the courts would typically receive from any correspondingly narrow field of rights, are also of a structural nature.

Thus, the distinguishing, structural characteristics one sees in the operational environments of major adjudicative tribunals are: an exclusive mandate, a narrow field of rights, and, arising from that narrow field, a large volume of rights disputes. These are the three structural idiosyncrasies of a tribunal's operational environment that are not typically to be found in the civil courts' operational environment. They are idiosyncrasies that have a unique impact on the nature of a tribunal's adjudicative responsibilities and of the corporate responsibilities of its members.

Then, there is the fact that a tribunal's operational environment is commonly an unusually hazardous environment from a political perspective. ***10** The statutory rights enterprises for which tribunals are the judicial arm are typically the means of government intervention in some key aspect of a society's life, and that intervention will reflect a political decision about which many people will have their own views, often deeply held, about the merits of the intervention itself or about the way in which it is being implemented. Frequently, individual decisions arising from that intervention will be inherently controversial. Workers compensation tribunals, for instance, are engaged in restoring the livelihood of some badly injured people, but in denying that restored

livelihood to other equally badly injured people; moreover they do so at the expense of employers who are rarely enthusiastic at the prospect.

Other examples abound. One need only think for a moment about the inherently, politically contentious nature of the activities of the IRB, of welfare tribunals, of information and privacy commissions, of human rights tribunals, of labour relations boards, of milk marketing boards, of professional disciplinary tribunals in the legal and medical fields, of child welfare tribunals, of parole boards and criminal code review panels, of landlord and tenant tribunals, and so on, to be convinced that an important aspect of the operational environments of most adjudicative tribunals is a special exposure to political controversy.

It is an exposure that is, it may be noted, significantly enhanced by the fact that all the controversial decisions will come exclusively from the one identifiable, high-profile source -- the tribunal -- and those decisions will come often. On an issue of current controversy, the courts might release one decision every year or two. On a similar issue, in some circumstances a major tribunal might be called upon to release several decisions over the course of a year, or a month.

Tribunals also operate in a legal environment that is in a number of significant respects materially different from that in which the civil courts operate, and these are differences that also have an important, special bearing on the nature of the corporate responsibilities of tribunal members.

In the first place, the doctrine of *stare decisis* does not typically apply to tribunal decision-making. So, unlike judges, tribunal members are free, as far as the law is concerned, not to follow previous decisions of their tribunal colleagues even if the previous decisions cannot be distinguished. This has been particularly recognized in the SCC's 1993 decision in *Domtar*¹¹ where it was held that the fact that two tribunal *11 decisions are in direct conflict with one another does not render either one of them necessarily reviewable by the courts.

Secondly, the *functus officio* doctrine does not always apply to tribunals. Many tribunals have been rightly and wisely given the statutory power to reconsider their “final” adjudicative decisions.¹²

Thirdly, the rules of evidence are typically much more relaxed and admissibility more a matter of adjudicative discretion.

Finally, tribunal decisions are not subject to appeal in the same way that the decisions of trial court judges are. Of course, the decisions of many tribunals are, in fact, subject to explicit, statutory rights of appeal. But those appeal rights have always been paradoxical relative to the reason for not assigning the decision-making to the courts in the first place. Professor Harry Arthur's famous observation about the lack of justification for judicial review of tribunal decisions applies with special weight to *appeals*. “There is no reason to believe”, he said, in his 1983 article in the Canadian Bar Review entitled “Protection Against Judicial Review”,¹³ “that a judge who reads

a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than [a tribunal adjudicator] who is sworn to uphold that purpose, who strives to do so daily, and is well-aware of the effect upon that purpose of the various alternative interpretations”.

But, the paradoxical nature of appeal rights in administrative justice proceedings are catching up with them. In BC's new administrative justice legislation, appeal rights have, I believe, been removed entirely. And the SCC decision in *Dr. Q*¹⁴ seems likely to have initiated a process of effectively converting them to judicial review applications like any other; applications to which the principles of deference will apply in the ordinary course.

The final aspect of a tribunal's operational environment that bears particularly on the quality of its and its members' responsibilities is the hard fact that *what tribunals do matters*. That adjudicative decisions matter is not, of course, unique to tribunals and tribunal adjudicators. It is self-evidently true with respect to courts and judges, as well. I make a *12 particular mention of it in this context only because it is implicitly accepted as a given for courts but, in my experience, sometimes overlooked or even ignored when it comes to tribunals.

Let me tell you a story. It is a true story, one that I have told before in small settings, and one that in 1998 Judith McCormack referenced in her article: *The Price of Administrative Justice*.¹⁵ However, as CCAT's administrative justice audience is always in a process of renewal, it is a story that in my view bears repeating.

About three years into my job as Chair of Ontario's WCAT, in the late 1980s, I received a letter from a mother living in a small Ontario town whose 22-year-old son had been seeking workers' compensation benefits for a major, disabling injury -- benefits that would provide the livelihood that he was now unable to provide for himself. After the WCB turned her son's application down on the basis that the injury, bad as it was, was not work-related -- had not arisen out of or in the course of employment--he had appealed to our Tribunal. A Tribunal hearing panel had heard the case and in due course agreed with the WCB and rejected his appeal.

“Dear Mr. Ellis”, the mother wrote, “as Chair of this so-called Tribunal I thought you should see the enclosed.” The “enclosed” was the last page of the Tribunal's decision in her son's appeal. The last line on that page read: “Appeal denied”. Her son, the mother explained in her letter, had read the decision, gone out to the back shed, taken a shotgun and killed himself. On the last page of the decision under the Tribunal's words “Appeal denied” the son had scrawled the words “Life Denied”. The enclosure in the letter was that last page. His mother had sent it to me in the blood-spattered condition in which she had found it.

I expect that some readers will find that story unsettling and my telling it perhaps of questionable taste. I take the liberty of telling it, however, because it so poignantly dramatizes the point that

seems to me many people, sometimes especially politicians, seem able to ignore or evade -- when it comes to tribunals -- that what tribunals and their members do, matters! Think of the potential for harm in the work of parole boards, of the IRB, of welfare appeal boards, of landlord and tenant boards, of compensation boards dealing with personal injuries in automobile accidents, or workplace injuries, of disability pension boards, of planning boards, of professional disciplinary tribunals, of licensing appeal tribunals, of human rights tribunals, of criminal code review panels, and so on and so forth.

***13** Tribunal members are not involved in political or ideological games, nor are they dabbling in public service, or wending their way through to a comfortable retirement; they are engaged in serious business, as serious as what the courts are engaged in, where the consequences of getting things wrong may be the infliction of injustices of the gravest kind, often in fact life-altering or, occasionally, as the note I received so many years ago said, life denying.

With that sobering thought held firmly in mind, I propose to now consider the implications for the corporate responsibilities of tribunal adjudicators assigned to formulate adjudicative opinions with respect to the various categories of issues I have mentioned, when they must formulate those opinions and make those decisions in an operational environment characterized most importantly by their tribunal's exclusive responsibility for the resolution of a large volume of politically sensitive disputes in a narrow field of statutory rights, and in a legal environment in which they are unrestrained by *stare decisis*, or, often, the *functus officio* doctrine, or strict rules of evidence, and where court review of their decisions is limited to proceedings in which the decisions are shielded from rigorous review by the principles of deference.

I will begin with the implications of the exclusive mandate--the monopoly -- over the resolution of disputes arising within the tribunal's field of rights. And, the first thing to note is that the monopoly is held by the tribunal--the corporate entity--not by its individual members. The tribunal is responsible for all the cases; individual members for only a small proportion. It follows, therefore, that the special responsibilities classically arising from the holding of a monopoly are, first and foremost, the institutional responsibilities of the tribunal.

What are those special responsibilities? It is not rocket science. If the tribunal has been established by law as the only place citizens may go for obtaining or vindicating important legal rights, if the courts and other competitors have been ruled out, the special responsibilities arising from those circumstances must, self-evidently, include the following: an institutional responsibility to ensure that the tribunal's adjudication is both actually performed at an optimum level of competency, fairness and objectivity and is perceived to have been so performed; that the tribunal and its procedures are as accessible as possible; that the tribunal works as efficiently as possible, but in ways that do not impair fairness and access; and that, in its exclusive role as the final arbiter of rights disputes arising in its statutory enterprise, the tribunal be as effective as possible in systemic terms.

***14** What is especially important to note in this context is that a tribunal's ability to meet those responsibilities effectively will be largely dependent on the reputation the tribunal earns for competency, fairness and objectivity, efficiency and effectiveness, most importantly within its client constituencies and amongst the communities of advocates representing those constituencies, but also within the statutory enterprise itself.

To take an obvious example: a workers' compensation tribunal that earns a general reputation amongst workers as being biased against the interests of injured workers, or, amongst employers as being biased against their interests, or, within its host ministry, as profligate in the management of its resources, cannot in the long run be effective in meeting its systemic responsibilities or in standing up for its independence. Thus, to state the obvious, there is much more at stake in the decisions of individual tribunal adjudicators than only the interests of the parties to the disputes, important as those are.

What, then, are the implications for an adjudicative tribunal's institutional responsibilities, and its reputation, of its idiosyncratic operational environment -- of its having to deal with a large volume of cases arising from a narrow field of politically sensitive rights?

From a negative perspective, one result is that there are much greater opportunities, coming forward at a much faster pace, for that tribunal to get itself into trouble; for conflicts and incongruence to arise amongst individual decisions on issues of special sensitivity. In that environment, inconsistent or incongruent decisions are prone to occur more frequently, their deficiencies to be, thus, more obvious, and the criticism that follows to be quicker and sharper. And when inconsistencies and incongruence do appear, it is not just a question of unfairness to an individual party, but of the impact; not on the reputation of the individual adjudicators involved in the decisions, but on the *tribunal's* reputation for competent adjudication.

Experience tells us that if a tribunal releases a poor decision on a sensitive issue, or one that cannot be logically reconciled with one released the week before, the most significant reaction within the various audiences for the tribunal's decisions is not that the tribunal member who wrote the decision has issued a poor decision, but that the *tribunal* has issued a poor decision; not that the individual adjudicator has shown himself or herself to be incompetent, although that may also be noted, but that the *tribunal* has evidenced incompetent work. And, thus, by that adjudicator's decision, the tribunal's overall effectiveness in its institutional role will have taken a hit.

***15** The narrow field also means that a greater proportion of the people judging the tribunal's performance will themselves be specialists and experts, and that fact, combined with the large volume of cases, means that negative, community-wide convictions pertaining to the tribunal's performance will be especially quick to develop.

The decisions to which I have been attributing the foregoing potential for trouble because of the high-volume of sensitive issues in a narrow field will, of course, be largely those based on interpretation opinions. But, the high volume of cases arising from a narrow field also infuses the formulation of opinions in the other categories of issues with a particular potential for harm. They are not likely to trigger political controversies on substantive matters, but to the extent that a large volume of individual decisions in similar cases on such matters as issue agendas, burden of proof, standard of proof, admissibility of evidence, judicial notice, fair hearing questions, and remedies are consistent or congruent one with the other, the content around which that consistency or congruence has formed will effectively define the tribunal's adjudicative nature, and its efficiency, effectiveness, and its accessibility. On the other hand, to the extent that such decisions are inconsistent or incongruent they will quickly sew confusion as to the tribunal's nature, and uncertainty as to its process, undermine confidence in the tribunal's management, and impair its reputation and general effectiveness.

But, a tribunal's unique operational environment presents much more than special dangers; it also presents very significant, special opportunities--opportunities that courts do not have. Because the tribunal's field of responsibility is narrow, it is easily within the grasp of the tribunal and its members to master it -- to become, both in academic terms and in terms of a practical understanding of its realities, true experts in the subject matter. And, because of the high caseload, that expertise is informed and enriched by a depth and breadth and currency of observation of the role of the statutory provisions in real-life situations that courts and judges can never match. In his criticism of judicial review, Professor Arthurs referred to the unique "universe of discourse" which tribunal adjudicators inhabit and to which courts and judges can, as a practical matter, have no access;¹⁶ it is a universe that emerges naturally from the adjudicative responsibilities shared amongst a tribunal's members and from the depth and richness of their, accumulating specialized experience.

In addition to the richness and depth of experience that tribunals can bring to bear on their adjudicative decisions, they also have a unique *16 capacity for constructively evolving their decisions in response to their developing experience. From the perspective provided by one set of facts, an interpretation opinion -- or an opinion on any of the other categories of common issues -- might present itself as eminently persuasive, but when that opinion is viewed from the perspective provided by another set of facts, deficiencies may become evident. Since previous decisions are not binding, and conflicting decisions are acceptable in law, the tribunal itself is able to readily correct its earlier opinions, and the quality and sensibility of its interpretation can grow in response to the tribunal's developing experience of the application of the statute to a range of factual situations.

In short, the common-law genius for the evolution of law finds a unique home in the tribunal context where, because of the narrow focus and large volume of cases, its advantages can be harvested on much shorter time-lines than is the case in the courts. It is rather like scientists doing evolution-of-species experiments with fruit flies. A tribunal can work it's way through generations

of evolutionary developments in its opinion jurisprudence over a very short time span because the cases come through its doors in large numbers and the life span of an established opinion on any particular issue can be as short as the developing knowledge and tribunal-wide consensus warrants.

A tribunal's usual power to reconsider a decision also gives it a unique instrument of quality control that courts do not have. If, on an application for reconsideration, a decision can be shown to have been wrong, the ability to think again and fix it -- right there and then -- is potentially invaluable. It is a power, however, that cannot be overused if it is to remain constructive, and so must be controlled from the tribunal's centre.

It is, of course, self-evident that the special dangers inherent in a tribunal's assignment as the exclusive final adjudicator of sensitive issues in a large volume of cases arising from a narrow field of rights, and the unique opportunities and advantages presented by the same circumstances, have obvious implications for the corporate responsibilities of tribunal members. It is, I would argue, perfectly plain, within the core of certainty, as it were, that in such a context it will be impossible for a tribunal to manage the dangers reasonably, nor harvest the advantages effectively or efficiently, unless all the tribunal's individual adjudicators understand that the adjudicative function of the tribunal is inherently a group activity in which they all have a stake and in which they are all engaged as members of a *team* of adjudicators. It is a team whose members must be infused with a spirit of collegiality and co-operation, who value ^{*17} a team's *esprit de corps*, and who are comfortable with strong, capable leadership, and effective, institutional co-ordination.

This is not an operational environment in which, in my respectful submission, there can be any place for adjudicators that have been insightfully described as “Islanders”¹⁷ -- adjudicators who conceive of themselves as occupying islands of justice within a tribunal's office, who see the tribunal as having no legitimate role beyond the delivery of registrar services, hearing rooms and supplies to their island, and who believe that their interaction with tribunal colleagues must properly be confined to social niceties. In other settings, the reader may have heard tribunal adjudicators with those attitudes referred to as “lone rangers”.

Fortunately, the courts have understood and responded to these special needs of tribunals. In *Consolidated Bathurst and Tremblay*,¹⁸ the Supreme Court laid down rules that mandate and facilitate a coordinated, team approach to tribunal adjudication. In those decisions, the Court highlighted the “necessity” of consistency and congruency in a tribunal's generic decisions -- a consistency and congruency that is, it said, to be fostered by the tribunal -- while nevertheless acknowledging the need for the common-law evolution of those decisions through the recognition of the legitimacy of conflicting decisions in the early going, on any novel issue. It also acknowledged the propriety of individual adjudicators taking those consistency and congruency requirements into account in their own decision-making notwithstanding the absence of any concept of *stare decisis*, and of members allowing themselves to be influenced in the formulation

of their opinions by the opinions of their colleagues in internal, institutional processes designed for that very purpose.

On the subject of lone rangers -- not, of course, a term used by the court -- the court observed that a situation in which the outcome of an appeal or application will be different depending only on which members of a tribunal happened to be assigned to the case “will be difficult to reconcile with the notion of equality before the law”, which, the court acknowledged, is “one of the main corollaries of the rule of law, and perhaps also the most intelligible.”¹⁹

*18 What, then, *are* the corporate responsibilities of adjudicator members of a tribunal's adjudicative team? With the unique aspects and institutional implications of the operational context of an adjudicative tribunal laid bare, and with the tribunal adjudicative function recognized as necessarily a group activity to be undertaken by the tribunal's adjudicative members working as a team, the corporate responsibilities of members of that team may be easily identified. And, in a paper already too long, I shall now leave readers to ponder, through the lens provided by the foregoing analysis, the specific emanations of the corporate responsibilities of tribunal members that would obviously pertain in the particular tribunal with which they are personally most familiar, were that tribunal to be, in fact, fully realized.

I also invite government officials and politicians to contemplate through that same lens the special institutional damage -- and injustices -- that any patronage or political abuse of the appointments or re-appointments to a tribunal's adjudicative team will be bound to cause.

Footnotes

a1 Ellis is a Toronto-based administrative justice consultant; the inaugural chair of Ontario's WCAT (1985 - 1997), and the Inaugural President of SOAR. He has been speaking and writing about administrative justice reform issues for over 20 years. This paper was first presented at the CCAT Conference in June 2008.

1 Frank A.V. Falzon, “The [Integrated Administrative Tribunal](#)” 19 *CJALP* 239.

2 *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 (S.C.C.).

3 Ed Ratushny, Q.C., Professor of Law, University of Toronto, Canadian Bar Association Report on the Independence of Federal Administrative Tribunals and Agencies at 31 [unpublished]. (This report had been commissioned by the CBA for presentation to the 1990 Annual General Meeting held in London, England commemorating the Seventy-Fifth Anniversary of the CBA.)

4 My own preferred label is “rights tribunals”, a label that I have used in other places.

5 For a description of the history of quasi-judicial agency classification in Ontario, see Part I, f.n. 16.

6 The Ministry's current classification identifies 50 “advisory agencies”, 19 “regulatory agencies”, and 42 “adjudicative agencies”. The definitions of these categories were originally found at page 19 of AppendixA of the Ontario Management Board Secretariat's “Agency Establishment & Accountability Directive” issued in February 2000, but see now Ontario Public Appointments Secretariat (“PAS”) web site at <http://www.pas.gov.on.ca/scripts/en/generalInfo.asp>.

A “regulatory agency” is defined as an agency that makes “independent decisions (including inspections, investigations, prosecutions, certifications, licensing, rate-setting, etc.) which limit or promote the conduct, practice, obligations, rights, responsibilities, etc of an individual, business or corporate body.” An “adjudicative agency” is defined as an agency that makes “independent quasi-judicial decisions, resolves disputes, etc. on the obligations, rights responsibilities, etc of an individual, business or corporate body against existing policies, regulations, and statutes, and/or hears appeals against previous decisions.” (Emphasis added.) The definitions are now on the PAS website: Homepage - Quick Links - “Functions”, and each agency’s classification is listed under “Type” in the PAS List of Agencies (see Items page).

- 7 For a recent clear example, see Leonard Marvy and David A. Wright, “[Master of Its Own House ...](#)” (2008) 21 C.J.A.L.P. 361.
- 8 H.L.A. Hart, *Concept of Law*, 2nd ed., at 123.
- 9 [Tranchemontagne v. Disability Support Program \(Ont.\)](#), 2006 SCC 14 (S.C.C.).
- 10 I am only speaking here of the major adjudicative tribunals of which there are in Ontario, in my estimation, at least 16: these include: Assessment Review Board; Child and Family Services Review Board; Consent and Capacity Board; Criminal Injuries Compensation Board; Crown Employees Grievance Settlement Board; Dispute Resolution Services (within The Financial Services Commission); Health Professions Appeal and Review Board; Human Rights Tribunal of Ontario; Landlord and Tenant Board; Medical Review Committee (Health Insurance); Ontario Labour Relations Board; Ontario Parole and Earned Release Board; Ontario Review Board; Public Service Grievance Board; Social Benefits Tribunal; and the Workplace Safety and Insurance Appeals Tribunal. The diminutive institutional footprint of adjudicative tribunals with small caseloads presents a different set of issues.
- 11 [Domtar Inc. v. Québec \(Commission d'appel en matière de lésions professionnelles\)](#), [1993] 2 S.C.R. 756 (S.C.C.) at para. 93.
- 12 See, e.g., s. 21.2(1), *Statutory Powers Procedures Act*, R.S.O. 1990, c. S-22, as amended by S.O. 1997:
- A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.
- 13 43 Can. Bar Rev. 277 at 286.
- 14 [Dr. Q. v. College of Physicians & Surgeons of British Columbia](#), [2003] 1 S.C.R. 226 (S.C.C.).
- 15 (1998) 6 C.L.E.L.J. 1-51.
- 16 *Supra* note 13.
- 17 “The Integrated Administrative Tribunal”, *supra* note 1 at 270.
- 18 [I.W.A. v. Consolidated-Bathurst Packaging Ltd.](#), [1990] 1 S.C.R. 282 (S.C.C.); [Québec \(Commission des affaires sociales\) c. Tremblay](#), [1992] 1 S.C.R. 952 (S.C.C.).
- 19 Yves-Marie Morissette, “Le controle de la competence d'attribution: these, antithese et synthese” (1986), 16 R.D.U.S. 591, cited with obvious approval in *Consolidated-Bathurst* at 327.

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