

COBA 2006 - Opening Plenary Session: Adjudicative Roots – A View from the Bench

Panel:

Justice Deena Baltman

Justice Peter Howdan

Justice Andromache Karakatsanis

Justice Anne Mactavish

Question: What's the difference between being an adjudicator and being a judge?

AM –

- Judges have to be generalists, as opposed to specialists; at Boards and Tribunals you usually become an expert on a narrow field
- At the Human Rights Tribunal, she felt as though she knew what she was doing, and counsel was aware of this as well
- Now she is in a Court with broad jurisdiction; she deals with life and death situations (like refugee issues)
- It can be disconcerting to make such important decisions without the expert background to back it up
- There is more pressure to make sure that you are credible
- The lesson to take from this is that reviewing judges are not all-knowing
- What you get on judicial review is 1-3 bright individuals who do not know your area as well as you do
- Adjudicators should write their decisions with that in mind; if there is an assumption you are making, spell it out

PH –

- He was on the Ontario Municipal Board for 10 years, and now on the Superior Court
- Not many judges of the Superior Court have municipal experience, so he gets a lot of those cases
- Lawyers do not want to waste two days explaining this area to a judge
- The most important thing when sitting in a generalist court is to prepare meticulously

Question: What have you learned in the administrative law world that is helpful as a judge?

DB –

- 3 areas:
- In a technical sense, decision writing skills are much improved
 - She learned clear, concise, and issue driven decision writing
- Behaviorally, she learned how to manage the hearing process
 - You have to make sure the parties know who is running the show
 - Tone – should be civil, courteous, but firm

- Managing a busy hearing room translates into managing a busy court room
- Also – dealing with unrepresented litigants – be the referee, not the coach
- Relationships (with colleagues and staff)
 - It is important to have people that you can show your decisions to, commiserate with
 - You should always treat the staff with respect

AK –

- Flexibility
 - Learning to take over the way a process proceeds
 - She does not mind modifying the adversarial process; you are not stuck to a particular way of doing things
- Controlling the process
 - She got used to dealing with a roomful of angry people (at the Liquor Licensing Board) so a couple of angry lawyers isn't bad

PH –

- Adds to the above
- Experts:
 - Having dealt with lots of experts from different fields (in the administrative law context) and then you move to the court system, you learn that some experts like to “take over”
 - He doesn't get awed by experts; he questions them, tries to find out what their assumptions are

AM –

- The majority of what she does in Federal Court is judicial review
- She developed an understanding of the Tribunal system at the federal level

Question: What have you learned as judges that you wish you knew as adjudicators?

DB –

- She used to labour over decisions, but now the volume makes it impossible
- Less is more; it's important to get decisions out faster
- “Shut up and listen” – you intervene more as an arbitrator than as a judge. Assuming the parties are on issue, just listen and don't distract them

AK –

- Agrees with above. She is now more efficient at writing quick, short endorsements.

AM –

- Wishes she'd fully appreciated as a tribunal member how deferential judges are to findings of fact from a Tribunal
- You don't need to strive for perfection

Question: How much do judges know about the administrative justice system? What's their impression of it? If you come from a Tribunal, does that make a difference?

PH –

- There used to be a sense that Judges should “put things right” in the other system
- That the administrative system needed help, particularly in the areas of legal principle and individual rights
- Now: there is a greater appreciation for specialized knowledge
- Standard of Review is front and centre
- See: *Baker v. Canada* – list of how to meet with duty of fairness
- The judiciary has a greater appreciation of the difficult questions the adjudicators have to face

AM –

- It varies from judge to judge; those who come from a tribunal tend to be very deferential
- The level of deference judges have also varies from tribunal to tribunal
 - Do the adjudicators of a particular Tribunal tend to write good, well-reasoned decisions? Are they solidly grounded in the evidence?
 - When it's a close call, you might cut more slack to Tribunals that usually write good decisions
- The level of deference also varies from adjudicator to adjudicator
 - When you do a lot of judicial review, you tend to see decisions written by the same people with the same flaws

PH –

- He sits in Divisional Court sometimes
- When you do not sit often, you just try to use standard of review principles and be consistent

Question: How do you manage backlog in terms of decision writing (finding a balance between being quick and being thorough)

AK –

- You want to create a “masterpiece” but parties want a quick decision
- The rule of thumb is to do it as quickly as possible
- It will be a rare case where you have to take a lot of time; most cases turn on the facts (and the application of well-settled legal principles to the facts)
- But: NOT giving reasons is not an option
- People have a right to know why you decided the way you did
- There is also a duty to the public at large – setting out your reasons fosters confidence in the judicial process

- It also allows for meaningful appellate review (but note: appeals courts don't expect perfection)
- The biggest problem with Tribunal decisions is that there is a long recitation of the facts, but not many reasons
- Explain the reason why you decided the way you did
- Tip: Start working on your decisions right away; generally, your memory doesn't improve with time. If you start right away you won't have to refer back as much

DB –

Her strategy is to divide decisions into big ones and little ones

She does her research up front

Does the introduction, issues, facts, and applicable law before the trial ends

Don't regurgitate statements witness by witness

She has 10-15 short motions per day

She prefers to do handwritten endorsements with the parties still there – that way if there are any questions she can deal with them right away

AM –

- If you don't write up your decisions right away it takes twice as long later and the results are half as good
- Identifying when to write is a challenge
- Some times when you should write a lengthy decision:
 - When you think it'll have precedential value
 - When the result is very important to the parties (see *Baker*)
 - When there is a chance of appeal
 - When the result is important to the public

PH –

- When the decision is of very strong public interest, make sure there are solid reasons
- Make sure your reasons are understandable
- He includes a "commentary" section in "straight language", incorporating all the reasons

AK –

- Used to do what Deena did, but by the end of the trial she'd see things differently and it took longer to revise
- She focuses on identifying issues (check with counsel – sometimes there's confusion about what the issues are)
- Writing decisions leads to better decision making
- It helps you identify faulty logic and keeps you honest

Question: Is collegiality crucial? How do you adhere to it? Do judges do it differently?

AK –

- Loved the collegiality of the Tribunal community

- Creating relationships with colleagues was very important
- It's important to be able to talk to people who encounter the same problems and issues
- In Superior Court it's even more important – it can be isolating
- There's not as much freedom to interact in the legal community
- You can go into the lounge on a break and find an “expert” in pretty much any field of law

DB –

- In Brampton, things are very hectic
- She deals with a lot of criminal and family law, and had no experience in this area before
- She is very dependent on the expertise of her colleagues
- You're bound to find someone who has specialized knowledge in the area your problem is in
- Collegiality has to come from the top – from the Chair and the senior adjudicators
- Have to show that the Tribunal is a safe place where you can ask questions

PH –

- At his Tribunal they used to have meetings once a month to discuss policy issues and to try to get consistency in decision making
- For judges, lunch time is important; if you're not based in the same city, you might not see each other very often
- You need all the support you can get – it can be very isolating

AM –

- The Federal Court is very collegial
- You travel a lot – judges often find themselves in the same city at the same time
- They have very broad and eclectic jurisdiction; they're lucky that there's usually at least one expert in every area of the law
- Judges don't really do anything differently when it comes to collegiality
- At the Tribunal they used to have meetings every couple of weeks; they used to debate, test arguments, challenge each others' thinking
- At the Federal Court there is enormous respect for the opinions of colleagues; they don't debate with the same vigor
- She likes to read the decisions of other judges and encourages adjudicators to do the same