

The Ethics of Adjudication

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My dictionary defines ethics as a set of principles of right conduct, a system of moral values or the rules and standards governing the conduct of the members of a profession.

I suggest to you that we cannot discuss the ethics of our work without first figuring out exactly what it is that we do. In the words of my personal ethical touchstone, Professor Bill Harvey of the Joint Centre for Bioethics at the University of Toronto, we must first figure out what it is that we are doing when we are doing what we are doing.

Although I have been with my tribunal for almost ten years, my mother keeps asking me exactly what it is I do for a living -- I keep telling her that I am in the dignity business. In a speech to a group of tribunal members a few years ago, I heard Madam Justice Beverly McLaughlin of the Supreme Court of Canada start her speech with the words: "Dear Colleagues." She obviously sees adjudicators as judges, real judges, with important work to do.

Both of these views are correct but present only part of the picture. Perhaps we can flesh things out a bit more. Maybe I will even send my mother a copy. As I proceed you will, I hope, see that this process of identifying what it is that we are really doing and why we are doing it will, in our case, also substantially answer the ethical question that has been posed.

Let us begin, then, by staking out our turf and discussing a little history. Quasi-judicial tribunals have been around for a long time. In this country the first one was established well over one hundred years ago. Since that time, the federal, provincial and territorial governments, not to mention municipalities and public institutions such as universities and self governing professions, have set up hundreds, probably thousands of tribunals. A similar phenomenon is found in most of the modern democracies. Australia, New Zealand, Israel, the countries of Western Europe, and the United States are also heavily reliant on quasi-judicial tribunals or administrative courts as they are sometimes called.

The first tribunals were created to fill a number of needs. It was recognized that there was a need for a mechanism to make government decisions like licensing and regulation of utilities in a manner and in a place that would remove it from direct attachment to elected officials and the civil servants that surround them.

This was thought to be a good idea for several reasons:

- The political mechanisms were not designed to make the volume of decisions required.
- Expertise of a sort not found in the cabinet or the ministries could be recruited.

- Parties and the public could be assured of some level of independent, non-political decision making while knowing that there was accountability to and by the government of the day for the proper functioning of the agency.

Just as importantly, perhaps, government could place itself at some distance from a process that was bound to make it as many enemies as friends.

The number of tribunals has mushroomed as this century has progressed. Some of this is attributable to the propensity of successive governments to create a new agency to deal with each new issue and a lack of willingness to abolish tribunals at the end of their useful lives. There are, however, more fundamental reasons for the phenomenal growth in the sector. We are becoming an increasingly regulated society. Even with recent steps to reduce the amount of regulation, we require mechanisms to handle the high volume of work arising from the need to deal with the minutia of regulation and its enforcement. This task was a natural one for quasi-judicial agencies. In fact, the need to regulate railways in the 19th century was how it all started.

Courts, with their cumbersome processes, costs and time delays would have collapsed long ago if assigned these tasks. More importantly, the public would not receive anything resembling a reasonable level of service. Tribunals, it was felt, could bring special expertise while maintaining distance from the sector that they regulate. They could tailor their process to the task at hand and, hopefully, they could do it in a cost-effective manner.

Functioning at arms length from government, it was hoped, would allow the tribunal to guarantee independent decision-making to the public while the non-permanent but somewhat protected nature of appointments would give the government of the day the comfort of appointing decision-makers who reflected its world view.

In recent years the role of tribunals has been greatly expanded. In addition to the traditional role of regulating licensing and utilities, tribunals have taken on much of the burden of mediating the relationship between individuals and the state and even between individuals. Tribunals stand between individuals and government in issues like entitlement to welfare, social insurance and workers' compensation. Disputes between individuals are increasingly put before tribunals instead of courts. These include landlord and tenant matters, labour law issues, appointment of medical decision makers and many others. In my own, peculiar, realm, I can show several areas of jurisdiction that have been effectively moved from the Ontario Court to the Board over the past several years.

A picture of our role and our ethical obligations in fulfilling it emerges from the description set out above. I would summarize obligations arising from this as follows:

- We must do justice.
- We must be compassionate, humane and respectful while guarding the public interest and serving the public.
- We must be efficient, timely and cost effective.
- How do we do all of this? Let me expand on the list that I have just presented:

Doing justice:

It is our responsibility to understand the law, both the statute and subsequent binding precedents. We must familiarize ourselves with the law as it evolves and to study the various legal principles related to our work and then apply it properly to the facts before us. This work requires intellectual rigour and hard work. Anyone not willing to learn the law and the legal principles or not willing to keep up, shouldn't accept the job. We must also acquire and maintain expertise and experience in the particular field of our involvement. This requires us to keep up with the literature and follow current developments. We do not operate in a vacuum.

We are adjudicators not legislators. Our job is to apply the law, not write it or change it. We must have the intellectual honesty to put our personal views aside and to remain open-minded right up to the moment of decision-making. This takes conscious effort and hard work. As officers of the legal system, and that is what we are, we must honestly neutrally apply the law. Our personal opinions are irrelevant as is our like or dislike of the party or parties before us. We must rise above that. To feel that one is somehow excused from following the law is the absolute epitome of arrogance; who made us kings and queens. It is also a violation of the most fundamental of democratic principles, that being that representatives elected by the people write the laws. We are all, I am sure, fine people, but nobody elected us.

I should emphasize that this obligation to follow the law, to be a creature of the law, applies to all adjudicators, legally trained or not. Some tripartite tribunals have a lawyer as well as non-lawyers. Some adjudicators are not lawyers at all. It doesn't matter, we are all bound by the law. Non-lawyers have been brought into the system to bring different perspectives into the process, not to ignore the law of the land.

Religiously following the law does not mean, however, that you are supposed to turn your brain off or disengage your heart. There is lots of room for compassion, fairness and common sense. You must know the law and follow the law but you are free to do this in a way that does justice.

You must be procedurally fair. There are basic rules that must be followed. I will not repeat them here but they basically boil down to being sure that people have:

- a right to be confident that you do not have a conflict of interest, that there are no factors or inputs from outside of the hearing room that will influence you,
- a right to notice,
- a right to be heard,
- a right to question witnesses,
- a right to hear all the evidence and
- a right to call evidence and make submissions.

All of this does not mean, however, that your proceedings are supposed to look like trials. There are ways to be user friendly, accessible and a bit informal while observing the procedural niceties.

It is a useful exercise to examine your procedural requirements in order to decide if each of them is logical and or/demanded by some legal rules or whether it is still around because of inertia and force of habit or a misplaced desire to look like a court.

By the way, you have an obligation to stay in charge of the hearing. Don't let the parties or lawyers take over the agenda or run the show. That is not fulfilling your responsibilities, that is abrogating them.

Compassion, humanity and respect

We are often the face of government, the face of authority for those who appear before us. They are entitled to be treated with the utmost respect and consideration. When the judge walks into a courtroom, everyone stands. If anyone stands in our hearing room, it should be us when the public enters the room. We have all heard of pompous judges. They should consider retiring. There is certainly no room for pompous adjudicators.

Some of the people we deal with are beat up, some are frightened or intimidated by the process and many do not even understand what the process is about. We must make those appearing before us feel welcome, feel that they have a right to be there.

Nothing infuriates me more than to see obviously different levels of respect accorded to different people in the hearing room. I care not a wit if you are a lawyer, an expert, a member of the public or the chair of the board. I will treat you in the same respectful manner. I will address you as 'Mr.' or 'Ms.' or 'sir' or 'ma'am', I will not laugh at you or look at my watch. I will not pass notes or read my papers when you are talking. Even if I have to be firm with you, I will do my best to be respectful and courteous. I will ensure that you understand the proceeding even if a translator is required, and I will slow the proceedings down to allow for the translation.

I will be sure that you have proper access to the hearing room and facilities like wash rooms. If you are coming as a witness and will be excluded for parts of the proceeding, I will ensure that this is explained to you before you are sent to cool your heels. I will, in fact, make sure that there is an appropriate and comfortable place for you to wait.

We have an absolute obligation, in my view, to explain to people what the process is about, what is going to happen and what the possible outcomes are. This often requires us to slow down in order to explain things. It also requires us to speak in plain and clear language. This is particularly the case when parties are unrepresented or face cultural, linguistic or other barriers to achieving a satisfactory level of comfort and understanding of the process.

People have the right to be heard and the right to be listened to (not always the same thing.) I call this a right of audience. Some call it the phenomenon of ‘telling it to the judge’. Whatever you call it, people have a right to say their piece and they have the right to your undivided attention.

In Boston recently, customer satisfaction research was conducted to assess the attitudes of psychiatric patients to the court reviews of their status. The results were interesting. Satisfaction levels did not relate very much to the result of the hearing. These folks did not expect to win. Rather, it was all about courtesy, fairness and being listened to. In fact, I think there is a lot to be said for thinking of things in terms of ‘customer service.’ I find that it helps to focus our obligations. Just don’t forget two things:

- Customer service in our context does not extend to giving them necessarily the decision they want.
- The public at large is often just as much a customer, a stakeholder in the process, as the folks sitting in the hearing room. We make a terrible, sometimes catastrophic, error if we only pay attention to the interests of those in the room and forget about the wider public interest.

Being efficient, timely and cost effective

The administrative justice sector costs the taxpayers about the same amount as the non-criminal courts. The way you carry out your tasks, will have a tremendous impact on direct and indirect taxpayer costs. I am, of course, speaking of the direct costs to the tribunal, but I am also speaking of indirect public costs like legal aid, costs to public funded agencies and the costs to the taxpayer that result while publicly funded endeavors wait for your decision. To this must be added the cost to the private parties that appear before you. Cost should not dictate your every move but it must always be in the back of your mind. For example, your decision regarding a request for an adjournment should be based, at least in part, on the cost of the adjournment.

Traditionally, things like adjournments are done on consent or, when contested, on the basis of the balance of the rights and convenience of the parties. I suggest to you that the cost to the public purse should be added to this mix. It should not necessarily be determinative but it most certainly must be considered. Your hearing should be as long as is required to get the job properly done but no longer. Your time is valuable. So is the time of the other participants. Don’t keep them waiting. Get them in and get them out.

Do not tolerate delay and do not be the cause of delay. We have all heard horror stories of it taking years for matters to get through the courts. That is one justification for tribunals. There is no excuse, then, for us to take months to reach a case, more months to finish it and then even more months to get our decisions out.

Our tribunal, by the way, hears very complex and important matters. We hold hearings within seven days of application, finish up as quickly as is humanly possible and get our decisions and reasons on the way within a few days of the hearing. It can be done.

Tribunals that think that this is impossible should revisit their priorities, philosophy and procedures. The public is entitled to accessible, speedy administrative justice and we must deliver it.

To summarize, we are in the business of properly applying the law in the fairest, most compassionate and appropriate manner that we can, keeping in mind the rights and interests of the parties as well as the general public.

We must do our task with humility, skill, and a sense of obligation.

If we do all of this then we will, in my respectful opinion, have conducted ourselves in an ethically exemplary manner.

Thank you.