

SOAR's 23rd Annual Conference of Ontario Boards and Agencies

OPENING PLENARY

You're Entitled to Your Day in 'Court', But You're Not Entitled to Someone Else's

Moderator: Linda Lamoureux, Health Professionals and Health Services Appeal and Review Boards

Speakers: The Honourable Stephen Goudge, Ontario Court of Appeal
The Honourable Coulter A. Osborne, Civil Justice Reform Project
Lorne Sossin, Dean, Osgoode Hall Law School – York University

The Honourable Coulter A. Osborne

Justice Osborne outlined how “proportionality” became part of the vocabulary of the justice system. He was the author of the Civil Justice Reform Project, whose purpose was to make the justice system more accessible and affordable.

The report featured “proportionality” and debunked the myth that “one size fits all” makes sense in the justice system.

His undertaking as part of the Civil Justice Reform Project involved meeting with adjudicative groups and other stakeholders to compile his report. He described how there was a clear demarcation in views between lawyers practicing in Toronto and those not practicing in Toronto.

In the report, there were two omissions; one intentional and one non-intentional. The intentional one was “family law”. Family law proved to be too complex and it was better to deal with it separately. Therefore, in the interest of getting the report done, this aspect of the justice system was omitted from it. The non-intentional omission was “unrepresented litigants”. They were omitted from the report because it was difficult to establish a meaningful dialogue with this group.

In his final report, Justice Osborne recommended that a study be undertaken to determine why litigants are sometimes forced to represent themselves. He pointed out that it is not always about money. He stressed that we should not regard unrepresented litigants as a problem. The access to justice principle of proportionality states that commitment of resources should be proportional to the issue at hand.

He pointed out that elements of proportionality were already in the system of the Court of Appeal. Time limits were assigned to deal with the backlog of cases. Time limits had a number of advantages. They could be seen by everyone, so no one could say that some cases were given privilege.

He further pointed out that it is important that access to justice be viewed as hybrid. The first part of it is the question of how does a party get access to justice. The second part of it is recognizing the rights of respondents or defendants. There had to be a way of getting rid of cases that have no hope of success.

The Honourable Stephen Goudge

Justice Goudge described how he was charged with conducting an inquiry to give advice regarding the backlog in the Court of Appeal. When he took on the inquiry, they adopted proportionality as one of their guiding principles because they had a timeline and responsibilities to meet.

The Court of Appeal had a very big civil appeal backlog. To deal with this issue, they put time limits on arguments. As a result, they were able to delete the backlog in 5 years and the quality of arguments has greatly improved, which has been an enormous benefit to the system.

He also described how there are “anti-proportionality” forces out there. Two main ones are inertia from litigants and push from lawyers to use every possible argument available to them.

An important consideration in the degree to which proportionality could be implemented was the balance between the court’s inquisitorial and adversarial roles. In determining how strict time-limits should be, the quality of counsel played an important role. The high quality of counsel helped establish strict proportionality. This would have been harder to accomplish if counsel were of lower quality or there were too many unrepresented people.

He also talked about the importance for tribunals to make their proportionality efforts transparent by making sure that the parties understand why certain things are being done.

He concluded by indicating that as a justice community we have to think of ways to add to our arsenal of proportionality tools.

Dean Lorne Sossin

Dean Lorne Sossin spoke about proportionality in the administrative justice system. He stated that things that unite the administrative justice system do so in a broad sense. He further stated that the idea of not having time limits to hearings would seem odd given the limited number of available resources and the great amount of cases.

Administrative tribunals were created to be a middle ground between the judiciary and the executive.

He also spoke about boundaries of proportionality that we must keep in mind. Firstly, statutory provisions are non-negotiable. Secondly, tribunals are not courts of inherent jurisdiction and therefore they must be more creative and use more tools to enforce the notion of proportionality. Lastly, variability requires more certainty and transparency.

The concept of proportionality is about a philosophy. It is not just about time and monetary limits. It is the idea that balancing wanting to do justice is not always a matter of resources. Fairness is very important as well.

Mr. Sossin talked about a case in British Columbia that dealt with the production of documents. After many days of hearing, the presiding panel member disclosed that her appointment was about to come to an end. One of the parties (veterinarians) contacted the Attorney General to

seek the reappointment of the panel member so that she could continue with the case. The panel member was re-appointed. The other party (the regulatory College) then called for the panel member to recuse herself on allegations of bias. The panel member refused to do so.

On an application for judicial review, the College asked for the documents related to the member's re-appointment to be disclosed. Justice Meyers said that the principle of proportionality must be used in the context of a judicial review application where production of documents is not a right but a discretionary power of the court. In this particular case it was held that if there was any relevance to the documents sought, it would be tangential. Proportionality has to guide whether discretion to order the documents to be produced is used or not.

Question 1:

Where a tribunal has to deal with a case that is not about a monetary value, does the tribunal have to give the parties an opportunity to argue how long they should be given to make their arguments or can the tribunal decide this itself without hearing from the parties?

Answer:

Dean Lorne Sossin – This is about fairness. You have to individualize different kinds of matters. These decisions have to be institutional decisions, but they have to take into account the value of the claim.

Justice Stephen Goudge – The bottom line is the question of what really matters in this case. You have to ask whether the issue is one that really matters. Do the witnesses really matter to the outcome of the case? There will be cases in which it will be wise to ask for input from the parties as to what really matters. It is always important to have the tribunal explain with transparency what they have decided are the issues that really matter and why.

Question 2:

When will we, as a community, have a critical discussion about how to allocate resources between tribunals?

Answer:

Justice Osborne – We tried to look at the issue of judicial resources. In some areas we had too many judges and in some others not enough. We tried to meet with policy people at the federal ministry of justice, but was told that he would be contacted when the Minister had time.

Dean Lorne Sossin – If the government cares about fairness and reasonableness, it cannot create Boards and Tribunals and then not have enough resources to deal with issues before them. Are we comfortable with the idea of allocating a fairness resource based on budgetary concerns?

Justice Stephen Goudge – Proportionality is about access to justice and better justice. It is within a resource envelope. Imposing constraints based on budgetary concerns is against proportionality.

Questions 3:

Time limits might not work for unrepresented people with language barriers. How is the issue of equality being addressed within the concept of proportionality?

Answer:

Dean Lorne Sossin – If you determine that language is a big barrier, you have to allocate resources to translation. Every individual matters. There is a limited amount of resources out there. Tribunals should be innovative and share resources. They should keep equality as a priority.

Justice Osborne – We strive for a *reasonable* accommodation, not a perfect one.

Justice Goudge – Proportionality is an enormously useful tool and it would be unfortunate to see it used by governments to shrink resources.

Question 4:

How can tribunals manage time allocated for a hearing to ensure that it ends within the given time limit?

Answer:

Dean Lorne Sossin – Adjudicators have to guide the hearing to ensure that they get all the relevant information.