Session 8: The Active Adjudicator

Moderator: **Catherine Bickley, Pay Equity Hearings Tribunal and SJTO-Human Rights Tribunal of Ontario**
Speakers: **Joseph Colangelo, Sole Practicioner**
Mark Hart, SJTO-Human Rights Tribunal of Ontario

Mark Hart

Mr. Hart discusses the issue of active adjudication. He begins with an introduction to this topic, discussing how active adjudication can be more expeditious than traditional adjudication and be a more effective use of resources. Nonetheless, he warns that active adjudication must be fair and just.

He explains that the traditional notion of an adjudicator is to remain silent while listening to two opposing parties, each represented by counsel. He states that now a large majority of parties are unrepresented and thus, this reality is one which adjudicators must recognize. There is no longer a notion that there is an equal champion advocating for each side. In fact, there can be a knowledgeable lawyer on one side and a self-represented litigant on the other. In these situations, adjudicators cannot merely remain passive and silent if they want a just outcome. However, Mr. Hart warns that there is a fine line and an active adjudicator cannot become an advocate for the self-represented litigant.

Mr. Hart provides a list of helpful approaches which he uses that could assist other adjudicators in adjudicating "actively." His recommendations include the following (although this is not an exhaustive list):

1) An adjudicator should consult with the parties and lay out the process that should be followed at the hearing, based on a case by case basis and allow the parties to provide submissions.
2) An adjudicator should receive information on each case. In order to be an active adjudicator, one requires all the relevant information. Therefore, parties should be asked to file documents, pleadings, notices of witnesses and so forth. This information should be reviewed by an adjudicator before the hearing. This practice sets out a good foundation prior to the actual hearing.
3) It is helpful for an adjudicator to begin the hearing with repeating his/her understanding of the issues and ask if there is anything to be added, modified or removed.
4) Subsequently, an adjudicator may wish to hear each applicant's evidence as a means of clarifying issues.
5) When dealing with witnesses, an adjudicator should review witness statements in advance to determine relevance. This process will also minimize the inconvenience for unnecessary witnesses. If there are any issues with witnesses, parties may raise their concerns prior to the hearing and an adjudicator may welcome submissions at this time.
6) An adjudicator should set reasonable time limits for all phases of the hearing including examination in chief, cross examination and submissions. This process ensures hearings are completed within the stipulated time frame.
7) When dealing with documents, an adjudicator should request that parties file documents before the hearing or mark them as exhibits at the beginning of the

hearing and welcome any objections to the authenticity of the documents at this time as well.

8) An adjudicator should try to obtain an agreed statement of facts. The adjudicator may do so by stating what he/she believes to be the agreed facts and then asking the parties whether they believe this is an accurate understanding of the facts.
9) An adjudicator may take the lead in questioning. Mr. Hart advised that he poses the questions that he requires the responses to and this process decreases the time spent in hearings.
10) An adjudicator may defer cross examination until the end of the hearing. Mr. Hart advised that his practice is to begin with the questioning himself and then he allows for cross examination subsequently.

Joseph Colangelo

Mr. Colangelo begins with an introduction to the notion of active adjudication. He notes that now there are many self-represented litigants and thus, active adjudication is going to be more necessary than ever. He states that self-represented litigants are anxious, in foreign environments, and worried and thus, require assistance.

Mr. Colangelo states that tribunals are answering one of three sets of questions: fact, law or policy. He notes that when the questions are of fact, the adjudicator has the least amount of room for active adjudication, whereas on the other spectrum where questions are ones of policy, it is appropriate for an active adjudicator to ask parties for their opinions.

Mr. Colangelo advises that the more serious the result is to an individual, the more court-like the hearing or process will become. The active adjudicator can quickly take the role of counsel in facilitating cross examination for example. Therefore, he warns active adjudicators to be very careful in these situations.

He advises that an adjudicator has the ability to control their own process. In fact, statutes give adjudicators this authority in several cases. However, he warns that this authority must be exercised with caution. There needs to be a collaborative approach/discussion with all stakeholders to produce the best approach for the public and the parties involved. He cites a House of Lords case named *Ashmore* in which it was held that counsel involved in proceedings should be concise and not raise multiple points if they have no merit. Mr. Colangelo compares this reasoning to situations where litigants are self-represented and notes in the latter case, an adjudicator will have to play a more active role. However, it is yet to be determined exactly what type of adjudication will be appropriate in these scenarios.