Art of Adjudication 2012:
Chartered and Unchartered Aspects of Active Adjudication

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Justice Stephen Goudge, Ontario Court of Appeal

Brian Cook

Active Adjudication: Improving Access to Justice

Mr. Cook began his presentation by explaining that adjudicative tribunals are engaged in dispute resolution, appeal of a decision of an administrative body or determination of rights. Alternative dispute resolution ("ADR") emerged as an alternative to traditional dispute resolution and most tribunals have a broad range of options for dispute resolution coming from the *SPPA*, their own statute or rules as well as the consent of parties to alternative approaches.

According to Mr. Cook, ADR could now be understood to be Appropriate Dispute Resolution utilizing the right mix of forms of mediation and different forms of adjudication.
He underlined the importance of ADR for self-represented litigants who might have difficulty engaging in the traditional adversarial process. Justice Anne L. Mactavish of the Federal Court of Canada explained the problem of the *self-represented* litigants in these words:

> The crux of the problem created when one party is not represented by counsel is that there are competing duties and responsibilities on the tribunal member, which duties and responsibilities may not be terribly compatible one with the other. The member has the duty to ensure that the parties before him receive a fair hearing. At the same time, the member has an obligation to remain impartial. The tribunal member must not, by virtue of the assistance offered to a party appearing without counsel, either become, or be seen to have become, an advocate for that individual.

There is also the problem of the *under-represented* litigant: a paralegal or lawyer who is not competent in the subject area or who has not properly prepared could provide under-representation; an under-represented litigant could be worse off than a self-represented litigant and there is greater concern about seeming to inappropriately help a represented litigant even if the representative is not competent.

Active adjudication techniques could help to provide a fair hearing process for the various combinations of represented and self-represented parties.

Tribunal rules such as 43.3(1) of the *Human Rights Code* could be of great assistance. However, even with support from Tribunal rules and statute, it would be preferable to proceed with the parties' consent. In the absence of Rules, consent is essential to see if there are any concerns or objections about the process; to encourage parties to raise concerns and remind parties that they could still object to questions even when they are asked by the adjudicator.

Mr. Cook proceeded to contrast Lord Denning's view of an adjudicator's role with that of an active adjudicator. In *Jones v. National Coal Board*, Lord Denning explained that "If a judge should himself conduct the examination of witnesses 'he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict'" According to Lord Denning, the appropriate role of the

adjudicator was to hearken to the evidence, only asking questions of witnesses when it was necessary to clear up any point that had been overlooked or left obscure; to see that the advocates behaved themselves in a seemly fashion and kept to the rules laid down by law; to exclude irrelevancies and discourage repetition, to make sure by wise intervention that the adjudicator followed the points that the advocates were making and could assess their worth; and at the end to make up his mind where the truth lay.

Mr. Cook suggested that doing any of these things that Lord Denning prescribed could require an enormous amount of intervention and result in very active adjudication. He explained that the reason that Lord Denning was so critical of the adjudicator entering the fray was that what he was talking of was a formal adversarial hearing where the parties were in complete control of their respective cases.

Mr. Cook then discussed various options open to adjudicators for active adjudication. One was opening statements that could be of limited value with full pre-hearing disclosure and pleadings but could be helpful to clarify hopes and expectations; issues that are and are not in dispute; the nature of the case and the interests of the parties and why witnesses were called. Another option was changing the order of witnesses which could help with the flow of the hearing, such as hearing from the applicant and then the respondent before other witnesses, or hearing from the respondent first to get a general overview of the conflict. Another option an adjudicator could consider is to defer cross-examination until after other witnesses had been heard. This could reduce or even eliminate the need for cross-examination, helped with the rule in *Browne and Dunne*, i.e., when witnesses are cross-examined questions should be put about actual, not anticipated evidence.

Mr. Cook underlined that active listening, found in a mediator's tool kit, was an important tool for an active adjudicator. He defined active listening as listening to understand. With active listening mediators accomplish two things: i) stating back and summarizing what the mediator has heard helps the parties know what the mediator heard and understood and ii) help counsel know that the mediator had understood their point (although not necessarily that she or he accepted their point).

Active listening could particularly be helpful during cross-examination. If a witness seems unable or unwilling to answer even straightforward questions, perhaps because they know that the counsel for the opposite side was trying to hurt their reputation, adjudicators could consider re-phrasing the question and asking it themselves.

Mr. Cook also suggested that adjudicators consider taking the lead in questioning. However, an adjudicator should only do so if the parties consent to it. The adjudicator could ask both examination in chief type questions and also cross examination type questions. The adjudicator would not actually cross examine: e.g., "I put it to you that you are lying" but use sentences like "respondent might say…". By the end, the representatives might have only a few or no remaining questions.

An example of taking the lead in questioning was Rule 7 of the Immigration and Refugee Board Guidelines which provides that "In a claim for refugee protection, the standard practice will be for the Refugee Protection Officer [the adjudicator] to start questioning the claimant." This rule was upheld by the Federal Court of Appeal in *Thamotharen v. Minister of Citizenship and IRB* and leave to appeal to the SCC was refused.

Mr. Cook also emphasized that active adjudication could make fact finding and establishing things that were not in dispute, as well as decision-writing much easier. The adjudicator could hear from more than one witness at a time to establish the chronology of events. This would change the dynamic of the hearing so that parties would be engaged in a collaborative effort to help the adjudicator understand the essential chronology. This would not mean that the issues in dispute were no longer in dispute or

that the parties were not adversaries but could mean that issues that should not actually be in dispute remained that way.

Mr. Cook concluded that active adjudication techniques improved access to justice; tailored the process to the participants; could lead to understanding of the underlying issues and conflicts; enhancing understanding of the evidence and the meaning of the dispute; could result in shorter hearing processes and could facilitate decision writing.

Justice Stephen Goudge

Public Inquires and self-represented litigants at the Ontario Court of Appeal
Justice Goudge underlined that there was a long-term trend by judges in guiding hearings before the Ontario Court of Appeal. The question was how judges could do that more efficiently and in a way that did not offend rules of natural justice and procedural fairness.

Justice Goudge reflected on his experience as the Commissioner of the Inquiry into Pediatric Forensic Pathology in Ontario. The inquiry was created to address serious concerns over the way criminally suspicious deaths involving children were handled by the Province. The goal of the inquiry was to come up with suggestions to improve the system.

Justice Goudge was appointed in April 2007 as Commissioner with a deadline to release his report in October 2008. He gave himself six months to understand the issues before starting to hear evidence in November 2007. He stressed that adjudicators had to take control of the inquiry and Lord Denning's advice would not have helped them finish the hearing in a timely fashion. Adjudicators were able to combine those who spoke to the same interests; to stream the hearing; to block out time for specific witnesses in advance in consultation with the parties while always providing reasons as to why it would take a certain amount of time to hear certain witnesses which created transparency, and; to determine the hearing dates up front in consultation with the parties.

Justice Goudge emphasized that the time limits made the parties more effective at gathering their evidence and producing their arguments. He thought that the time limits did not only bring enormous benefit in terms of efficiencies but also justice in outcomes. When it came to expert opinions and policy questions – areas of controversy - fair process requirements kicked in. Active adjudication allowed the adjudicator to engage in a process that allowed the inquiry to reach the just outcome while respecting the budgetary and time limits.

Justice Goudge also explained how the justice system could help unrepresented litigants understand the Court's procedures. The Court of Appeal could produce literature about what an appeal was, what the court needed to know and how it could not do original fact finding, while pro-bono help centres could help litigants understand a point of law or provide pro-bono assistance in the courtroom. Mediation services could work in cases where the landscape had changed after the trial.

Justice Goudge concluded by emphasizing that active adjudication required an intangible style of active adjudication which was the biggest challenge for adjudicators. New adjudicators need to be trained in active adjudication. SOAR and the judiciary could engage in collaboration to identify what worked and what did not work to improve adjudicators' practices.