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Administrative Justice & Adjudicative Ethics in Canada

Lorne Sossin*

This article explores the idea and practice of adjudicative ethics in the context of administrative justice in Canada. This analysis is divided into three parts. The first part distinguishes adjudicative ethics from judicial ethics on the one hand and public service ethics on the other. The section considers adjudicative ethics in practice, drawing on examples from the codes of conduct of particular adjudicative tribunals to legislation addressing conflicts of interests on a province-wide basis. Adjudicative ethics is also situated within the broader context of accountability legislation. Finally, the third section canvasses unsettled areas and the challenges ahead. The article highlights the patchwork nature of adjudicative ethics in Canada, and contends that a more coherent and comprehensive approach is needed.

Le présent article traite de l'idée et de la pratique d'une éthique judiciaire dans le contexte de la justice administrative au Canada. L'analyse comporte trois volets. Le premier volet fait, d'une part, la distinction entre l'éthique en arbitrage et l'éthique judiciaire et, d'autre part, l'éthique relative aux services publics. Ce volet traite également de l'éthique en arbitrage dans la pratique et présente des exemples de codes de conduite de certains tribunaux d'arbitrage et de législation en matière de conflits d'intérêts à l'échelle d'une province. L'article situe également l'éthique en arbitrage dans le contexte plus large de la législation en matière de responsabilité. Enfin, le troisième volet présente des domaines où le droit n'est pas clairement établi et les défis futurs. L'auteur de l'article met en lumière la nature disparate de l'éthique en arbitrage au Canada et soutient qu'il est nécessaire de trouver une approche cohérente globale.

INTRODUCTION

In this article, I explore both the idea and practice of adjudicative ethics in the context of administrative justice in Canada. This is a large topic and one which is particularly timely as accountability, transparency and conflict of interest are all renewed areas of interest for governments across Canada. Elsewhere, I have suggested it is time to approach administrative justice as a justice system rather than as a disparate set of tribunals and boards. One way in which this coordination can be

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expressed is through a shared process of accountability for the conduct of adjudicators.¹ My hope in elaborating adjudicative ethics is to provide a foundation for such an evolution of administrative justice.

This analysis is divided into three sections. In the first section, I discuss what is distinct about adjudicative ethics (for example, distinguishing this field from the ethics of public servants or judicial ethics). In the second section, I consider some existing schemes which address adjudicative ethics and their limitations. In the third section, I canvass what remains unsettled and the challenges ahead.

(1) ADJUDICATIVE ETHICS

Adjudicative ethics require some kind of definition. First, while administrative justice covers a broad swath of administrative decision-making, my concern is with the conduct of public officials who participate specifically in adjudication. This definition includes full and part-time members to adjudicative tribunals (such as Labour Boards, Human Rights Tribunals, Workers Compensation Tribunals and Landlord Tenant Boards), but also members of regulatory bodies such as Securities Commissions and Energy Boards who perform adjudicative functions. Finally, it captures members of the broader public sector who perform adjudicative roles (for example, in areas of University or hospital discipline), professional bodies who regulate members in the public interest and more polycentric bodies (such as a municipal board) whose members have an adjudicative function.

Secondly, my concern is with governance over ethics as opposed to decision-making. For example, a decision may be found to have given rise to a reasonable apprehension of bias, and on those grounds, that decision would be reversed by a court. There are no consequences for the decision-maker, should one of her decisions be reversed on such grounds. By contrast, if that member is found to have acted in a conflict of interest by deciding a case in a particular way, this constitutes unethical conduct which may be subject to sanction. These are distinct forms of accountability. As the *Matlow* decision of the Canadian Judicial Council illustrates, however, the same action (i.e. deciding a matter notwithstanding a conflict of interest) can give rise both to a ground of appeal for the decision and a basis of complaint against the ethics of the decision-maker.²

In light of the oft-cited diversity of administrative justice, ranging across adjudicative, regulatory and policy settings at municipal, provincial and federal levels of government, covering a dizzying array of fields, any definition must necessarily remain open-ended. At a minimum, I understand the term “adjudicative ethics” to

¹ See, for example, Lorne Sossin, “Reflections on the U.K. Tribunal Reform: A Canadian Perspective” (2011) 24 Can. J. Admin. L. & Prac. 17; and Jamie Baxter & Lorne Sossin, “Ontario’s Administrative Tribunal Clusters: A Glass Half-Full or Half-Empty for Administrative Justice” (2012), 12 O.U.C.L.J. (forthcoming).

² In that case, a judge’s decision to hear and decide a dispute against the city when he personally was engaged in a dispute with the city gave rise to a judicial review of the decision and an investigation by the Canadian Judicial Council (“CJC”) into the judge’s conduct. See the Report of the Inquiry into the Conduct of Justice Matlow by the CJC (2008) at http://www.cjc-ccm.gc.ca/cmslib/general/Matlow_Docs/Final%20Report%20En.pdf.

include the following areas:

- The conduct of adjudicators in hearings and the adjudicative process;
- The conduct of adjudicators outside the adjudicative process;
- Receipt of gifts and benefits;
- Conflicts of interest;
- Improper use of influence;
- Civility;
- Collegiality;
- Competency and continuing professional development;
- Cultural competencies;
- Political, civic and community involvement; and
- Respect for the independence, impartiality and integrity of the adjudicative process.

This list is not, of course, uncontested. For example, should access to administrative justice be included as an ethical obligation? Are cultural competencies a matter of ethics or tribunal policy and human rights? Are some ethical breaches more significant than others? The distinct aspect of adjudicative ethics lies not in the scope of activities covered but rather in the application of ethical rules and guidelines to the settings of administrative justice.

Most notably, adjudicative ethics should be distinguished from judicial ethics, although there are important aspects of overlap. There is a well-developed literature on judicial ethics — in Canada and around the world — and a sophisticated statutory process in Canadian jurisdictions for regulating the conduct of judges through ethical guidelines.³ The Canadian Judicial Council provides peer led investigations and inquiries into judicial conduct, and each province has a judicial council for provincially appointed judges. Through the activities of these bodies, and judicial reviews of their decisions, there is now a developed jurisprudence on the application of judicial ethics in Canada.⁴

Unlike courts, tribunals and boards have a policy rationale in addition to an adjudicative mandate. This role, memorably characterized by Chief Justice McLachlin as a bridge spanning the executive and judiciary,⁵ may affect the ethical standards applicable to adjudicators in administrative justice. For example, a judge may be expected to recuse herself if she has connections to an industry, and a dis-

³ See the Canadian Judicial Council's "Ethical Principles for Judges" at http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf.

⁴ For a review of this case law, see P. Bryden and L. Sossin, "Judges" in A. Dodek & J. Hoskins, *Canadian Legal Regulation in the 21st Century* (Toronto: LexisNexis, 2009) (looseleaf) at ch. 16. See also L. Sossin, "Judges, Recusal and Bias" in H.P. Lee (ed.), *Judiciaries in Comparative Perspective* (Cambridge: Cambridge University Press, 2011).

⁵ See *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52, 2001 CarswellBC 1878, 2001 CarswellBC 1877 at para. 24 (S.C.C.).

pute within that industry ends up before her, such connections may pose less concern in the context of an expert tribunal. For example, a pension expert may be expected to sit on a pension tribunal. Indeed, the federal government was recently criticized for failing to appoint enough veterans to the Canadian Veterans Review and Appeal Board.⁶ In such settings, expertise and familiarity may be as important qualities as impartiality. By the same token, constitutionally protected independence is a hallmark of the judiciary while independence is a bounded, common law quality for administrative adjudicators.⁷

Another key distinction is the breadth of backgrounds of administrative adjudicators. While all judges must, by definition, be legally trained and all have been subject to regulation by provincial law societies for, among other areas, ethics and professionalism, adjudicators in administrative justice settings may or may not have legal training or previous experience complying with professional, ethical standards. There remains no generally applicable educational or professional training required of adjudicators. Thus, any framework of adjudicative ethics must give consideration to the array of backgrounds which tribunal and board members bring to their adjudication.

Further, virtually all judges are full-time (apart from supernumerary judges who all once were full-time judges, and deputy judges in some provinces). Administrative adjudicators on the other hand may be full or part time. Judges enjoy security of tenure until the age of 75 whereas as adjudicators with boards and tribunals may have short, fixed appointments. These distinctions also may bear on ethical frameworks. For example, the ethical guidelines for judges with respect to involvement in the private sector or with other government bodies contemplate that these employment opportunities may occur upon retirement, not during a judge's appointment. In the administrative justice context, a common consequence of ethical transgressions may be a recommendation not to renew the appointment of a member.

The part-time and short-term nature of administrative justice appointments results in the recurrence of certain types of ethical concerns. These tribunal members, for example, typically have a wide range of "day jobs" which present a particular risk of conflicts of interest. To take just one example, should a part-time regulatory board member be able to use that affiliation in the promotional material for her consulting business to the energy sector? Is that an improper use of influence or an expected aspect of recruiting those with expertise in a specialized industry?

In contrast to judicial ethics, there is little literature in Canada with respect to the ethics of adjudication which takes place in agencies, boards, commissions and tribunals,⁸ and no shared process for dealing with complaints, investigation and

⁶ See M. Brewster, "Guy Parent: Veterans Review and Appeal Board Failing in its Mission" (May 7, 2012) at http://www.huffingtonpost.ca/2012/05/07/guy-parent-veterans-review-appeal-board-canada_n_1495634.html.

⁷ See the discussion in *Ocean Port*, *supra* note 5.

⁸ For notable exceptions, see D. Mullan, "Regulating the Conduct of Agency and Tribunal Members" (2009), 22 Can. J. Admin. L. & Prac. 339; A. Christou, "The 'Good' Tribunal Member — An Aretaic Approach to Administrative Tribunal Practice" (2009), 28 U.Q.L.J. 339; L. Sossin & C. Smith, "Hard Choices and Soft Law: Ethical

reporting on ethical breaches. Most tribunals or boards are responsible for their own investigation and review where allegations of unethical or inappropriate conduct arise.

Ontario's recent governance legislation for administrative tribunals, the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*⁹ goes some distance to addressing this challenge, as discussed below, by requiring all tribunals develop shared templates for member accountability.

Adjudicators in Ontario boards and tribunals also fall under Regulation 381/07 of the *Public Service of Ontario Act, 2006* which provides conflict of interest rules for public servants and overall governance of this regime by a provincial conflict of interest commissioner.¹⁰ Since this regime only applies to conflict of interest, however, it places an aggrieved person or party in the position of having to seek redress for an alleged ethical breach over a conflict of interest through one mechanism, while redress for another kind of breach (for example, harassing conduct or incivility) in another. This possibility highlights the patchwork quilt of governance and oversight which characterizes the status quo.

This fragmentation is accentuated by the fact that administrative adjudicators may also be subject to other ethical and professional governance. For example, many adjudicators are lawyers who remain members of their provincial law society frameworks. Members of other boards are physicians, accountants, architects, engineers and so forth. Forensic Pathologists in Ontario, for example, are subject to the ethical standards of the College of Physicians and Surgeons of Ontario, the Forensic Pathology Service (created after the Goudge Inquiry in 2008), and the public service.

While adjudicative ethics in administrative justice lacks the infrastructure of judicial ethics (for example, a public institution analogous to a Judicial Council responsible for developing adjudicative ethics), there is a significant foundation on which to build, both in Canada and abroad. This includes well-considered model codes such as the code for Society of Ontario Adjudicators and Regulators ("SOAR"), and examples of ethical regimes in analogous contexts. Below, I canvass adjudicative ethics in practice with a view to better understand the current landscape and suggesting a constructive path forward.

(2) ADJUDICATIVE ETHICS IN PRACTICE

Adjudicative ethics is a vast field. At its broadest, it covers both formal instruments (statutes and regulations) and quasi-formal instruments (such as protocols and guidelines) which purport to address ethics as well as informal practices which

Codes, Policy Guidelines and the Role of the Courts in Regulating Government" (2003), 40 Alta. L. Rev. 867; R. Ellis, "The Administrative Justice System in the New Millennium: A Vision in Search of a Centre" (2000), 13 Can. J. Admin. L. & Prac. 171; and A. Mactavish, "Administrative Justice - Reflections on the Road Ahead" (2002), Canadian Council of Administrative Tribunals, 18th Annual Conference: http://www.ccat-ctac.org/downloads/2002_anne.pdf.

⁹ S.O. 2009, c. 33.

¹⁰ Ontario Regulation 381/07 — http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_070381_e.htm.

develop over time.¹¹ The focus of this analysis will be on the standards and processes that are captured in rules, guidelines or codes of one kind or another. Some of these are developed by tribunals and boards themselves, while others have been imposed by government or developed collaboratively between government and tribunals. Moreover, these instruments differ in their coverage and in how advice, investigations and reports may occur. For this reason, it is not possible to provide an exhaustive review of adjudicative ethics in practice. Rather, I will provide an illustration of the most salient features of such instruments below.

The British Columbia Employment and Assistance Appeal Tribunal, for example, has a Member's Code of Conduct,¹² which focuses on the members' responsibilities to the Tribunal, which are as follows:

3.0 Responsibilities to the Tribunal

The Tribunal is composed of members from throughout the province. To ensure consistency of service and treatment of parties it is important that any member who observes any conduct of a colleague that they reasonably believe is in breach of this Code or which may threaten the integrity of the Tribunal bring it to the attention of the Tribunal Chair. The Tribunal operates through its members, and the Tribunal Chair needs the assistance of all members to ensure the public trust is upheld.

Confidentiality — Members must not divulge confidential information obtained as a result of their appointment unless legally required to do so.

Participation — Members are expected to attend and participate in orientation and training opportunities and in periodic meetings arranged by the Tribunal.

Knowledge — Members are expected to acquaint themselves with the orientation and training materials provided prior to being appointed to a panel to hear an appeal.

Disclosure — Members are to disclose to the Tribunal Chair any matters that could have an adverse impact on the public perception of the Tribunal, including an actual or potential conflict of interest with respect to the performance of his or her duties and obligations as a member of the Tribunal.

Judgment — Members are expected to exercise good judgment regarding appropriate conduct at all times, including on matters or in situations not specifically mentioned in this Code.

Performance — Members agree to participate in performance evaluations.

Interestingly, the British Columbia Employment and Assistance Appeal Tribunal emphasizes the duty of members to the Chair and does not highlight any direct obligation on the part of members to the public or to those who come before the Tribunal. An example of a Code of Conduct which highlights such a direct relationship is that of the Alberta Human Rights Commission.¹³ The preamble to the Alberta *Human Rights Commission Code of Conduct* states:

The people of Alberta have a right to fairness, competence and quality deci-

¹¹ For discussion, see Mullan, *supra* note 8.

¹² http://www.gov.bc.ca/eaat/popt/member_code_of_conduct.htm.

¹³ http://www.albertahumanrights.ab.ca/about/mandate/code_of_conduct.asp.

sion-making when they appear before a human rights panel. This Code of Conduct for commissioners is based on the oath of office that commissioners take at the beginning of their term of office (refer to Appendix A). In that oath, commissioners commit themselves to act honourably and conscientiously, independently and without bias or conflict of interest. When members of an administrative tribunal accept an appointment, they also accept limitations on some of their activities. Commissioners must not be biased, and must never create the appearance of bias. This code is a living document, which will be amended from time to time as new concerns arise.

This difference of orientation between ethical duties owed to the Chair and Tribunal on the one hand and to the public on the other is a creative tension. Some obligations appear better suited to institutional obligations (for example, the obligation to disclose any activity which might create a negative public perception of the tribunal) while others to broader obligations to the public (for example, to recuse oneself from a matter where an activity might give rise to a conflict of interest). This distinction raises the question of the purpose or purposes to which the Code is directed. Several Codes address this issue directly. For example, the *British Columbia Review Board's Code of Conduct* sets out the following purposes:

1.0 Purpose of this Code of Conduct

To establish and articulate the *values and conduct expectations* of Board membership; including diligence, prudence, respect, confidentiality and ethics

To identify the *criteria against which members' performance will be assessed* and which will affect their appointment or re-appointment

To emphasise the concept that Board membership constitutes a public trust

To foster, *reinforce and maintain high standards of professional conduct* and performance

To *promote public confidence* in, and the independence and credibility of, the Board

To *identify* and provide guidelines respecting specific activities which may give rise to problematic perceptions of *conflict*.¹⁴ (Emphasis in original)

The Codes set out above typically cover key substantive areas (conflicts, confidentiality, collegiality, etc) but provide no clear mechanism for complaints, investigations or reports on findings. This gap raises significant concerns as to how these Codes lead to better outcomes. Ethical codes in and of themselves may serve hortatory ends, but they are not self-executing.

An example of a Code which includes a clear and transparent process is provided by the City of Toronto's "Code of Conduct for Members of Adjudicative Boards" (2006) (these Boards would include the City's Licensing Tribunal and Assessment Board).¹⁵ This Code allows for complaints to be made to the City of Toronto's Integrity Commissioner with clear provisions governing the investigation

¹⁴ <http://www.bcrb.bc.ca/code.html>.

¹⁵ <http://www.toronto.ca/integrity/pdf/code-conduct-adjudicative-boards.pdf>.

and, if appropriate, public report on the findings of the Integrity Commissioner.¹⁶ Further, and importantly, the Code itself allows for members to rely on the advice given by the Integrity Commissioner in advance of any subsequent complaint or investigation. Far more important than a mechanism to redress ethical breaches is a system designed to prevent such breaches.¹⁷ That said, the other missing feature to most Codes of Conduct which the *Adjudicative Boards Code* for the City of Toronto includes is what happens in the event of a breach. The City of Toronto Code provides that in the event of a breach, remedies against members of adjudicative boards include a reprimand, suspension of remuneration and removal.¹⁸

To promote adjudicative ethics in administrative justice, some organizations dedicated to the administrative justice system as a whole have sought to provide shared templates for such rules, such as SOAR.¹⁹ It is not just adjudicators themselves who have given thought to model rules of conduct but also the Government itself. SOAR's *Model Code* of Conduct dates from 2006 (and owes much to the then Chair of SOAR, Ron Ellis) and includes a daunting 95 sections. The *Model Code* focuses not just on adjudicative ethics but on conduct more generally — highlighting, for example, the obligation on adjudicators to conduct a hearing as expeditiously as possible.²⁰ The *Model Code* is exhaustive and covers important areas which most others neglect, such as particular ethical duties of Adjudicative Chairs and restrictions on post-appointment employment for administrative adjudicators.

The Ontario Ministry of Government Services (“MGS”) “Code of Conduct: Regulatory and Adjudicative Agencies” (2009) is an instructive example.²¹ This model code is “founded on the professional and ethical values of public service, which are set to uphold the public trust”. The provisions of this Code reflect an amalgam of ethical concerns (e.g. integrity) with policy concerns (e.g. timeliness standards).²²

Beyond suggested standards such as the MGS Code of Conduct, Ontario also has imposed mandatory ethical rules on adjudicative tribunals and boards through the application of Regulation 381/07 of the *Public Service of Ontario Act* (“PSOA”).²³ This Regulation requires each adjudicative body to establish a conflict of interest policy, which must comply with the minimum standards set out in the Regulation. Allegations of conduct inconsistent with the Regulation are to be investigated by a designated “ethics executive” (usually the Chair of the tribunal or board), under the guidance and overall governance of the Conflict of Interest

¹⁶ See the Complaints Protocol at <http://www.toronto.ca/integrity/pdf/complaint-protocol-local-boards.pdf>.

¹⁷ See *supra* note 15 at para XX.

¹⁸ *Ibid.*

¹⁹ SOAR “Code of Professional and Ethical Responsibilities” <https://soar.on.ca/docs/publications/code-of-conduct.pdf>.

²⁰ *Ibid.* at para. 43.

²¹ <http://www.mgs.gov.on.ca/en/AbtMin2/157790.html>.

²² *Ibid.*

²³ *Supra* note 10.

Commissioner.²⁴

While this scheme represents an interesting hybrid which allows both for common standards and adapting conflict of interest codes to the distinct context of particular tribunals, it is in my view problematic to extend a scheme designed for public servants to adjudicators. The key difference, of course, is independence. Public servants owe a duty of loyalty to the Crown while adjudicators do not, and indeed may be in the position of deciding between the Crown and claimants. Consider, for example, a social benefits tribunal, or health services board where the Crown is always on one side, and a recipient of a public benefit on the other. This is illustrated starkly in the provision of the Regulation dealing with “confidential information”. Section 5 of the Regulation provides:

5. (1) A public servant shall not disclose confidential information obtained during the course of his or her employment by the Crown to a person or entity unless the public servant is authorized to do so by law or by the Crown.

“Confidential information” is defined as:

“confidential information” means information that is not available to the public and that, if disclosed, could result in harm to the Crown or could give the person to whom it is disclosed an advantage;

This definition perhaps makes sense in the context of public servants, but not independent adjudicators, for whom “harm to the Crown” ought not to be the standard by which their ethical conduct is measured.

The Conflict of Interest Commissioner provides summaries of his advice and decisions under the PSOA regulation. For example, one of the requests for advice related to the common issue of a part-time adjudicator who also has connections to a lobbyist:

Conflict of Interest Advice (07/08)

In his/her role as ethics executive, the chair of an adjudicative agency asked the commissioner for advice about a conflict of interest matter concerning a member of the agency. Specifically, the member had advised the chair that he/she worked on a part-time basis with two outside organizations, and that he/she acted as a registered lobbyist for both organizations.

The commissioner advised the chair that, in his view, the PSOA would not prohibit the member from working with the first organization, provided he/she recused him/herself from any discussions at the organization involving the Ontario government. The commissioner also advised the chair of his view that section 8 of Ontario Regulation 381/07 would prohibit the member from being involved with the second organization, since there is a conflict of interest between the member’s adjudicative role and the second organization’s primary function, which is to make representations to the Ontario government on policy issues. The commissioner stated that this conflict could not be resolved by the member’s recusal. Further, the commissioner advised the chair that he believed the PSOA would prohibit the member from acting as a lobbyist with either organization.

²⁴ <http://www.coiccommissioner.gov.on.ca/scripts/en/whatwedo.asp>.

The commissioner stated that to resolve the conflict, it may be the case that the member should either resign from the second organization and from his position as lobbyist with both organizations, or resign as a member of the agency. The member later advised the commissioner that he/she chose to resign from the agency.²⁵

These summaries are helpful as is the overarching governance of a province-wide Conflicts of Interest Commissioner in providing a sense of cohesion too often missing in administrative justice. It is also appropriate that advice given to ethics executives or adjudicators remain confidential, or is shared, in anonymous form. That said, the failure of the Conflict of Interest Commissioner to indicate which individuals and organizations are involved in investigations which result in decisions is problematic. Because this office has jurisdiction not just over adjudicative bodies but over the entire public service, there is no separate attention given to the distinctive role of adjudicators, or the distinctive need for accountability over adjudicative ethics that is not applicable in the context of other public servants (where, for example, there is a labour relations context to any consequences of ethical breaches, rather than a public responsibility for transparency, so that impugned contact might lead to sanctions, grievances and hearings). Here, the analogy with judicial ethics is closer. Public confidence in the administration of justice requires that judicial discipline be a matter for the public record. Why, however, should it be a matter of public record if a member of the Ontario Court of Justice is subject to an investigation into an alleged ethical breach but not a member of the Ontario Human Rights Tribunal?

It is not just government bodies that have become more involved in adjudicative ethics; legislatures also have waded into this field, in part because of the broader rise of accountability measures dealing with public servants and public appointees.

In Alberta, recent legislation known as the *Alberta Public Agencies Governance Act* makes it a responsibility of every public agency to develop and publish codes of conduct.²⁶ This legislation provides:

Responsibilities of Public Agencies

11. Codes of conduct — (1) Every public agency shall implement
 - (a) a code of conduct governing the conduct of its members, and
 - (b) a code of conduct governing the conduct of its employees, if any.
- (2) A code of conduct referred to in subsection (1) must include provisions
 - (a) requiring members or employees to conduct themselves impartially in carrying out their duties,
 - (b) prohibiting members or employees from acting in self-interest or furthering their private interests by virtue of their position or through the carrying out of their duties,

²⁵ <http://www.coicommissioner.gov.on.ca/scripts/pdfs/en/casesummaries-coi.pdf>.

²⁶ <http://www.qp.alberta.ca/documents/Acts/A31P5.pdf>.

- (c) requiring members or employees to disclose real and apparent conflicts of interest, and
- (d) respecting any other matters specified in the regulations.

(3) A public agency shall make its codes of conduct available to the public.

Ontario's *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009* similarly provides for a "Member Accountability Framework". Under this framework, every tribunal in Ontario must develop an accountability framework including:

- (a) a description of the functions of the members, the chair and the vice-chairs, if any, of the tribunal;
- (b) a description of the skills, knowledge, experience, other attributes and specific qualifications required of a person to be appointed as a member of the tribunal;
- (c) a code of conduct for the members of the tribunal; and
- (d) any other matter specified in the regulations or in a directive of the Management Board of Cabinet.²⁷

2009, c. 33, Sched. 5, s. 7(2)

It is important to note that such accountability frameworks must be "approved" by the tribunal's "responsible minister",²⁸ which again highlights the distinctive space tribunals occupy — neither implementers of policy nor judges but with elements common to each.²⁹

Additionally, under the Ontario legislation, every tribunal must develop an "ethics plan".

6. (1) Ethics plan — Every adjudicative tribunal shall develop an ethics plan.

2009, c. 33, Sched. 5, s. 6(1)

(2) Contents — The contents of the ethics plan shall be prescribed and must also include any matter specified in a directive of the Management Board of Cabinet.

2009, c. 33, Sched. 5, s. 6(2)

(3) Approval — The ethics plan must be approved by the Conflict of Interest Commissioner appointed under the *Public Service of Ontario Act, 2006*.

2009, c. 33, Sched. 5, s. 6(3)

(4) Conflict with *Public Service of Ontario Act, 2006* — In the event of any conflict between an adjudicative tribunal's

²⁷ C. 33, s. 7(2).

²⁸ *Ibid.* at s. 7(3).

²⁹ For discussion, see Laverne Jacobs, "A Wavering Commitment?: Administrative Independence and Collaborative Governance in Ontario's Adjudicative Tribunals Accountability Legislation" (2010) 28(2) *Windsor Yearbook of Access to Justice* 285-307.

ethics plan and the conflict of interest rules made under the *Public Service of Ontario Act, 2006* that apply to the tribunal, the conflict of interest rules prevail.

2009, c. 33, Sched. 5, s. 6(4)

Leaving aside whether it is necessary or appropriate for ministers to be “responsible” for adjudicative ethics, or whether a public service conflict of interest commissioner is the proper body to approve adjudicative ethics standards, legislation requiring publicly available standards for adjudicative ethics is a significant step forward. First, it signals that adjudicative ethics are a public and not a confidential matter. Secondly, it signals that no adjudicative body can fulfill its mandate without such standards. The Ontario legislation also highlights, however, the overlapping and fragmented nature of adjudicative ethics in Canada. This fragmentation raises a host of questions. How is an “ethics plan” different than a members code of conduct? Why are conflicts of interest treated separately from other ethics obligations? Why would “directives” from Management Board be relevant to an adjudicator’s conduct?

Importantly, however, the legislation does not require that adjudicative bodies develop or publish a process for complaints, investigations or reports under such accountability schemes. This gap renders the benefits of member accountability frameworks as potentially hollow. This gap also stands in stark contrast to the other part of the legislation requiring that adjudicative bodies have a process for making, reviewing and responding to complaints about the service provided by the tribunal. It is puzzling, to say the least, that a party would have a clear mechanism for complaining about a lack of timeliness in the decision, but not a lack of integrity in the decision-maker.

This patchwork approach to adjudicative ethics arises because government often responds in the moment to a particular concern or crisis rather than taking a comprehensive or coherent approach. The *Ontario Broader Public Sector Accountability Act 2010* is an example of accountability driven responses to public scandals.³⁰ This legislation arose in the wake of revelations into expenditures by public agencies such as “E-Health” which embarrassed the provincial government. As a result, this legislation requires all the Chairs of adjudicative tribunals and boards, in addition to other public bodies, to submit expenses for review by the Provincial Integrity Commissioner. While the Integrity Commissioner also has jurisdiction over the ethical conduct of Ministers and MPPs, the office has no other connection to adjudicative bodies, or even to the Conflict of Interest Commissioner with jurisdiction over conflicts and political activity of adjudicators in Ontario, thus illustrating and deepening the piecemeal approach by which adjudicative ethics have evolved in Canada.

In sum, the various Codes of Conduct represent important and positive steps towards strengthening the framework of adjudicative ethics of those responsible for delivering administrative justice. The diversity of language, orientation and scope in such Codes also may be seen as appropriate to the diversity and variability of administrative justice itself. Further, the Ontario Regulation 381³¹ approach of a

³⁰ <http://www.health.gov.on.ca/en/legislation/bpsa/default.aspx>.

³¹ *Supra* note 10.

system-wide set of minimum standards which can then be adapted, expanded and modulated to fit particular tribunals is an interesting hybrid model worthy of greater scrutiny. Ontario Regulation 381, however, was not drafted with the distinctive dynamics of administrative justice in mind. Adjudicative roles are not the same as public service roles. What administrative ethics lack is a model designed with administrative justice in mind.

My concern with the current practice relating to adjudicative ethics relates mostly to what is missing from these schemes rather than what is present.

First, there is no transparency with respect to operation of these Codes. Often, these Codes provide no mechanism for parties, council or members to make complaints or seek advice as to the application of the Code to particular circumstances.

Secondly, where complaints are made, there is no transparency around how investigations are to be conducted, by whom, and with what reporting requirements. In particular, there is no stated commitment to peer led investigations so that adjudicator conduct is investigated by others with adjudicative responsibilities to ensure such investigations never infringe adjudicative independence and the integrity of administrative justice.

Thirdly, there are no rules governing the publication of reports or findings following such investigations, or clear sanctions where ethical breaches are found. There are few, if any, places where a member of the public can go to obtain decisions dealing with the ethics of adjudicators in administrative justice of the kind the Canadian Judicial Council provides for the ethics of judges.³²

(3) CHALLENGES AHEAD

In light of the above analysis, there are clear challenges and opportunities ahead. Below, I explore five related areas to watch in the future.

First, it remains to be decided whether adjudicative ethics in the context of administrative justice should aim for “A Thousand Flowers” and nurture the diversity of standards, frameworks and principles, or attempt to develop shared standards, frameworks and principles which could be adapted to all adjudicative settings. In my view, while each tribunal and board may require some unique ethical considerations, what is shared between every adjudicative setting in administrative justice is significant — and worthy of a system of shared governance. Such shared governance could be responsible for providing advice in addition to conducting investigations and reporting findings. The growth of tribunal “clusters” presents an opportunity for developing such shared governance across several tribunals.³³

The second challenge is to ensure that allegations of breaches of adjudicative ethics are investigated in a public and independent fashion. Again, this may be best accomplished by an entity dedicated to adjudicative ethics but could also be delegated to an integrity commissioner, conflict of interest commissioner or other independent, accountability officer. Schemes to safeguard adjudicative ethics are tied to public confidence in administrative justice — for this reason, they must not only articulate clear principles but also be accessible and transparent. As the recent

³² See reports of CJC investigations and inquiries at http://www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_inquiry_en.asp.

³³ For a discussion of “clusters” see Baxter and Sossin, *supra* note 1.

travails of the federal Public Sector Integrity Commissioner illustrate, strong accountability measures which are never invoked undermine public confidence.³⁴ Transparency includes not just information about how to make a complaint, how it will be investigated and how it will be reported upon, but also what remedies or sanctions are available and information on how many complaints have been received, investigated and reported upon in the past.

Thirdly, adjudicative ethics are not static but rather a set of principles and standards in motion. For example, a shift from adversarial to more “active adjudication” which calls on adjudicators to assume greater leadership over obtaining the necessary information and argument to fulfill the adjudicator’s statutory mandate will give rise to very distinct ethical challenges. How much leadership is too much? How should asymmetries in representation or resources be addressed in such contexts? Or, to take another example of a moving bar for adjudicative ethics, the impact of technology will intensify the scrutiny on adjudicative ethics. In the past, what transpired in hearing rooms of tribunal and boards, and with members outside the hearing room, was rarely known. This “practical obscurity” meant that while tribunal proceedings were open, there was very limited access to administrative justice. Until recently, most tribunals did not even make their own decisions publicly available in accessible forms. Now, it is possible for tribunals and boards to reach out to the public as never before and to be exposed to public scrutiny as never before. Indeed, some adjudicative bodies have already moved to making audio and/or video broadcasts of hearings available. Finally, how adjudicative bodies respond to the multiculturalism and heterogeneity of Canadian society will play a vital role in the development of adjudicative ethics. In all of these areas, ethical schemes need to be designed in order to evolve and adapt.

The fourth related area, safeguarding adjudicative ethics, highlights the importance of training and education for administrative adjudicators. It is odd, in my view, that virtually every professional in Canada is required to demonstrate a basic knowledge of ethics and professionalism in the conduct of their work but appointees to adjudicative bodies who have the power to affect the rights of all who come before their tribunal are required to have no training or education whatsoever. If adjudicative ethics are to be taken as a serious barometer of accountability, education and training would seem essential.

Fifth and finally, promoting adjudicative ethics will require a better understanding of administrative adjudication itself — how decision-makers decide and the institutional, social and cultural frameworks within which those decisions take place. For example, will adjudicative ethics differ depending on the gender, racial, ethnic or linguistic make-up of an adjudicative body?³⁵ To address such questions, better quantitative and qualitative empirical data will be needed.³⁶

³⁴ For the critique of the Public Sector Integrity Commissioner by the Auditor General, see <http://www.cbc.ca/news/politics/story/2010/12/09/auditor-general-integrity-commissioner.html>.

³⁵ For an exploration of this question, see Lorne Sossin, “Discretion and the Culture of Justice” [2006] *Sing. J.L.S.* 356–384.

³⁶ For a promising example of what such study might reveal, see Laverne Jacobs, *Administrative Tribunal Independence: Fashioning Independence at the Tribunal Level - A*

CONCLUSION

In this brief review, I have argued that adjudicative ethics in the context of administrative justice represents a distinct field with distinct dynamics. These dynamics may be distinguished from judicial ethics and public service ethics more broadly although sharing some elements of each. Adjudicative ethics has the potential to become the glue that binds administrative justice, and to be a constitutive factor in developing a system of administrative justice in Canada. For the moment, however, adjudicative ethics have developed in a fragmented and patchwork fashion. Adjudicators are subject to ethical standards derived both from judicial and public servant models without sufficient attention to the distinctiveness of administrative adjudication. While codes of conduct and conflict of interest policies are now common, it remains unclear the extent to which they influence how adjudicators act or the culture of administrative justice.