FAIR HEARINGS IN AN OCEAN PORT WORLD
A Textured Concept

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RéSUMÉ

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INTRODUCTION

This paper is essentially the transcript of a speech I gave to the Toronto Clinics’ Training Conference on April 7, 2003. The Conference organizers had asked me to address two matters: first, to describe the “markers” of a fair hearing at an administrative tribunal; and, second, to address the question of why administrative justice has deteriorated.

Before discussing these primary topics, there were some preliminary matters that I felt it necessary to address. The first of these was the importance of categorizing administrative tribunals; the second was Ocean Port and its implications; and the third was a suggestion for getting beyond Ocean Port with respect to rights tribunals.

Rights Tribunals

In an article published last year in the Journal of Administrative Law & Practice,¹ I suggested that we should not treat all administrative tribunals as if they were the same species. This article was written just before the Supreme Court of Canada’s decision in Ocean Port² was released. Regardless of that decision, I remain convinced that it is wrong to regard all tribunals as the same species. The Ontario Securities Commission is not, in my opinion, the same animal as the Social Benefits Tribunal, nor is the Canadian Radio Telecommunication Commission the same as the Rental Housing Tribunal. To pretend otherwise is to obscure fundamental, administrative justice issues and deflect critical analysis.³

2. Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch), [2001] 2 S.C.R. 781, 204 D.L.R. (4th) 33. This is the decision in which the Supreme Court allowed an appeal from a B.C. Court of Appeal decision which had set aside a decision of the B.C. Liquor Appeal Board. That Board had confirmed penalties awarded against the Ocean Port Hotel for infractions of the Liquor Control and Licensing Act and regulations. The Court of Appeal held that the Board members did not have the necessary guarantees of independence required of administrative decision-makers who impose penalties. The basis for the Court of Appeal’s concerns in that respect was two-fold. First, the decision-makers were part-time members of the Board who were only paid when they were assigned cases and those assignments were entirely within the discretion of the Chair. Second, the Board members served at the pleasure of the Lieutenant Governor in Council and were appointed for one-year terms only. The S.C.C., noting that administrative tribunals were created for the purpose of implementing government policy, and were part of the executive branch of government, held that, unlike provincial courts, their independence did not attract constitutional protection. Since the manner and term of the Board members’ appointments and assignments were clearly authorized by the terms of the Board’s enabling statute, no objection could be taken. If the statutory intent was sufficiently clear, a statutory provision could effectively displace principles of natural justice that might otherwise be seen to apply to administrative tribunals and their proceedings.
3. In suggesting this categorization of tribunals, I was remiss in the earlier article in not acknowledging that the categorization of administrative tribunals was a central component of the recommendations in the Ratushny Report (Ed. Ratushny, Canadian Bar Association Task Force on the Independence of Federal Administrative Tribunals and Agencies in Canada (Ottawa, Ont.: C.B.A., 1990) that we should reserve the term “tribunal” for “independent adjudicative bodies” and the terms, “board”, “commission” or “agency” for “independent bodies which are required to apply policy to their
I will confine my comments in this article to tribunals that I believe are most appropriately categorized as "rights tribunals" – tribunals that are like courts because their dominant responsibility is to adjudicate disputes about tightly defined private statutory rights or benefits. The Social Benefits Tribunal and the Rental Housing Tribunal are two examples of what I categorize as rights tribunals.4

Most of the tribunals with which clinic lawyers and caseworkers are involved fall into the rights tribunal category.

I categorize tribunals that have more general oversight responsibilities for the public interest, and ones that exercise delegated political powers, as "regulatory agencies" or "government agencies". I will not be discussing the latter type of tribunal in this article.

**Ocean Port**

I have referred to the Supreme Court’s views on the categorization of administrative tribunals as these appear in the *Ocean Port* decision. I am referring to the Court’s characterization of administrative tribunals as “ultimately operating as part of the executive branch of government” with the “primary function” of “policy-making”.

While some may celebrate *Ocean Port* as having eliminated the constraints imposed by the principles of natural justice from the design of administrative tribunals, it is important that clinic counsel not be overly impressed by the decision.

First, while the Court used general language, *Ocean Port* was a decision about only one type of tribunal – a Liquor Appeal Board. Second, if the Court indeed intended to lump all administrative tribunals into the one category, its decision in that respect is *obiter dicta*, and, moreover, *dicta* unsupported by much in the nature of either evidence or analysis.

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4. My "rights tribunal" terminology appears to be no different from Ratushny’s recommended use of the "tribunal" label. The addition of the word "rights" serves, however, to make a distinction from the current us of the term "tribunal" as encompassing regulatory agencies, as well, and, in addition, serves to highlight the principal business of these non-regulatory tribunals that do not have an economic or social mission.
I believe that ten or fifteen years from now Ocean Port's place in the jurisprudence of the administrative justice system will be seen to have been principally important for the impetus it gave to a fundamental re-thinking of our theory of administrative justice and to a more careful consideration of the nature of our administrative justice tribunals. In some future case, the Court will be faced with an administrative tribunal that is a rights tribunal but whose decision-makers, by reason of statutory provisions of an "orangutan" nature, clearly do not qualify as impartial or independent. In that future case, the Court will, in my opinion, be inevitably moved to reassert the role of the courts as the ultimate guardians of the rule of law in our administrative justice systems.

As authority for legitimizing rights tribunals that are by legislative intent neither impartial nor independent, Ocean Port cannot, in my opinion, endure. Canadian rights tribunals will not forever be allowed to stand in conflict with the rule of law and as a disgraceful footnote to the universal, international consensus that the determination of legal rights in a free society must be the prerogative of tribunals that are, in fact and not just in name, independent and impartial.

Rights Tribunals and Provincial Courts
Fortunately, there is one element of the Ocean Port decision that may provide an important point of departure for a new analysis of the status and nature of rights tribunals. I refer to the distinction drawn in the decision between administrative tribunals and provincial courts.

Provincial courts, like rights tribunals, are statutory, rights-determining institutions without the inherent powers of a superior court. Like rights tribunals, they are the children of the provincial legislatures.

The requirement that provincial courts be independent in the exercise of their criminal-law jurisdiction is explicitly required by s. 11 of the Charter of Rights and Freedoms. There is no such explicit constitutional protection with respect to their jurisdiction over civil law – for example, in their jurisdiction over family law matters. In this respect, it is difficult to see how their constitutional status differs from the constitutional status of rights tribunals.

Yet, in the 1997 Provincial Judges Reference, having decided that "judicial independence is at root an unwritten constitutional principle", the Supreme Court, in a

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5. A label that emerged in the Toronto union labour bar to describe the Ontario government's legislation in the hospital and education fields authorizing the government to appoint anyone they choose as interest arbitrators, explicitly regardless of their having any experience or training and whether or not they are acceptable to either or neither of the parties. As the wags in the labour bar said, it was legislation that would permit the government to appoint an orangutan as an arbitrator and no one could object. As suggested in the "Super Provincial Tribunals" article (supra note 1 at 37) it seems to the writer to be a label of potential general usefulness in identifying any legislative provision that explicitly overrides rule of law principles in an egregious manner.

unanimous judgment written by Chief Justice Lamer, concluded that that unwritten principle gives implied constitutional protection to the requirement of independence for provincial courts when they are exercising their civil jurisdiction.

In Ocean Port, it was therefore argued that the unwritten constitutional guarantee of independence found in the Provincial Judges Reference to be applicable to provincial courts in their civil law garb, logically must apply as well to administrative tribunals exercising adjudicative functions.

Chief Justice McLachlin rejected that argument. She explicitly distinguished provincial courts from administrative tribunals, characterizing the latter as part of the executive branch of government. But she did not say on what analysis she based the distinction. It is an expedient distinction, since no one would want to think of our provincial courts as part of the executive branch, but the basis for the distinction remains unclear.

I therefore offer the hypothesis that the way to a viable theory of administrative justice for rights tribunals may lie through the drawing of creative analogies between the role and nature of rights tribunals and the role and nature of the provincial courts in their civil law aspects.

THE MARKERS OF A FAIR HEARING

Let me now turn to my first particular assignment – an examination of the markers of a fair hearing. As mentioned, I will be speaking of a fair hearing in a rights tribunal environment. In considering these markers, it is important to remember that Ocean Port only makes a difference when one is contemplating structures, arrangements or practices that are incompatible with the principles of natural justice, and authorized by clear statutory language. Even then, the difference Ocean Port will make in the end is doubtful, particularly when one is dealing with a rights tribunal.

On this subject of fair-hearing markers, I propose to offer a big-picture perspective on what it takes to have a dispute resolved by a rights tribunal in a hearing that is seen to be fair.

Definition of a Fair Hearing

I will begin with a definition of a fair hearing – a definition that is based on a look backwards at the process from the point where the decision in a case has been released.

The definition I would propose is this:

A hearing will be seen to have been a fair one if, after the decision has been released:

1. a competent and professional counsel for the losing party,
2. has no substantial reason to doubt,
3. that the decision was the product of a fully informed and competent analysis of the law and evidence,
4. by adjudicators committed to going wherever a genuine attempt at viewing the evidence and law objectively might take them.

Now, let us look more closely at the essential elements of that definition.

Perceptions Are What Count
To begin with, we are concerned with perceptions of fairness – thus, a hearing “will be seen to have been a fair one ...”. It is fundamental that a hearing that was in fact a fair one, but was not perceived to be fair, will have failed the rule of law test that justice not only be done but be seen to be done.

Two Qualifiers on the Standard for Reviewing the Fairness of a Hearing
Next, in specifying that the fairness of a hearing be judged through the eyes of a notional, competent and professional counsel for the losing party, the definition is positing two qualifiers on the standard for reviewing issues of fairness. The first qualifier is that while an assessment of the fairness of a hearing will require the assessor to have an intimate knowledge of the losing case, the fairness of a hearing can nevertheless not be assessed through a partisan lens.

The second qualifier is that ultimately the fairness of a hearing can only be fairly judged by expert and competent counsel. Naturally, one hopes that a fair hearing will leave even the losing party satisfied with at least the fairness of the process. However, given a party’s usually intractable preoccupation with results, and a lay party’s general inability to appreciate the nuances of process, evidence or law, ultimately the fairness of the hearing cannot be left to be judged only through the eyes of the losing party.

The definition also calls for the conclusion of unfairness to require a “substantial doubt” in the mind of notional, losing counsel. Hearings are operational environments, not laboratories. The business of the tribunal has to be accomplished in the hearing in a reasonably efficient manner, despite the frequently fractious nature of the proceedings. It is, therefore, unrealistic to counsel perfection.

On nagging questions about fairness issues – possible bias, the level of competence, openness to hearing new arguments and the like – adjudicators must, therefore, be given the benefit of the doubt. If we are to be realistic about this, we must extend to rights tribunals a presumption of intended fairness.

So much for what might be called the “standard of review” on questions of fairness. Let me now address the elements of a fair hearing.

Elements of a Fair Hearing: An Adjudicator’s Genuine Attempt at Objective Assessment
I will begin by focusing on the latter part of my definition (item 4) – that is, that for a hearing to be seen to be fair there should be no substantial doubt that the adjudicators were at all times in fact committed to going wherever a genuine attempt at objectively assessing the evidence and law might take them.
You will note the nod to the reality of the human experience in the phrase a "genuine attempt ... at objectively assessing the evidence and law". It is fashionable to disparage even the possibility of objective adjudication. And it is certainly true that with respect to issues of importance, adjudicators will inevitably bring to the adjudication pre-conceived views and biases rooted in their own innate nature and developed through their personal and/or professional life experiences.

Objectivity in the pure sense of the concept is, in reality, impossible to attain, if indeed there is such a thing at all. As has been said, one wants an adjudicator's mind to be open but one cannot expect it to be empty, nor, of course, does one want it to be vacant. However, when we understand the rule of law as requiring an objective assessment of the law and evidence as part of the prerequisites for a fair hearing, we do know what is meant.

On legal issues, the assessment we have in mind is one in which adjudicators acknowledge a professional duty to suppress personal policy preferences as to outcome, and to search assiduously for, and be bound by, the intent of the legislature or the effect of established doctrines of common law, as those are determined by a genuine, best-effort adherence to established cannons of legal reasoning. We also expect that that loyal adherence to the cannons of legal reasoning will be informed by an open-minded consideration of all competing arguments.

To knowingly strive to achieve a personally preferred policy outcome through a clever manipulation of the rules of legal reasoning is the proper business of advocacy. Adjudicators who indulge themselves in a similar exercise are, in my view, acting in a manner that is incompatible with the rule of law and that subverts the integrity of our legal system.

A few years ago, I had a personal occasion to experience what such an approach by an adjudicator would be like. I was present at a private meeting of a tribunal's executive council when an experienced, private bar lawyer retained to act for the tribunal spoke to the council on the issue of the legality of a particularly contentious, proposed interpretation of the tribunal's legislation. The lawyer advised the council that the interpretation in question was open to the tribunal, i.e., was legal, not because it was a reasonable interpretation but because it was not so unreasonable that it would be considered patently unreasonable by the Divisional Court.

The lawyer's advice was, effectively, that it was legal and appropriate for a tribunal to adopt whatever interpretation it could reasonably hope to get away with - that is, whatever interpretation fell short of being patently unreasonable - even if that interpretation flew in the face of the intent of the legislature as most reasonably interpreted.

I was shocked to find that view of an adjudicator's role being espoused by experienced counsel, and I am hopeful that I would not be alone in that reaction. It is a way of looking at an adjudicator's role that, in my opinion, is flatly incompatible with the rule of law. Under established precepts of legal reasoning, the bright-line question for tribunals and their adjudicators - and I would suggest for government bureaucracies as well - must surely be this:
What is the principled legal reasoning we honestly find most persuasive as to the intent of the Legislature?

So much for what constitutes an objective assessment of the law. What do we expect from the rule of law’s requirement that there be an objective assessment of the evidence? What we expect is that adjudicators will be attuned to their own prejudices, biases and cultural pre-dispositions and will be professionally committed to a genuine and informed attempt to push those aside in a personal best effort attempt at a fair assessment of the evidence - to be committed, in a word, to ignoring factors that are not fairly relevant to that assessment. No one would suggest, for instance, that adjudicators who consciously allowed their own stereotypical thinking about unfamiliar cultures or race to influence their assessment of the credibility of witnesses would be acting legitimately.

The system’s aspirations of objectivity as far as the assessment of evidence is concerned may be seen in the attention now being paid in adjudicator training courses to the problem in a multicultural society of assessing credibility across cultural differences between adjudicators and witnesses. Another example is the prudent skepticism by which modern adjudicators now believe the factor of their intuitive “read” of a witness’s demeanor in the witness box should be viewed.

I previously mentioned the traditional expectation that an adjudicator would give open-minded consideration to all competing arguments. In this respect, I would mention a technique that Bertrand Russell used when he was responsible for critically assessing the work of philosophers for whom he harbored an innate disrespect. Russell’s technique was to consciously adopt at the outset of an assessment a professional attitude that he called “hypothetical sympathy”. It is an elegant description of what having an “open mind” means - or should mean - and it is a concept that should resonate not only with adjudicators but also with counsel on those hopefully rare occasions when they find themselves conducting a first interview with a client for whom they have difficulty in mustering the necessary degree of actual respect.

Elements of a Fair Hearing – Confidence that Adjudicators are Committed to Going Where the Evidence and Law Fairly Takes them

The second part of element 4 in my definition of a fair hearing is a losing counsel’s confidence that the tribunal’s adjudicators were in fact committed to going where a genuine attempt at objectively assessing the law and evidence would take them.

There are many foundations for such confidence. They include, for example, the tribunal having administrative and management structures and arrangements that are not incompatible with independent and impartial decision-making.

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Counsel for losing parties who believe that the adjudicators in their cases were frightened of going where the evidence and law would have fairly taken them, or who perceived the adjudicators to be arbitrarily resistant to going to that place for personally or institutionally preferred policy reasons, will come away from those cases with a very substantial doubt about the fairness of the hearing they received.

Structures and arrangements that may be expected to undermine confidence in the independence and impartiality of rights tribunal adjudicators will include the following:

One: Adjudicator selection and appointment procedures that are seen to prefer biased candidates and not to value essential adjudicator qualifications, such as judicial temperament;

Two: Arbitrary reappointment policies or practices that leave adjudicators apprehensive about possible reprisals should their decisions trench too strongly on the interests of the government, or that signal to adjudicators that independence or excellence in decision making is not valued or respected by the people in charge of reappointments;

Three: The assignment of rights disputes to a tribunal in which the interests of the tribunal’s host ministry or the host ministry’s staff are directly implicated, thus putting the tribunal’s institutional interests and the personal interests of the tribunal’s adjudicators in direct conflict with the interests of the non-ministry parties in the tribunal’s proceedings;

Four: A tribunal’s adoption or acceptance of institutional or adjudicator performance criteria that gives undue priority to the efficiency of either hearings or decision making. By “undue”, I mean to a degree that is not sufficiently respectful of, or proportional to, what justice reasonably requires in that tribunal’s environment. Such inappropriate emphasis on efficiency will be seen to put the personal interests of a tribunal’s adjudicators in conflict with what the principles of natural justice require of them as adjudicators; and

Five: Exposing tribunals to institutional performance reviews by government-dependent, private sector business consultants without perceivable administrative justice expertise or empathy, and with an agenda of uncertain provenance.

The foundations for confidence or lack of confidence in the independence and impartiality of the decision making that a losing counsel would have in mind would also include the reasons he or she would have for generally accepting or not accepting the tribunal’s own, institutional commitment to impartial and independent decision making.

Counsel who are not confident about the tribunal’s own commitment to unbiased and independent decision making will find it difficult to believe that individual adjudicators have not been influenced by the culture of bias and dependency in which they are perceived to work.

The markers of an institutional culture of independence and impartiality in a particular tribunal would include:
First: A chair who has been selected through a meaningful consultative process involving the tribunal’s various client constituencies and who projects impartiality and a commitment to independence, both through his or her professional background, qualifications and reputation and through what he or she says or does in the course of administering the tribunal;

Second: A chair who operates in a manner that is demonstrably respectful of the independence and autonomy of the tribunal’s individual members;

Third: Tribunal adjudicators who themselves project impartiality and commitment to independent decision making, both through their professional background, qualifications and reputation and through conduct in their hearings that demonstrates respect for parties and their counsel on both sides of an issue;

Fourth: A tribunal whose administration operates at arms length from any ministry whose decisions or policies it reviews;

Fifth: A tribunal administration that is open with all of its client constituencies, consults with the constituencies in the development of administrative and process policies, is receptive and responsive to criticisms, and is confident about explaining and defending its policies in public venues; and

Sixth: A tribunal that is committed to a publishing policy respecting reasons for its decisions that opens the impartiality, fairness, quality, consistency and congruency of its decision making to informed criticism by parties and their counsel and by other expert outsiders, including, of course, the courts.

Elements of a Fair Hearing: Confidence in the Adjudicator’s Competence

Next, consider the middle element of my definition of a fair hearing (item 3), i.e., that losing counsel would have no substantial reason to doubt that the decision that flowed from the hearing was the product of a “fully informed and competent analysis of the law and evidence”.

I will talk about competence first. Confidence in the competence of an adjudicator is fundamental to the perception that one has received a fair hearing. Nothing is quite as frustrating to counsel as the perception that an adjudicator is not up to the job. And the concept of competence involves not only the question of an adjudicator’s innate intellectual capacity – is he or she intelligent enough to understand and deal sensibly with sophisticated issues – but also the question of qualifications. And here it is important to distinguish between credentials and qualifications. One does not have to be licensed as a lawyer to be a good adjudicator, but one does need to have the knowledge, training and experience that adjudication requires.

Confidence in the competence of rights tribunal adjudicators must begin with the belief that the selection criteria being applied in the adjudicator appointments process are appropriate indicators of the qualities, talent, skills and knowledge that a competent adjudicator actually needs.
But, of course, the most important foundation for such confidence is the performance of adjudicators in the hearing environment. If counsel come away from a hearing substantially doubting the competence of the adjudicator, then, however much that adjudicator may have been trying to be fair and objective, all perceptions of a fair hearing will go out the window. If the adjudicator is perceived not to have the intellectual capacity or the skill or knowledge to properly understand and evaluate an argument, no counsel will believe that that argument has been heard in any meaningful sense of the word.

Elements of a Fair Hearing: A Fully Informed Analysis

That brings me, then, to the final element I want to discuss in my fair hearing definition—losing-counsel’s confidence that the decision reflects a fully informed analysis of the law and evidence. Here, again, competence is an essential prerequisite, as being fully informed presupposes a capacity to understand and appreciate the significance of the information.

Other requirements for confidence on this score include:

First: The parties receiving fair notice of the case they must meet;

Second: The parties being given a fair opportunity to meet that case through the presentation of proofs and submissions; and

Third: An adjudicator who demonstrated through the hearing that he or she was attentive, prepared to listen and to strive to appreciate such proofs and submissions.

Then there is the quality of the reasons for the ultimate decision. If the reasons ignore important issues or demonstrate a failure to understand the losing party’s evidence or submissions, doubt as to the competence and fully informed nature of the analysis on which the decision is based will naturally be palpable.

And if no reasons are provided, and the issues were not simple, the answers not straightforward, and the consequences of the decision not minor, then the absence of reasons should give any counsel substantial reason to doubt the fairness of the hearing. Without reasons it is impossible to know whether the adjudicator was listening, understood the issues, applied an objective analysis to either the law or the facts, or simply succumbed to personal or institutional biases or fears. Without a reasonable basis for assessing those questions, it is impossible to say that justice has been seen to be done.

WHY HAS ADMINISTRATIVE JUSTICE DETERIORATED?

Introduction

Now to the question: why has administrative justice deteriorated? Implicit in the question is the premise that administrative justice has deteriorated. Personally, I have only anecdotal evidence based largely on second- or third-hand information. However, from the evidence offered by this experienced audience’s loud and derisory appreciation of the mock, administrative justice scenarios with which this conference was opened this morning, I will take it as read that justice delivered by rights tribunals in Ontario has, indeed, deteriorated.
To discover why it has deteriorated, one must first examine how it has deteriorated – what is the nature of the deterioration? And to address that question one needs to know what the present system's performance is being judged against – that is, deteriorated as compared to what?

The Absence of Objective Base-Line Data
One of the great problems for administrative justice critics, and one that severely handicaps reform efforts, is the absence of any objective data on the qualities and performance of administrative justice systems. Data from an annual or biannual, non-partisan, professional and confidential survey of administrative law counsel, caseworkers and tribunal members, designed to record what those people think of the rights tribunals with which they are familiar relative to closely defined administrative justice criteria, would make a huge contribution to the weight of reform proposals.

Ideally, the initial step towards a useful database would be a base-line survey directed at recording what those views were over the past ten years or so.

Absent data of this nature, one is left with anecdotal evidence. And, as experience teaches, reform proposals based on anecdotal evidence are always vulnerable. Opponents of the reform may deny that the evidence is fairly representative, or point to different anecdotal evidence or to self-developed data of questionable objectivity, and there is little reformers can do against that kind of response.

The “Renaissance” Decade – 1985 to 1995 – as the Ad Hoc Point of Comparison
In any event, to say how the system has deteriorated one has to have some standard or benchmark of administrative justice against which one would want to compare the current system. And, absent objective survey data, one can only resort to such ad hoc descriptions of the system in previous times as may be available.

The decade between 1985 and 1995 has been described as a renaissance period in the history of administrative justice in Ontario. At least I have described that decade in those terms, and I believe others have as well. And there are a number of items to be found in the literature of administrative justice in Ontario that can help us in understanding the qualities of the system during that period.

For a particularly interesting insight into what was going on inside one particular tribunal – the Ontario Labour Relations Board – I would recommend Judith McCormack's article, “Nimble Justice: Revitalizing Administrative Tribunals in a Climate of Rapid Change”, published in the 1995 Saskatchewan Law Review. (Another piece by McCormack that no administrative justice reformer should ever lose sight of is her 1998 article, “The Price of Administrative Justice”, published in volume 6 of the Canadian Labour & Employment Law Journal. This is an article that provides, in my opinion, a wonderfully insightful and sophisticated exploration of administrative justice issues.8)

8. These articles are reflective of Judith McCormack’s experiences while she was the Chair of the
In December 1997, I was one of a number of speakers in a Law Society Continuing Education Program in Administrative Law entitled “Dramatic Departures in a Downsizing State”. That speech is particularly relevant to the question, “deteriorated as compared to what?” because I took that occasion to record the progress that had been made in the administrative justice system during that renaissance decade and to describe the system as it had existed in June 1995 when the government changed.

The speech was written at a point over two-years into the Harris government’s regime, at a time when the measure of that government in terms of its administrative justice policies had already been taken. And I conceived the speech as something akin to a testament scratched on a wall that future generations might wonder at.

The speech also contains a prediction as to what the consequences of this government’s appointments policies would be. At the time, I was not focused as much as I am today on the need for distinguishing rights tribunals from the other categories of tribunals, and from an overall system perspective we may not yet be in quite as much trouble as the speech predicted. How close the prediction comes when one looks only at rights tribunals, I will leave you to judge.

Another point of reference for picturing the administrative justice system to which the tribunal chairs and members of the renaissance decade were aspiring – and coming very close to attaining – is “Little Green Book”, produced by a committee of the Society of Ontario Adjudicators and Regulators (SOAR) chaired by Brian Goodman. It is entitled Principles of Administrative Justice, A Proposal. Unfortunately, like a child with the bad luck to have been borne on a south Saskatchewan farm in the second decade of the twentieth century – on the cusp of the depression and the dust-bowl years – this little book was released to the public in that now historic month - June 1995 – and has never been heard of since.

And, finally, any search for the model of administrative justice against which it would be useful to compare the current system must include the April 1998 Report of the Agency Reform Commission on Ontario’s Regulatory & Adjudicative Agencies. That Report was insightfully entitled Everyday Justice and is now known as the “Guzzo Report”.

The recommendations in the Guzzo Report reflected much of what had already been achieved on a de facto basis in the renaissance years, and the fact that the government publicly endorsed it and undertook to implement its recommendations was a moment of promise in an otherwise pessimistic time. The fact that the undertaking turned out to be a cruel joke does not detract from the merits of the Guzzo Report as a reasonable blueprint for what an acceptable administrative justice system might look like.

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Ontario Labour Relations Board from, I believe, 1991 to 1995. Prior to her 1991 appointment as chair, she was an experienced and highly respected Vice-Chair of the OLRB.

Adjudicator Selection Criteria as a Principle Indicator of What Has Gone Wrong

So now the question: why has administrative justice deteriorated? I cannot, in this article, answer that question in detail, but it is not a tough question to answer. Generally speaking, in the current administrative justice environment, many of the markers of a fair hearing have gone missing, particularly for rights tribunals.

If you were to compare the multi-textured markers of a fair hearing that I outlined herein with the reality of the system as you know it now; if you were to read the materials I have mentioned in the light of that current reality; then I think you would have no difficulty in figuring out what has happened.

But of the many contributing factors, one is particularly important. And here I refer to the Harris government’s understanding of what constitutes appropriate qualifications for adjudicators in rights tribunals.

The Guzzo Report identified the getting and keeping of competent and qualified people to be the essential prerequisite of a good administrative justice system.

This was an axiom that was well respected in the renaissance years. And three years before Guzzo, in 1995, the Society of Ontario Adjudicators and Regulators (SOAR) had occasion to publish a carefully considered list of the qualifications that it thought necessary for an adjudicator appointee.

In 1994, the Circle-of-Chairs section of SOAR initiated an inquiry into the practices and policies for managing the performance of adjudicators. The inquiry was by an ad hoc committee selected by the Circle. The committee’s members brought to the assignment a wealth of experience at various levels of tribunal work. It was a four-person committee comprised of the then chair of the Environmental Appeal Board, who chaired the committee; the manager, operational planning, of the Ontario Energy Board; a vice-chair of the Environmental Assessment Board; and a vice-chair of the Ontario Municipal Board.

The committee conducted a survey of Ontario agencies, chairs and members respecting the then current adjudicator performance management practices, and particularly inviting ideas and concerns about the prospect of establishing formal performance evaluation systems.

When the committee’s draft report was ready, it was circulated widely amongst the chairs and members of Ontario tribunals, adjusted in response to the ensuing input, and, when finally adopted by the SOAR Board of Governors in October 1995, was understood to reflect a broad consensus of opinion within the administrative justice community as it existed at that time in Ontario. The report is entitled Towards Maintaining and Improving the Quality of Adjudication: SOAR Recommendations for Performance Management in Ontario’s Administrative Justice System. It may be found published in its entirety in volume 9 of the Canadian Journal of Administrative Law and Practice at page 179. I will refer to it here as the “SOAR Report”.
Recognizing that any effective system of performance management must begin with the appointment of qualified people, the SOAR Report proposed a specific list of qualifications that should be required for any appointment as an administrative justice adjudicator. Using the current government's terminology, these qualifications may be usefully referred to as SOAR's 1995 "core competencies".

These core competencies, labeled in the SOAR Report as "Generic Selection Criteria for Tribunal Members" read as follows:

**Professional**

- A good understanding of the mandate of the tribunal and other relevant legislation
- Experience with public hearings
- Experience in a field related to the subject matter of the tribunal's hearings or in law
- A good understanding of procedure, including the *S.P.P.A.* [Statutory Powers Procedure Act] if applicable to the tribunal's hearings, and the common law concepts of natural justice/fairness
- An awareness of, and sensitivity to, the various interests and issues represented at the tribunal's hearings
- An aptitude for adjudication, including fairness, good listening skills, open-mindedness, sound judgment, tact, and an ability to interpret legislation
- An ability to organize and analyze evidence (written and oral)
- Good writing skills – the ability to write a clear, well-reasoned decision that takes into account the evidence, the submissions, the law and policy
- A willingness to participate in non-hearing related matters affecting the tribunal, e.g., tribunal committee work; speaking engagements; the drafting of tribunal policies/rules/procedures; the training of new tribunal members.

**Personal**

- A commitment to public service
- Good interpersonal skills, including the ability to work in a team
- The ability to work under time pressures
- Computer literacy
- Bilingualism [obviously, this would only apply to some of the adjudicative positions in a tribunal]
- Willingness and ability to travel throughout the province, often with voluminous written materials.

Many of you may recall on November 16, 2000, the then Attorney General and the then chair of the Management Board of Cabinet presented a binder of "tools templates and guides" to the 12th annual Conference of Ontario Boards and Agencies (COBA). In their joint accompanying letter, the Ministers said that these represented the work
completed up to that time on the measures necessary to give effect to the government’s undertaking to implement the recommendations of the Guzzo Report. These measures included a description of the core competencies that the government would require of new appointees to adjudicator positions.

In assessing the reasons for the deterioration in administrative justice since 1995, it is instructive to compare SOAR’s 1995 adjudicator core competencies with those that the current government thought appropriate, as evidenced by the tools, templates and guides binder the government presented to the COBA Conference five years later. The government’s adjudicator core competencies listed in the latter documents (including, of course, the core competencies for rights tribunals adjudicators) read as follows (I have marked with an asterisk those competencies that seem to me to be particularly problematic for a rights adjudicator):

- Analytical Thinking
- Conceptual Thinking
- Concern for Image Impact*
- Flexibility*
- Information seeking
- Organizational Awareness*
- Organizational Commitment*
- Self-Confidence
- Self-Control
- Self-Development
- Steady Focus*

One can readily see from the foregoing that the policy in Ontario is not to require of candidates for adjudicator positions in rights tribunals the qualifications that most counsel would understand to be absolutely vital for such a position. That the latter is an accurate view of the government’s selection policy is made particularly clear by a passage in the government’s adjudicator and regulator learning strategy document – also part of the November 16, 2000, government package.

In the paragraph in that document devoted to explaining why “at least some level of basic orientation and training early in the term of new appointees” is important, one finds the following:

[Early orientation and training is important, the paragraph explains, because]

“[a]ppointees come into the agency sector from many walks of life, and are commonly unfamiliar with government, the role of administrative justice agencies, the agency decision-making process, and particularly with the expectations associated with the role of an appointee”. (emphasis added)

It is sobering to note that in the covering letter accompanying the release of the November 2000 documents, the Attorney General of Ontario thought it right to say
that the release of these documents – including the new set of core competencies for rights tribunal adjudicators set out above – represented "an important step in the direction of realizing the [Guzzo] Commission's vision" and were part of a "firm foundation for excellence in the delivery of administrative justice in Ontario".

There are many factors that may have contributed to the deterioration of administrative justice in Ontario since June 1995. However, it seems obvious that having the responsibility for rights tribunals and adjudicator appointments in the hands of a government whose Attorney General saw this November 2000 list of adjudicator core competencies as an important step forward could not have helped.