

Speaking Outside Decisions: The Limits of Adjudicator Free Speech

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Outline

- * The Puzzle
- * Some Examples
- * Toward a better framework

The Puzzle

- * “Dealing with off-the-bench speech from a *Charter* perspective, we do not think that there is any basis for concluding that judges, as persons, have lesser *Charter* rights than other individuals or have “restrictions on free speech and association” imposed on them. That is not the correct context in which to consider the matter.”
- * CJC Inquiry into Justice Ted Matlow, (May 28, 2008), at para. 118

The Puzzle

- * The role of the Tribunal/Regulatory Chair bridges adjudicative and policy communities – these adjudicators also often play leadership roles in their policy community (e.g. the Chair of the Labour Board in relation to labour policy)

The Puzzle

- * Chairs (and sometimes other adjudicators on a Board) regularly provide communications outside decisions in the following settings:
 - * Board communications/updates/speeches
 - * Parliamentary/Legislative Committees and Commissions/Inquiry submissions/testimony
 - * Government policy process (formal and informal)
 - * Academic, policy and/or popular writing
 - * Media commentary

The Puzzle

- * The tension between independence on the one hand, and the desire for coherent policies affecting a Board's jurisdiction on the other, often arises whenever new legislation or policies are being developed.
- * Should the Chair or adjudicators play a role, if asked?
- * Should the Chair or adjudicators ask to play a role?
- * Should the decision on what role adjudicators play be individual, collective or institutional?
- * Should the Chair or adjudicators disclose whatever role is played to stakeholders and/or interested parties?

Some Examples

- * 2013 - Chair of the Ontario Review Board criticizes Canadian Government reform of NCR - https://www.huffingtonpost.ca/diane-bederman/not-criminally-responsible-bill_b_2895678.html

Some Examples

- * 2008 - Chair of Canadian Nuclear Safety Commission removed on eve of testifying before Parliamentary Committee for “lack of leadership” - <http://www.cbc.ca/news/canada/nuclear-safety-watchdog-head-fired-for-lack-of-leadership-minister-1.748815>

Some Examples

- * 2006 - Chair of the Alberta Labour Board involved in undisclosed consultations around new labour legislation

<https://d3n8a8pro7vhmx.cloudfront.net/afl/pages/475/attachments/original/1263307118/sossinreport.pdf?1263307118>

Toward a Better Framework

- * Three principles toward a better framework:
 - * Transparency (i.e. whatever approach is determined to be appropriate to the context should be disclosed, with rationale, and opportunities for others to have input if helpful)
 - * Acknowledgment (e.g. stating at the outset the Board is not engaged in advocacy, and reiterating the Board's respect for democratic process determining policy direction)
 - * Restraint (e.g. question always should be what will enhance public confidence, add value to public discussion, and not impair independence, impartiality or statutory mandate of Board)