

The Administration of Justice Response to Public Perception — An Administrative Lawyer's Perspective

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Public perceptions place administrative tribunals under many of the same pressures as the courts. Lacking the history, the deep seated respect for their independence and the enforcement powers of courts, tribunals have had to experiment with different ways of responding to public perceptions. This is particularly so when public perceptions and pressure translate into political controversy or action.

Social changes customarily produce changes in the processes we use to resolve disputes in a just way. This is as it should be. Facilities and approaches must change and resources must be reallocated to meet changing needs, albeit with fidelity to basic human values of fairness. Much change is taking place within our traditional court systems. The changes in our quasi-judicial systems are equally profound.

Ever since legislatures started taking a serious interest in the administration of justice, they have deliberately allocated certain disputes outside the traditional court system to what I will generically refer to as administrative tribunals. In North America, this tendency became a flood with the wave of New Deal innovations that marked the end of the Depression. It was a trend that grew with the twin moves toward a more regulated economy and increased statutory protection for rights in the workplace, the environment, the stock market and so on.

More recently, economic pressures and new styles of management have led to a growth in Alternate Dispute Resolution (ADR). Some parties are now deflecting disputes away from the traditional courts (and indeed from administrative tribunals) into new, more flexible procedures for achieving fair and just resolutions to problems. Again, there are lessons to be learnt from why this is happening and how it is happening.

In some quarters, the term "inferior tribunal" has carried with it the implication that administrative tribunals and arbitrators are purveyors of an inferior brand of justice. Happily, that attitude has diminished. Tribunals and arbitrators have paid more attention to training, procedural justice and the perception of fairness. This reflects in their product. Now, as courts struggle to deal with case loads, demands for efficiency and accountability, and strained resources, it would be useful for them to look at what has been done in the areas of ADR and administrative law to see what ideas can be gleaned.

I am not advocating that courts become administrative tribunals, or judges become managers, private arbitrators or mediators. I am saying that, within this vast area of administrative law, there are some real success stories, some useful examples and some abject failures. It is worth a safari through the administrative law jungle to see what it can offer.

I. WHY LOOK AT THE ADMINISTRATIVE LAW EXPERIENCE

Despite the broad scope of superior court jurisdiction, the experiences of the majority of the population with law are at the lower levels of the system. Citizens' impressions of the value we, as a society, put on justice are often formed by personal experiences with institutions like the Immigration and Refugee Board, labour arbitrators, Unemployment Insurance Referees or Development Appeal Boards. If

those impressions are poor, the nation's faith in justice will be poor just because of this volume of exposure.

Administrative tribunals are also worth examining because of their diversity. They range from huge (like the Immigration and Refugee Board) to tiny (like the local Taxi Commission). They are often given wide discretion in how to conduct their quasi-judicial business. This flexibility has led to experimentation, the results of which may have significance beyond the initiating tribunal.

Tribunals, unlike courts, have normally had access to resources beyond their adjudicators and clerical staff. It is useful to look at how they have used those resources to improve the quality of justice they administer. In some cases these tribunals have used their resources to find out how their client groups feel about the procedures they follow. Tribunals have learnt much, for example, about racial sensitivities, problems with language (spoken and body!) and what can be done to make the administration of justice more accessible to those affected by it.

The diversity of tribunals has also led the administrative tribunal community to identify and talk about the fundamental values of justice they should embody. For example, the Ontario Society of Adjudicators and Regulators (SOAR) have distilled their "first principles" down as follows :

- Administrative justice requires that the adjudicative process be accessible
- Administrative justice requires that the adjudicative process be understandable and transparent.
- Administrative justice requires that the adjudicative process be lawful, fair, expeditious, efficient and affordable.
- Administrative justice requires that the adjudicative process provide an opportunity to resolve issues without a formal hearing and be as informal and nonconfrontational as the law and subject matter permit.
- Administrative justice requires that persons who are unrepresented by counsel or an agent not be unduly disadvantaged in the adjudicative process.
- Administrative justice requires that decisions in the adjudicative process be consistent.
- Administrative justice requires that all persons be treated with courtesy, dignity and respect, and with the utmost regard for the principles of equality and fundamental justice.
- Administrative justice requires that adjudicators and staff be competent, objective, impartial, accountable and have no conflict of interest.

- Administrative justice requires that adjudicators be independent in their decision-making, and the adjudicators and staff be free from improper influence and interference.
- Administrative justice is advanced by adjudicators and staff identifying problems and solutions respecting the governing legislation, process or structure.

This list shows the vigour and insight with which the administrative tribunal community has approached the perceptions of justice question.

The technological revolution is changing the way we all do business. It is changing public perceptions and public expectations. Consumers and businesses are growing accustomed to faster and more user friendly ways of doing business. Courts and administrative tribunals are experiencing these pressures at the same time. Once again, tribunals provide a useful pool of experimentation upon which the courts can draw. They are generally ahead of the courts in the use of new technologies.

We are also in an era of government cutbacks, consolidation of services and performance-based budgeting. Governments are deregulating in many areas. Tribunals are being consolidated and given new mandates. It may well be that the dividing line legislators choose between the courts and agencies will once again change. These choices will depend in part on the public's perception of the value it receives from the various styles of judicial and quasi-judicial decision making.

II. LET THE FORUM FIT THE FUSS

As a general proposition, the complexity of judicial mechanisms should be proportionate to the complexity of the case being tried — the forum should fit the fuss.

One of my early appearances in Alberta's Supreme Court (as it then was) involved an eviction. A mobile home park tenant protested his eviction caused by his tying up his best friend outside his home at night. The case under his lease was arguable. Not two minutes into the submissions the Learned Justice said bluntly "Why is the Supreme Court having to deal with a dog?" The court was intemperate, and the case was dismissed, but the point was significant. The law had been built on the assumption that all disputes over tenancies should go to one place and follow one procedure. Many of our laws and most of our court structures have been based on that premise. One law, and (increasingly with consolidation) one court and one set of procedures apply to all but the most minor disputes.

We have tended to proclaim the fundamental values of justice as universal and applicable to all disputes, large and small, public and private. We have allowed some of our rhetoric to get out of hand. The right to be heard, to know the case to be met, and to make a full defense, are all said to be too fundamental to be compromised. We set aside arguments based on efficiency as of no moment when the right to justice is involved. At the same time, we have no money for legal aid. These values often do

not accord with people's real life experiences or their personal priorities, or with government's allocation of scarce resources. Certain disputes are simply "not worth the candle" of a full blown trial with discoveries. It is easy to design different processes. It is more difficult to allocate cases fairly to the appropriate procedure against the wishes of the party that wants more lavish justice.

An appealing feature of ADR is the ability to craft a dispute resolution process where the forum indeed "fits the fuss". Obviously adverse parties can differ markedly on what they think a dispute deserves. Who should decide? Under our more traditional party driven litigation, the party that wants to spend the most tends to decide, by default. Stronger judicial direction or case management can even out the balance, but as long as all cases proceed under the same general rules, the scope for "streaming" cases according to their import is limited.

Many cases arise out of contract, or out of routine social interactions governed by a legislated framework. When parties choose to govern their contractual disputes by arbitration, they have an option normally unavailable to those who leave their dispute resolution to the courts. They can specify, at the outset and before any dispute arises, what type of dispute resolution process they want. They can designate a set of arbitration rules, limit or eliminate discovery, choose specialist or generalist jurists and impose time frames. The important point is not that they can opt out of the courts, but that once they have done so, they have a broad array of options about how to proceed in the event of a dispute. Our court procedures could be adapted to facilitate similar, but court-based options allowing different levels of judicial process. Parties could pre-contract into or out of certain types of litigation procedures. This would require the development of standard form contracts and permissive rules of court that respect and enforce the choices thus made.

Perhaps such choices should not just be left to the parties. A model used in the labour area is statutorily mandated arbitration, leaving the parties themselves to set the style of arbitration process. Governments are increasingly using similar options to mandate arbitration of consumer disputes, insurance issues and intergovernmental disputes. This is often driven by an aversion to perceived costs and delays in the court process. If the courts offered a selection of processes, including more streamlined options, legislatures might begin to direct such disputes, by statute, to such streamlined processes instead of to arbitration.

III. ACTIVE CASE MANAGEMENT NEEDS RESOURCES

Judges alone cannot expect to manage cases effectively. The process requires a close watch on scheduling, deadlines and keeping documents flowing to the right place. Administrative tribunals have been dealing with case management for some time. Many have developed sophisticated case management systems that show the status of all the proceedings that are pending, predict hearing times, monitor fluctuations in the type of volume of applications and so on. None of this can be done without support staff, computer resources and management support. Many of the tasks are either uneconomical for judges to perform or unsuited to their temperament.

There is a difficulty getting such resources in an age of restraint. But behind that basic problem is a more fundamental concern for the protection of judicial independence. In this area, as well, administrative tribunals offer some useful models. Some tribunals are tied directly into departmental budgets, and their resource

allocations are heavily influenced by government's day-to-day policy choices. This can and sometimes does compromise their independence. In other cases, tribunal chairs are afforded full "deputy minister" status for personnel and budget purposes, and need do no more than defend their annual budget. Several chairs of major tribunals have struggled with how to structure an independent organization, free of political interference backed up by the threat of fiscal penalty. Chief Judges could learn valuable lessons from their experience.

A second underlying problem with courts acquiring resources is not independence from outside, but independence within the court itself. Case management, and the resources it requires, also brings an ability to monitor and influence who on the court is doing what. Again, many tribunals have had to come to grips with the internal collegiality issues this raises. Resources to manage may come at the price of a bureaucratic judicial hierarchy where individual judges lose all independence to their computer equipped chiefs and administrators.

If courts strive to become more accountable for what they do they must be given the resources, and the ability to manage those resources independently, to achieve their objectives. Most major administrative tribunals administer their own budgets without letting budget debates threaten their independence.

IV. MEDIATION, ADJUDICATION AND CHINESE WALLS

There is a growing perception in the corporate and governmental community, as well as in the public at large, that a higher proportion of cases could be mediated to settlement instead of being resolved by the extravagant process of litigation. How do the courts respond to this perception?

Several legitimate fears arise when talk moves to judicial mediation, case management or other "intervention". First, judges are not necessarily trained to be case managers or mediators. This is true, but just as some lawyers learn to become effective mediators, so can some judges. We should not expect all judges to work effectively in all roles, accepting an inevitable degree of specialization in such matters. Hopefully, we are now passed the point where judicial training is seen, of itself, as an affront to judicial independence.

If there is to be judicially sponsored mediation of some kind, there is no necessity that it always be performed by judges. In most administrative tribunals that have a strong adjudicative function, the mediation options are customarily handled by seasoned case officers rather than members or chairpersons. The courts have the facility to appoint referees, practice masters and in some cases expert advisors. Adopting a mediation function based on the same model would not be too great a leap.

Administrative tribunals have been very active in exploring ADR options. Mediation is a skill in itself, quite distinct from adjudicative skills (although the two are not mutually exclusive). Once the tribunal had the necessary skills available, the

concern then turns to how to combine effective mediation, with the full and frank discussions it necessitates, with the adversarial process used to adjudicate. More precisely, the challenge is how to stop the two processes from overlapping and corrupting each other.

This requires a clearly understood protocol about the relations between those involved in the mediation stage and those who will be involved in adjudication. Some argue that the two can never be mixed, that at the very least there must be, and be seen to be, an effective Chinese Wall between the two. I do not accept that rule as universal. It is probably true in those tribunals that have a high regulatory or enforcement jurisdiction, where proceedings can be "quasi-prosecutions". It is less so where the subject matter is a dispute between two parties with little or no regulatory component.

While it must be clear that any court-based mediation will not result in a brown paper envelope on the judge's desk full of the inside scoop on the mediation, it is not essential that mediation processes be free of the courts entirely. What is needed is a discussion of the proprieties involved that makes sure litigants and their representatives understand the ground rules and the protections. The administrative tribunal experience is that it is uncertainty and inconsistency in the relationship between mediation and adjudication that causes perception problems, not the fact that they reside within the same institution. When such a mediation function works it is usually a source of high satisfaction among tribunal users.

IV. THE ROLE OF PRECEDENT

If legal arguments are seen as prolix and legal expense inordinately high, at least part of the blame must go to the role prior decisions play in our system. There are two aspects to this. The first is the sheer volume of decisions and their increasing accessibility. The other is the continued strength of case based precedent.

Technology is a mixed blessing. Computerized indices, case citators and electronic publishing have resulted in an exponential growth in reported cases. Researching, handling, arguing, reading and digesting this volume has placed a great load on the legal system. Seminal cases sometimes become swamped by mountains of fact specific dross. (In this I fault those who cite such mountains more than those who write them, but probably both share some blame).

There is a commendable trend in some courts to move away from the rule to decide as little as possible in each given case and, in areas that generate a lot of litigation, to give more general guidelines for applying the law or judicial discretion. Such "benchmark decisions" serve a helpful role by encouraging settlement in some cases and in focusing the litigation in others.

Some years ago, quite rightfully in my view, Alberta's Court of Appeal banned the publication of memoranda from the bench, and refused to receive such "precedents" in argument. It wished to preserve its right to choose the cases where it

was setting a precedent, and save itself from having to write full reasons in all cases. I wonder if we have not got to the point where we should adopt a mid level of decision. Judges might say, expressly : I am setting a general precedent here or, this is a fact specific case which does not set a precedent, my review of the law is just a synopsis. Without this, there is the danger that every synopsis of the law casts another gloss. What I advocate is a more formalized "leading case" category and a recognition that citing lesser cases serves, at best, an argumentative function.

On this point, I would like to comment on precedent and the position of administrative tribunals. It is quite easy for one judge in a court to disagree with a sister judge. They are not bound, and can go their own way. Administrative tribunals are in a less enviable position. The rules of judicial review — where decisions are often upheld as not patently unreasonable — imposes much ambiguity on the administrative process. A tribunal decision may decide an important point for that tribunal that affects its day-to-day approach to hundreds of cases. One court may quash on the point, another uphold and a third give the backhanded compliment : while I might have decided differently, it is not patently unreasonable. Perhaps this could be relieved by directing judicial review to the appellate level, as is often done.

VI. PREVENTATIVE LAW, COMMUNICATION, RULE MAKING AND CONSISTENCY

An area where the courts and administrative tribunals differ markedly is their role in promulgating the body of law they administer. The administration of justice is about resolving disputes that the parties have been unable to settle.

My experience in administrative law is that a significant proportion of the cases that go to hearing were caused or exacerbated by lack of understanding of the procedures or the law involved. I sense the same is true in many areas of the general law. It is obviously true that many institutions and some individuals receive and take good counsel before they get themselves into legal difficulties. But many do not. They act on false assumptions and simply presume the law is what they think it ought to be.

Administrative tribunals have adopted a series of steps to make the laws they administer clearer and more accessible. They have done so by :

- Adopting rules covering substantive areas of law, codifying precedent as it moves forward.
- Adopting and publishing non-binding but generally highly persuasive information bulletins, guidelines, criteria to be applied and practice directions.
- Providing user friendly forms for disputes that arise with regularity.

- Hiring communication specialists to ensure the press has the necessary background to understand and report accurately upon new decisions or shifts in policy.
- Conducting policy making hearings to help settle the practice in areas causing adjudicative difficulty or procedural bottlenecks.

I believe the courts are cautiously moving forward in such area. This is appropriate, and again, they might find some inspiration and comfort in the administrative tribunal experience.

The challenge is to communicate the courts' decisions in a way that will help settle normal disputes without blocking abnormal ones. This requires consistency of decision making and clarity of communication. A good communication process is a form of preventative law. By this, I do not mean putting chief justices on talk shows. Let me illustrate my point by example. In Alberta, the courts experienced difficulty with the volume of cases over quantum of maintenance. Judicial diversity removed the incentive to settle. Conflicting decisions gave scope to most arguments. The Court of Appeal's decision to issue a "benchmark ruling", with general guidelines capable of general (but not universal) application helped settle the practice in this important high volume area.

The trial court built on this with standard forms for chambers motions that capsulized the important information for such applications. This expedited cases. More importantly, it also helped settle cases as predictability increased. The Court could go one step further and publish guidelines based on its decision in a form practitioners could easily explain to their clients. Many administrative tribunals have eased their case loads by publishing such practice guidelines or by adopting substantive rules about how they will, absent the exception case, approach the law in a given area.

Any such communications by the courts would have to be careful, well done, and up to date. They would require collegial acceptance and resources. The form of communications can be an important factor in their effectiveness, as well as their content. The experience of many administrative tribunals suggests that this approach can lead to improved perceptions and a reduction in the flow of settleable cases.

VII. MULTIPLE FORUMS

My comments so far have been on what can be learnt from the ADR and administrative law experience. There are also negative lessons to be learned. Dickens's description of the English Courts before the *Judicature Act* gave impetus to the sweeping amalgamations and reforms that followed. If Dickens was writing about our current system of administrative law he would voice some of the same complaints. Our rush to specialization and governmental regulations has given us a vast array of tribunals, agencies and boards, often with exclusive but nonetheless conflicting jurisdictions.

We are now at a point when fiscal concerns are driving tribunal amalgamation and rationalization. The Supreme Court of Canada has been addressing the problems raised by conflicting decisions within tribunals, the question of the extent to which tribunals can enforce the full law, including the Charter, in matters within jurisdiction, and conflicts between the decisions of two different tribunals. In this debate, we should seriously think about the tools our laws and statutes will call upon to resolve the dispute of tomorrow. While administrative tribunals will, in my view, continue to handle a significant portion of the nation's (quasi-judicial) dispute resolution, it is a good time to reassess some assumptions.

Again, an example. When legislators first, and cautiously, ventured into the arena of human rights legislation, they assigned most adjudication to specialized human rights tribunals. The argument was that such tribunals would be more sensitive to the cultural issues involved. This decision predated the Charter, which now vests many such sensitive decisions in the ordinary courts. In other situations, cases have been assigned to specialized tribunals, only to be followed by a trial *de novo* to the Superior Court.

It is an opportune time to look at the fundamentals of our justice system, including the various agencies of administrative justice. Some jurisdictions (Ontario, for example) are doing just that. This review should ask what types of disputes should be allocated to what type of judicial or quasi-judicial process. It should distinguish cases based on their impact as well as their subject matter. That same review should assess what lessons can be learned from the public's perception of various styles of court-based and administrative justice.

