THE INTERSECTION OF HUMANS RIGHTS AND PROCEDURAL FAIRNESS IN TRIBUNALS

Gary Yee is the Chair of Ontario's Social Benefits Tribunal. He has held positions in legal clinics, the Ombudsman's office and five different tribunals. In 1999, Gary received the SOAR Medal from the Society of Ontario Adjudicators and Regulators for his contribution to Ontario's administrative justice system. He is on the Board of the Council of Canadian Administrative Tribunals (CCAT) and co-chair of the 2011 CCAT Conference.

ABSTRACT

This paper examines the intersection of human rights and the general procedural rights of natural justice and fairness in adjudicative tribunals. Tribunals are expected to be impartial and independent, but also responsive to societal values. This challenge can be met with proactive and systemic approaches to promote diversity and engage in stakeholder relations.

I. INTRODUCTION

In such a diverse society as Ontario, what are the competing rights issues faced by adjudicative tribunals that try to be responsive to the diversity of the parties and still operate wholly within the rule of law with an impartial and fair process? This short paper will seek to examine the intersection of human rights and the general procedural rights of natural justice and fairness in adjudicative tribunals.

II. TRIBUNALS, NATURAL JUSTICE AND FAIRNESS

The competing rights issue in tribunals must be examined within the legal context of tribunals. A tribunal of course is bound by its enabling legislation. But more importantly, for the issue of competing rights, a tribunal is bound by the common law as it relates to the principles of natural justice and procedural fairness. It is this latter area where we find the most fruitful discussion about competing rights in a general sense. A party's right to natural justice and procedural fairness before a public decision maker is one of the key components of administrative law.

Natural justice basically involves the right to be heard and the right to an impartial decision maker. The right to be heard includes the right to know the case against you and the opportunity to respond to that case by presenting evidence and making arguments. This is very flexible and it depends upon such factors as the nature of the tribunal or government department, the governing legislation, the decision that is being made and its impact on the party, and so forth.

The second branch of natural justice is the right to an impartial decision maker, which is basically the rule against bias. An adjudicator is disqualified if there is actual bias or a reasonable apprehension of bias.

In addition to these legal limits on tribunals, there are practical and political factors that define the reality of tribunals. Adjudicative tribunals have a unique place in our system of justice and government – pulled by the demands and benefits of each of these institutions, and trying to find a place in the nebulous space between them. As noted below, the result can be conflicting expectations that reach to the core of a tribunal's existence.

III. ROLE OF PUBLIC OPINION AND SOCIETAL PRESSURES

If a tribunal can be responsive to societal values in a systemic sense (as opposed to individual cases), then it can effectively resolve competing rights issues. Democracy and democratic principles have legitimate roles in this area also. But minority groups often face an unfair battle in many of the democratic arenas – whether it is the media or a referendum. In contrast, courts and tribunals can provide a more level playing field with protections for adjudicative independence, and a process that may have more integrity and principle than the potential tyranny of the majority.

Adjudicative tribunals, like courts, depend upon independence and impartiality for their credibility or legitimacy. It is the tribunal's adjudicative independence that is essential to its identity. Otherwise, it would just be like another part of the government, and its members would be like other public servants.

Judges are provided lifetime security of tenure and protection from political interference so that they may make decisions without bending to public pressure. Tribunal members in most jurisdictions do not have a similar security of tenure. But regardless of legislative protections or government practices, there is certainly an expectation by the public – as well as a legal obligation imposed by the courts – that tribunal members act independently from government and be impartial when dealing with the parties, which in many cases would include a branch of the government.

At the same time, tribunals are easy targets when they make what may be unpopular decisions, and they may face criticism – usually unfounded or unfair – that they are out of touch with societal values. Because the role and identity of tribunals is often a hybrid one, we end up wanting tribunals to be sensitive to public opinions or government policies but still act independently from public opinion or government policy. There is a dissonance between these expectations and demands that is rarely identified or openly addressed.

We may expect or want judges and tribunal members to be responsive to society but that should not be equated with having these adjudicators be swayed by popular opinion about the specific cases that may be before them. There are many appropriate ways in which tribunals can be more responsive to societal values – these would be systemic ways that fully respect the impartiality and adjudicative independence of tribunals.

One approach is to ensure that the tribunal has members and staff who reflect society, and who have a background and understanding that is relevant to the area. Having tribunal personnel who are qualified and expert in a narrow sense will not be enough when trying to achieve legitimacy in dealing with value-laden issues of human rights and inclusiveness. There is both a "pure justice" rationale and "practical justice" rationale for diversity in tribunals. As an example of the former rationale, a decision maker who is culturally competent will provide better hearings and better decisions. And on a broader public policy or political basis, a tribunal whose personnel is reflective of its stakeholders will have more legitimacy and credibility.

Another way for tribunals to be responsive to societal values is to engage in stakeholder consultations, public education and media relations. It may not be surprising to know that tribunals traditionally shun publicity. This is manifested in the often-repeated fear of not making the front-page news and thereby causing the responsible Minister to answer questions about the tribunal. At the same time, there is a trend towards tribunals becoming more transparent and open about their processes, and taking deliberate actions with respect to media and community outreach.

These external activities, if done effectively, can have an impact on the overall reputation of the tribunal, on how well-informed the counsel and parties are, and on developing and implementing changes to practices and policies.

It is especially important for tribunals that deal in controversial areas or in highly polarized settings to have a proactive communications and stakeholder relations strategy. These tribunals are seen as fair game in the media and political arena. And since tribunals are so limited in how they can respond to case-specific criticisms, the best strategy will involve actions that enhance general reputation and foster supporters in the media, legal groups, community groups, and the government or political realm. Of course, all of this must be done within the limits of a tribunal's unique needs to always maintain its integrity as an impartial and independent decision maker.

IV. FOCUS ON PROCEDURAL ISSUES, NOT SUBSTANTIVE ISSUES

In discussing specific issues about tribunals dealing with competing rights, a discussion about substantive decisions by tribunals will not be very instructive because it would tend to be too subject-matter specific. Indeed, not many tribunals have true discretion in their substantive decisions to weigh competing public interests or competing rights. This would be more common in tribunals on the regulatory end of the tribunals spectrum – such as those dealing with public safety, land use, telecommunication regulation, and so forth.

On the other hand, in Ontario (and other provinces), parties may challenge the application of a law by saying that it is discriminatory under section 47(2) of Ontario's *Human Rights Code.* In those cases, the tribunal must explicitly consider the issue of human rights – and in some cases, competing human rights. While there is undoubtedly some interesting discussion that can occur in this area related to the tribunal's substantive decision making, it may be very subject-matter specific. The focus of this paper is not on challenges under the *Human Rights Code*, but rather on human rights in general and how that conflicts with or influences the procedural rights of parties. This is consistent with the focus of administrative law – which is on the procedural rights of the parties.

The discussion of rights becomes more interesting and relevant when we focus on process because that is also the area where tribunals have a great deal more discretion. It is only with the presence of discretion in the true sense that competing rights issues can become very significant. And it is only when the decision maker has broad discretion that the impact of societal values or public opinion becomes an interesting issue.

In an area with little discretion, the law may lead to a result that is seen as harsh or unfair, because tribunals are legally obliged to find the facts and to apply the law to those facts. The decision maker may have little choice in these situations – it is not a matter of whether he or she is insensitive or mean-spirited; it may simply be that the tribunal has no discretion and that it is simply upholding the law.

In contrast, procedural matters are rich in discretion. The rules of natural justice and procedural fairness are notoriously general and elusive. There is no single organized source with numbered paragraphs such as would be found in an Act or regulation. Instead, you must read many long court decisions, some of which may conflict with each other, all of which are open to interpretation, and most of which are specific to the particular case's fact situation.

There are several common situations involving adjudicative discretion where human rights may intersect or overlap with procedural rights:

- adjournment requests
- extension of time deadlines for filing materials or forms
- accommodation requests for persons with a disability
- reconsideration requests.

As illustrations, one can consider what a tribunal should do in the following situations:

- a party with anxiety disorder has a panic attack during a hearing and wants to stop, but the other side will be prejudiced by any further delay, and asks that the hearing continue after a short break
- a party asks for an extension of time to file an application for a postponement of the hearing date because his depression caused him to lack the motivation and energy to get someone to help him in a timely manner
- a party asks for an interpreter even though she understands English adequately, but would be more comfortable in a stressful situation to have some assistance
- a party starts using racially offensive words in his testimony and submissions
- a party enters the hearing room with her face covered by a veil that shows only her eyes – the tribunal member sometimes finds it difficult to understand her because she speaks very softly and the veil makes it even more difficult to hear her; also, her credibility is the key issue in the hearing.

These examples raise issues such as how to accommodate for disabilities and for diversity, what are the rights of one party when faced with a request by the other party that is based upon their human rights, and how does the tribunal deal with the intersection between human rights and procedural fairness when these two rights may conflict.

It is not easy to answer the questions that arise from these above examples. This is an area that is complex and developing. There is potential to develop practices and guidelines to address some of these areas specifically or to put forward some general principles and directions. But as with all areas of natural justice and procedural fairness, the multitude and diversity of tribunals and their specific circumstances will make it very challenging to provide any truly practical assistance. At this stage of dealing with these issues, it marks progress to at least begin to identify the problems, discuss the framework and concepts, and move towards a principled approach that respects both the human rights of a tribunal's parties and the natural justice procedural rights that are at the core of a tribunal's identity.