

**"COURTS, BOARDS AND LABOUR:
RECONCILING COMPETING CULTURES"**

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There is a predictable phenomenon that emerges when someone enters a new environment. The process of exploring the intricacies of the new structure is illuminated by the prism of prior experience. What I entered was not only the world of labour relations, it was housed in an institutional framework very different from the one I had just come from. As a descendent of the court system, I had developed certain loyalties to the judiciary, the adversarial process, the right of appeal, and the legally trained bar. I was no stranger to dispute resolution or hostile adversaries, but I approached them through a formalistic model of decision-making, with strict rules of procedure, accepted notions of reviewability by a higher court, and clear evidentiary guidelines. What I faced when I joined the Labour Board was a very differently constituted legal environment called an administrative tribunal.

The expectations of the public and the parties were nowhere near as clearly defined, the rules significantly less formal, and the policy component substantially increased. Over time, I become intensely institutionally patriotic, and became totally preoccupied with how the Board works, who it works with, and its proper role in the legal system.

What emerges is a fascinating collage of conflicting cultures - government, courts and tribunals. Each branch understands the other all too little and the result has often been at the expense of labour relations. Is the introspective examination worth the effort? Undoubtedly. Without understanding the process and the competing claims to it, the victim could well be the very object of the entire exercise - harmonious labour relations and the encouragement of collective bargaining.

The origin of labour law is, like most law, political. The Labour Relations Act was promulgated as a governmental response to the rise in industrial unionization before and especially during the second World War. It became increasingly obvious that unions had become formidable players in the workplace and, in the absence of a regulatory mechanism, capable of generating unsettled and unsettling consequences. The first political response in Ontario came with the establishment in the early forties of a labour court at the Supreme Court level in which judges presided. It did not take more than one year to discern that both the mechanism and personnel were inappropriate for the resolution of labour disputes. The limitations of a formal and generalized court to deal with what were both policy and legal matters became apparent both to the adjudicators and to the parties.

The next response was to establish an administrative tribunal called the Ontario Labour Relations Board. Administrative tribunals, especially after the war, generically became a favourite policy tool by government in which to vest responsibility for implementing decision-making the overburdened courts and bureaucracies had little time for. But their institutional character was never clearly defined beyond filling a vacuum other bodies were happy to vacate. They were all designed to be specialized, expeditious, and informal. But the extent of the informality and the relationship both to the Courts and governments had been an ongoing identity crisis.

What exactly is an adjudicative tribunal and where exactly does it fit. Now that tribunals are a fully accepted partner in the public policy arena, they have at least begun to understand more clearly their own identity needs. As adolescent organisms struggling to develop systems and perceptions compatible with the stated mandate of their board, they often reacted interstitially to the demands placed by Ministers, the courts, or their constituencies. They made some mistakes - most of them innocent and most of them arising as doubtful responses to people and institutions they thought they were accountable to. But as they came to understand more clearly to whom they were and were not accountable, they were then able to resist or acquiesce on a principled basis. True, they were creatures of the legislature.

Their mandate flowed from legislation designed to establish policies in a specialized area and they were certainly compelled to act in accordance with the legislative guidelines their enabling statute outlined. To this extent they are creatures of government executing governmental policy as it is from time to time declared through amendments to the statute. The government of the day, as the accountable body responsible through electoral scrutiny for implementing public policy as it then perceives it, is free and indeed required to adjust legislation in whatever way it deems to be in the public interest. But in consigning to adjudicative bodies exclusive responsibility for decision-making in specialized areas, it has declared that to the extent that a decision is within the mandate of that tribunal, it is no longer the government's responsibility. There is no overlap of decision-making authority.

The government makes the law that the tribunal is bound to implement; the tribunal makes the decision about the appropriate application of the law. Ministers are neither responsible nor accountable for the correctness of these decisions. They need only say, as they frequently do, that the matter is one for the tribunal to decide, just as Attorneys-General disclaim responsibility, or the perception of responsibility, for court decisions.

If however, Ministers responsible for legislation are persuaded that a tribunal, or a court for that matter, has made a decision that illuminates an unanticipated or unexpected consequence, they are perfectly within their rights to attempt to correct the consequence through amendments to the law. The design belongs to government, the interpretation to the tribunal. Tribunals explicate public policy; governments articulate it.

There is much to be said for this independent, arms-length relationship between governments and tribunals. Their mutual credibility depends on it. The tribunal's constituency in its area of expertise expects that it will get a fair hearing, and that the only people it has to persuade are the adjudicators hearing the case.

It would be unacceptable at the least and a violation of natural justice at the most if parties to a hearing thought the government was a spiritual partner whose advice and admonitions formed any part of the panel's deliberations. The hearing is designed as a forum to determine whether rights exist or have been violated. The issues raised are often of a delicate or controversial nature, and the tribunal, like the court, must feel free to make an unpopular albeit legally justified decision notwithstanding the prospect of politically difficult side-effects. Nor can Ministers be expected in their role as macro-political architects, to find the time to give both sides to every legal dispute an opportunity to present the full story. That's what tribunals and courts are for, and it is in both their and the governments interests that both act in the arms-length way their roles and their public expects.

The specialized public who appear before specialized tribunals do so understanding that the tribunal and not the government is making the decision, and they conduct themselves accordingly. In the determination of their rights they want and need impartial adjudication based not on political perceptions but on the expert assessment of an independent and independently-minded group of people concerned only with the language and objectives of the statute they administer.

They expect adjudicators with fixed terms whose renewals do not depend on ideologically acceptable decisions, who are sufficiently remunerated to reflect the importance of the task and the expertise they bring, and who are appointed because they have meritorious qualifications, regardless of and notwithstanding partisan affiliation.

What of the particular tribunal the labour community considers its court. It has several distinguishing and unique features. It is, firstly, tripartite. The adjudicators are selected for their experience and skill from three communities - labour, management and law. The labour and management representatives are lay members who bring to the decision-making process years of background in their respective areas. They have first-hand knowledge of the workplace and have lived the realities of many of the situations that translate into legal problems. They are practical, they are knowledgeable, and they are committed to the Labour Relations Act. Although they are "partisan" appointments in the nature of their expertise, having come to the Board as representatives of either the labour movement or employers, their role at the Board is not to function as knee-jerk representatives accountable to either community.

As Justice Roach said in 1957 decision: "the nominees of management and labour represent neither. As members of the Board they are independent of both. They occupy a quasi-judicial position and in the discharge of their duties must act judicially". Their role is to assist in deciding a particular problem under the Act by bringing into the legal equation the practicalities and wisdom of their experience. Together with the labour law expertise of the neutral Vice-Chair, the experience they bring assures that the legally correct interpretation is also the sensible one in labour relations terms. It thus becomes an informed, collegial judgment of three persons on a panel who combine reality, law and common sense, and help develop the rights and rules of the Labour Relations Act in a way which is credible and has integrity for the labour relations community.

In their decision-making, all adjudicators at the Board recognize that in 100% of the cases, 50% of the parties will be disappointed in the result. It is a truism of adjudication that someone wins and someone loses. This does not argue for reticence or caution, it argues for process.

If the Board cannot please everyone in the results of every case, and it cannot, it can at least strive to ensure that everyone feels that the process is fair - that they had an opportunity to make their case, and to hear and attempt to meet the case against them. To those who harken wistfully to days of greater informality, one can only observe that one person's informality may be another person's denial of due process.

In an area as contentious and adversarial as labour relations can sometimes be, it is critical that in the determination of duties and rights, duties and rights each party clings to tenaciously, there is a process available that deprives or enforces them in a way which is neither arbitrary nor seen to be arbitrary. The results in any case may be cataclysmic to a union, company or employee, and every precaution must be taken to ensure that the result flows from respected and respectable sources. Although the Board was designed to be and must be expeditious, it was never meant nor permitted to be expeditious at the expense of a fair hearing. Delay must be checked through scheduling adjustments, not avoided by transgressing the right to a fair opportunity to present and meet a case.

The ideal is still, in the Board's view, a settlement between the parties. Consensual arrangements are inevitably preferable to imposed ones, and the Board's labour relations officers are successful in negotiating settlements in 80% of the almost 4,000 cases the Board deals with annually. But where the parties cannot settle, for whatever reason, they enter the realm of adjudication, and are entitled to a process in that realm that acknowledges their right to be heard.

We need not be and are not as formal as the courts, and we consistently design processes and develop rules that are uniquely suited to the issues we decide, regardless of the analogous regulations the courts observe.

But in our quest for a process less rigorous than the courts and more apposite to the informality expected of tribunals, we cannot disregard the central fact that as a quasi-judicial adjudicative body, we are obliged by law to provide for the determination of rights as quickly as possible, as expertly as possible, as wisely as possible, but also as fairly as possible.

What about the correctness of our decisions. As I will attempt to show later in this lecture, correctness as an absolute value exists no more in tribunals than it does anywhere else. There are more or less politically acceptable decisions, understandable decisions, creative decisions, philosophically cohesive decisions, or internally consistent ones. But there is no such thing as an absolutely right one.

It is as right or correct as it appears to be to the decision-makers when they synthesise the evidence, the law, their perceptions, and their experience.

And this is what the Ontario Labour Relations Board was designed to do as a tribunal: to make decisions interpreting the Act consistent with its expertise and the facts, and above all, in accordance with the preamble to the Act which speaks to the furtherance of "harmonious relations between employers and employees by encouraging ... collective bargaining". It is expected to be to the final arbiter of matters arising under the Act and in this finality is protected by two privative clauses giving it exclusive jurisdiction and declaring its immunity from review by the courts. There is no appeal from labour Board decisions.

Privative clauses are statutory reflections of a number of assumptions about the culture of the Ontario Labour Relations Board: that tribunals like the Labour Board were constituted to render expeditious procedures and decisions, finality that is undermined by delay through appeals; that tribunals like the Labour Board have adjudicators who are selected for their experience and expertise, a specialization that can be undermined when reviewed by a legal generalist unfamiliar with the unique terrain; and that tribunals like the Labour Board are best constituted and staffed to understand the Act and its objectives and render as consistently principled decisions as can be expected from a unscientific and human process, a recognition that risks being undermined by a culture like the courts which tends to view correctness as a legal rather than a policy principle.

This takes us into an examination of the other culture with which the Board sometimes collides: the courts. Whereas the risk to credibility from governments came from a bureaucratic or Ministerial desire to keep tribunals as closely reflective of the prevailing policy and political imperatives as they could attempt to influence, the courts posed a threat through their zeal to blend labour relations in the blender of traditional legal principles.

Bear in mind what the courts understand to be part of the decision-making hierarchy. At every level of judicial decision-making except the Supreme Court of Canada, there is a right of appeal, an appeal not only of any procedural rulings, but the right to have the final decision replaced with a different one.

All judges understand this cultural imperative, and although no judge relishes the prospect of an overturned decision, he or she recognizes the appeal process as a legitimate safeguard against the potential for error.

When judges are confronted, therefore, with an organism like a tribunal which presumes in its area of expertise to be the final arbiter of a given problem or issue, when privative clauses appear to be worn as shields from judicial scrutiny to protect this expertise from the generalism of the courts, judges are being asked to ignore their own culture and give to tribunals a deference they are not themselves routinely accorded. This is no small challenge. Courts too often seemed unable to resist the temptation to replace a tribunal decision they did not agree with, with one they would rather impose.

And they did it partly because they made too narrow a distinction between judicial review and appeals, and partly because they did not sufficiently respect the tribunal's expertise or values.

It is a perfectly normal response, this desire on the part of the judiciary to substitute its opinion for that of a lower tribunal. Descartes might have said "I judge therefore I review".

The temptation for courts may be to offer a superior quality of decision, but the test is supposed to be a principled one based on sound administrative law, not of one-upmanship.

I am not unaware that the test for judicial review is not as simple as it sounds - in a 1983 article Dean Rod Macdonald of McGill found 28 examples of what constituted jurisdictional error. But if you look closely, what you will find is the wolf dressed up as the sheep of jurisdictional error to disguise a wish simply to replace a tribunal's decision with one a judge is more personally comfortable with.

Aside from violating the objective that specialized tribunals render expeditious hearings and final decisions in their area of expertise, protected not only by their philosophical mandate but by what has turned out to be the paper tiger in private clauses, there is another sinister side-effect to the courts ignoring the purpose of tribunals and administrative law.

And that is in the effect on the lawyers and parties who appear before these tribunals. Leaving aside for a moment what is obvious, namely, that the tribunal itself through the way it conducts its hearings and gives its decisions is the most important progenitor of the respect its community will give it, that community cannot help but notice the extent to which the courts overturn, as opposed to review, decisions the tribunal, based on its expertise, is supposed to be making with finality. That community expects the courts to defer to the tribunal's specialized and independent judgment calls and when the courts violate that expectation, whatever the sophistication of the language they use to find a way around the existence of the privative clause, the community's respect for both the tribunal's expertise and its independence is necessarily reduced, and as a result, so is the tribunal's credibility and effectiveness to do the job it was set up to do.

What is the problem with this approach? It is not in the right to judicial review, a right we ought assiduously to respect in its original goal of protecting parties from serious procedural violations and from patently, and I stress patently, unreasonable decisions.

But one judge's patent unreasonableness may be another tribunal's expert and specialized opinion, an opinion, moreover, that was meant to be final and binding both in law and in theory. Judicial supervision is not, and was not meant to be, judicial substitution. The problem lies in the courts' unwillingness to appreciate that tribunals have been established to deal with specialized issues, many of which do not lend themselves to the usual cerebral exercises judges invoke in assessing contract breaches, negligence claims, or criminal liability. Many of the decisions tribunals are called upon to make, after all, may appear to be counter-intuitive to a generalist.

It is not that tribunals make decisions violative of common sense, it is that the specialized terrain may have its own unique common sense, with road-maps appropriate only for its particular navigation. If, as a policy matter, governments had felt these matters appropriately belonged in a more generalized judicial forum, that is where they would have been consigned. But they have not been, specifically because governments understood that some issues are best left to a different and final process more apposite to the special issue to be decided. And having given tribunals the sole responsibility for decision-making over that area precisely because they and better identify, administer, and adjudicate a particular policy issue, it violates both the territoriality and credibility of the tribunal if the courts feel little reluctance to impose their own sensibilities and conclusions on the tribunal.

Until the intervention is replaced by respect for, and understanding of the unique perch tribunals occupy in the legal system, tribunals are rendered anaemic in their capacity to be the final arbiters in their own areas, areas that require both speed and integrity in decision-making.

It is no accident that the court only came to reassess its approach to the Labour Board, as it has in recent years, after the appointment to the Bench of judges who had a labour law background and understood that the best judicial response to labour relations was deference to the decisions of persons who did nothing but.

In an effort, however benign, to require the Board to conform with the purity and supremacy of law, judges before 1980 had all too frequently ignored the intricacies and delicate policy balances inherent in labour in favour of an approach that was more consistent with their own more generalized and often less empathetic assumptions. We have only to look at the majority of the decisions judicially reviewed before 1979 to see both the unwillingness to recognize the unique sensibilities and then the trend to judicial deference after decisions by Justices like Osler, Laskin, and Dickson.

What the decisions show is that in the early years there was clearly a judicial reluctance to accept the expertise of the Board, partly because administrative tribunals had not earned judicial respect as contemporaneously authoritative decision-makers, and partly because labour law in general and collective bargaining in particular had not earned judicial sympathy as values to be promoted.

In these earlier decisions, one sees a clear attempt in the name natural justice and due process to impose the same procedural restrictions on parties as they faced in the courts, largely as a formula for overturning results with which the courts did not agree. Ironically, as the courts attempted to impose credibility on the Board by insisting on strict observance of judicial rules, they undermined it by signalling that the Board's expertise could only be acknowledged if the court agreed with the result, a result Parliament had declared through privative clauses the parties should be prepared to live with as final and binding.

Over the decades, the courts have come increasingly resigned to the philosophical view I have earlier expressed, that in the absence of human infallibility and therefore in the absence of the possibility of absolute rightness or correctness, it is wiser to defer to the decision of experts unless they have made a patently unreasonable decision. And so, whereas in the 50's, 33% of judicial review applications of Board decisions were granted, in the 60's it reduced to 20%, in the 70's to 15%, and in the 80's to 3%.

Conclusion

Each of government, labour boards, and the courts, I think, have participated in the development of labour law in a way they consider principled based on the tenets of the culture each inhabits. Governments rightly believe that their credibility with the public, a public itself unclear of governments relationship with bodies as anomalous in the legal and political system as tribunals are, demands accountability for the promulgation of sound, consistent and effective labour relations policy. Courts rightly believe that their credibility rests on ensuring compliance from judicial and quasi-judicial bodies with established legal principles and the spirit of the governing legislation.

And the Labour Board rightly believes that its credibility flows from its capacity as the expert and exclusive legal interpreter of the Labour Relations Act to render final, authoritative and expeditious decisions. The problem arises where each attempts to stretch its reach beyond its grasp. The intensity of the effort to achieve a peaceful accommodation in this generation has not come without its painful moments for the objective of all these energies - harmonious labour relations and the furtherance of collective bargaining. But most of the identify crises appear by now to have been resolved into a workable division of territoriality.

One can only hope that the respective and now respected institutional spheres of purported influence will over time retain their hegemony or deference, as the case may be, and that their grateful beneficiary will in fact prove to be a labour relations community with effective, distinctly defined and clearly understood access to all the instruments of labour policy in a way which makes it credible.