

What We Talk About When We Talk About Merit^{**} (And Why It Isn't Enough)

Judith McCormack

*Speaking Notes for The Future of Administrative
Justice Conference, January 17th and 18th, 2008*

- The discourse about merit appointments in Ontario has been largely defined in reaction to what might be described as the worst practices of governments. These practices can be roughly summarized as the tendency to use appointments to tribunals as a way of rewarding individuals for political services rendered, or to provide plum jobs to be distributed to various constituencies whose political support the government hopes to acquire or maintain, together with the tendency to try to control the decisions of tribunals through such appointments, through the termination of appointments, and through the resulting chill produced by these terminations.
- This discourse has been dominated by three main thrusts. The first involves judicial decision-making with respect to the necessary structural or functional conditions for either adjudicators or tribunals to ensure various procedural and other rights of parties are protected. The second takes the form of extra-judicial government and tribunal initiatives with respect to modernizing the appointment process, and making it accessible, fair and transparent, while the third involves the efforts of tribunals to create appropriate selection criteria, training programs and performance evaluation processes. However, all of these are essentially reactive, and all suffer from some weaknesses with respect to a coherent consideration of merit appointments.

Judicial Decision-Making

- The judicial debate is probably the most obvious example of this. It stems from a scrutiny of the rights of the parties before a tribunal, and only reaches back through this scrutiny to issues such as tribunal independence and security of tenure. As a result, it is necessarily limited in scope, and unlikely to extend to either the process or criteria for initial appointments, except to the extent that these are related tangentially to issues of adjudicator tenure and termination. Moreover, to the limited degree that courts have focused on the latter issues, the jurisprudence has been at best, erratic and incomplete. At worst, it has effectively sanctioned some of the dubious government practices described above.

* With apologies to Raymond Carver

- It is also far from clear that the courts are the appropriate forum for such issues. Their ability to address them in a comprehensive, organized fashion is severely constrained by the doctrinal concepts involved, which are essentially keyholes on a much broader discussion. The popularity of litigation in this area springs largely from the fact that remedial relief with respect to various types of government actions is not available elsewhere, and because the debate has been conceived of in terms of analogies to judicial protections and structures. However, the courts have either attenuated or declined to adopt some of these analogies in regard to tribunals, and meaningful remedial relief has been scarce. And the idea that the supervisory authority of the courts should extend to selection processes or criteria for adjudicators is both legally novel and potentially problematic in terms of organic social policy. Now that the courts have demonstrated their reluctance to adopt judicial norms with respect to tribunal appointments, it is not obvious why they would be the best forum for the creation of alternative tribunal norms.

Government Initiatives

- The efforts of various governments to create appointment policies and procedures which focus on accessibility, transparency, and fairness are laudable, but attended by other weaknesses. They are, again, largely reactive in the sense that they are designed to address problems such as cronyism and patronage and their consequences, such as a lack of diversity. This is not to suggest that these are not important goals – indeed they are crucial pre-conditions for merit appointments.
- At the same time, governments have priorities what are not necessarily entirely congruent with the kinds of appointments that at least some tribunals require. For example, the focus on accessibility in Ontario has translated into a public appointments system designed to maximize the ability of members of the public to submit their names for consideration. This has a number of strengths, both political and otherwise. It signals that the government has adopted a policy of openness and inclusiveness that emphasizes a breadth of representation from the general public – for example, with respect to regional representation, representation from various ethnic communities and so forth. It also reflects an attempt to provide a transparent system that is in contrast to backroom appointments. In practical terms, it may also create a more diverse pool of qualified applicants who might not otherwise have come to the attention of appointers.
- On the other hand, there are some problems associated with it as well. While such a system may be a genuine source of applicants for minor non-adjudicative agencies, the reality is that a very large number, if not the majority, of unsolicited applicants from the general public will not have the necessary legal skills or specialized expertise to be appropriate

appointees to most adjudicative or regulatory tribunals. Moreover, if my experience as the Chair of the Ontario Labour Relations Board in the 90's is any example, open-ended advertising does not necessarily produce the range of diversity in applicants necessary for a sound administrative justice system in a multicultural society. While the demographics of Ontario are changing rapidly enough that such diversity may occur more naturally in the future, at the moment, we are still at the point where deliberate, active outreach processes are necessary to overcome a variety of systemic obstacles facing people of colour, people with disabilities and so on.

- However, the focus on the ability of the general public to apply for adjudicator positions has a potential downside in the sense that it contributes to a culture of appointments which includes a significant element of what might be called *amateurism* – that is, the idea that almost anyone with a smattering of skills or experience and a little training or mentoring can be an adjudicator or regulator. As a result, it tends to de-emphasize the degree of skill or experience actually required for a high-functioning tribunal, and undermines both the proposition that adjudication is a profession which requires a substantial educational background, and the idea that tribunals are repositories of specialized expertise.
- Contrast this, for example, with the vast array of professions or occupations from teachers to plumbers, where extensive formal education or years of apprenticeship are required, as well as licensing. Without venturing to far into the admittedly dangerous territory of comparing occupations, it is impossible to be struck by the fact that to be a funeral director in Ontario, one must complete a two year college course, do a year of supervised fieldwork and pass three provincial licensing exams, while adjudication requires no formal education or licensing. Similarly, it seems a little odd that a hairstylist in Ontario requires a certificate of qualification to practice, and an adjudicator does not.
- This is not to suggest that Ontario's system focuses on accessibility to the exclusion of qualifications – indeed, the Public Appointments website is replete with references to the need for highly-qualified applicants. This is certainly to be applauded. However, it is not a substitute for job advertisements that require particular types of formal education or licensing.
- Again, part of the problem is the reactive nature of these efforts. In an historical context in which adjudication positions were viewed to some extent as rewards or plums, accessibility, transparency and fairness in the selection process can translate into the proposition that such plums should simply be shared for fairly or broadly. While this is undoubtedly better than having them reserved to an exclusive club, it does not adequately address the issue of the skills and expertise actually required for the job.

- This problem is highlighted in circumstances where governments have mandated short terms of appointments, or a limited number of appointment terms. Such a practice is in part related to the notion that these desirable positions should be shared around the population more broadly, and that limited terms will provide more citizens with the chance to obtain one. And while the argument put forward on behalf of this practice with respect to benefits of “new blood” for a tribunal has been thoroughly debunked elsewhere, it is worth noting here that this is not an idea that affects our treatment of almost any other profession or occupation. Practitioners are not limited to three or six year stints in teaching, health care or funeral direction on the basis that this will be beneficial to their schools, hospitals or funeral establishments. Indeed, in an era where much of the emphasis in human resource theory is on decreasing turnover and increasing retention, the idea would be considered nonsensical in these contexts. Put simply, the costs of turnover in terms of issues such as training and loss of expertise are too prohibitive for this to be seen as a benefit for almost any other organization, even leaving aside the specific problems created for tribunals by a lack of security of tenure.
- The fact that paralegals in Ontario are regulated now has also led to the rather startling situation where those who appear as client representatives before tribunals must fulfill training and licensing requirements, while those who make the decisions on their cases are not required to do so.
- Of course, certain occupations or professions have been criticized, quite justifiably, for their inaccessibility. However, the emphasis in this regard has been on strategies for facilitating the entry of a broader group into the education programs or apprenticeship programs required to qualify, increasing the recognition of foreign credentials, or shaping workplace conditions to be more inclusive. It is not normally suggested that the solution is to consider these professions or occupations to be the province of amateurs, or parcelled out in short terms to be shared more broadly among the general public.
- Rather, the idea would be to design the appropriate education programs and formal qualifications with a keen awareness of the importance of access. So, for example, the necessary courses could be provided at both law schools and community colleges, offered on a part-time basis or at night, offered at various locations around the province, and accompanied by financial assistance. Similarly, outreach and recruitment programs could be designed to ensure that the graduating adjudicator class of 2010 represented the multicultural face of Ontario. Indeed, this process might well serve to jumpstart or facilitate the diversification of the available pool of adjudicators much more effectively.
- In other words, while there is no question that recruitment practices should be accessible, fair and transparent, these critical elements are not enough;

they must be combined with the recognition that adjudication is a profession with specific educational and licensing requirements.

- It is also true that government initiatives can be dismantled in the blink of an eye, or an election. The recent history of administrative justice in Ontario provides a sorry testament to this fact. The creation of professional educational programs and licensing requirements might serve to make progressive appointment reforms slightly sturdier, and help to ensconce a less fragile merit-based appointment culture. In that sense, the development of formal education programs and licensing requirements can be considered a way of addressing this problem from another angle, and one which may not be quite so vulnerable to political wind shifts.

Tribunal Initiatives

- The third set of initiatives in this area, the efforts of tribunals to establish selection criteria, training programs and performance evaluation protocols, are to some extent a product of the problems described above. For example, to fend off unqualified applicants in the absence of formal education or licensing requirements, tribunals have been forced to establish selection criteria and core competency descriptions with respect to even the most generic of adjudication skills. Training programs have been developed to address the fact that such unqualified applicants are often foisted upon them, and tribunals have been left to their own devices to make the best of it. In other words, tribunals have taken on this task largely out of desperation, not because they are the appropriate fora for adjudicator education.
- This means that however excellent the training programs and materials developed by organizations such as the Society of Ontario Adjudicators and Regulators (and they are indeed excellent), they are expected to accomplish miracles we would not contemplate in regard to other occupations. We do not, for example, expect school principals to take members of the public and turn them into teachers in the space of a one week training course, followed by a few weeks of mentoring. Nor do we expect hospital administrators to hire and train people as nurses or laboratory personnel in this manner. While on-the-job training and mentoring can be an important adjunct to formal education and qualifications, relying on this as a substitute for professional education programs is at the very least, unrealistic.
- This point is highlighted by the SOAR adjudicator manual which includes such basic topics as “What is a tribunal?” and “Who makes laws?”. Leaving aside the philosophical implications of these questions, in practical terms, it is difficult to avoid the impression that this is a valiant attempt to bring unqualified applicants up to speed. One assumes, for example, that teachers do not need to know “What is a school?” on their first day at work – presumably this is covered by the respective Faculties

of Education long before then. Similarly, it seems unlikely that funeral directors would be able to escape knowing what a funeral is by the end of their two year college course.

- In sum, then, if one of the *raison d'etres* for tribunals is that they are possessed of specialized expertise, we have markedly failed to ensure that is the case, with respect to either legal skills, adjudication skills or knowledge of the specific fields which are their subject matter.

What Do Adjudicators Need to Know?

- The knowledge and skills required of adjudicators can be roughly divided into two categories: legal and adjudication skills, and those related to the tribunal's field.
- A quick sampling of the legal and adjudication knowledge and skills involved might include:
 - The legal system and the role of administrative justice
 - Principles of statutory interpretation and legal analysis
 - The full range of administrative law principles and doctrines, including issues of jurisdiction, rules of natural justice, standards of review, and procedural statutes
 - The full range of evidence law and procedure, including expert evidence, physical evidence, privileges, etc.
 - Constitutional law for tribunals that have Charter of Rights jurisdiction or that deal with areas involving both federal and provincial jurisdictions
 - The conduct of hearings, decision-making and decision-writing
 - Ethical issues with respect to the conduct, decorum and collegiality of adjudicators
- It is important to note that there is a significant danger of the overjudicialization of tribunals which may follow on the heels of such a program. Part of the curriculum, then, should also include why and how tribunal procedures differ from those of the courts.
- A consideration of the second aspect of expertise, the knowledge and skills related to a tribunal's home field, uncovers another problem that has bedevilled tribunals in the area of appointments. Simply put, there is a strong element in our appointment culture that overplays ideology and underplays objective knowledge. So while we may grant, at least to some extent, that adjudicators on an environmental board should have some environmental expertise, in the past adjudicators appointed to tribunals such as the Social Benefits Tribunal or the Landlord and Tenant Board

have not been required to be experts in social welfare law and policy, or housing law and policy respectively. Rather, their credentials are examined in terms of whether they are likely to favour more protections for tenants or less, or stronger or weaker social assistance regimes.

- There are a number of reasons for this that have to do with a much broader problem of the two solitudes of law and social sciences, as well as a lack of recognition that there are objective (or at least more objective) bodies of knowledge in areas which are also the subject of public and political debate. This in turn, reflects and contributes to the “dumbing down” of social policy discourse more generally.
- Without attempting to tackle these issues here, it is possible to note that the courts have not been of any assistance in this regard. To the extent that they have been interested in issues of tribunal independence, they have focused on the adjudication functions of tribunals. Indeed, they have declined to insulate the policy-making functions of tribunals on the basis that these are the very areas in which democratically-elected governments should be permitted to impose their particular visions. While this proposition may have legs in terms of democratic theory, the idea that this is an “all or nothing” formula has been neither nuanced nor useful.
- Again, without the time to explore these issues further, it is worth observing that the effect of these various larger problems in the administrative justice area has been to undermine the subject-matter expertise of many tribunals. If we were indeed serious about the idea that one of the central purposes for the existence of tribunals is that they possess specialized knowledge and experience, we would require this to be reflected in the credentials of those who are appointed to them.