Hearing and Listening
Respect in Action in Adjudicative Hearings

If you judged by the title of my presentation as it appears in your program – "Active Listening" – you might have come this afternoon expecting to hear some deep secret about how one deploys one's ears to better advantage in an adjudicative hearing. And, of course, one *can* find workshops on how to listen better and some of you may have participated in workshops of that nature. But what I plan to speak about today is the fundamental thing that provokes and ensures active listening on your part without your even thinking about it, and also – and almost as importantly – provokes and ensures active listening on the part of the parties and counsel who appear in the hearings over which you preside without them even being aware that they are engaged in any such thing. And, you can be sure, if you are in a hearing in which both you and the parties and counsel are all unthinkingly engaged in active listening, then, you are in a hearing that is working as it should.

My theory is that active listening occurs automatically if, in one's own interest, one truly cares deeply about understanding the words that are being spoken and brings to the listening no distorting bias. And, my thesis this afternoon, is that the thing that provokes and ensures that self-interested caring and unbiased listening by adjudicators is *respect* – the adjudicators' respect for themselves and for their role and duties as an adjudicator, and their respect for the parties and their counsel and for their right to a fair hearing.

In what I have to say about respect this afternoon, I am aware of taking a risk: the risk that this audience may conclude that much of what I say could just as well have gone without saying; that I will be seen by you to be condescending, to be preaching and, perhaps worse, to be preaching to the choir, as it were. But, I have spoken in a similar vein to audiences of adjudicators on other occasions and the feedback has usually been somewhat positive and so I have decided to take the risk of boring you, or even possibly giving you some reason to be offended.

The question I will ask you to think about is this: what are the sources and components of the respect that motivates active listening in hearings, and how is that respect to be given maximum effect? And the component I will begin with is the respect one must have for one's own role as an adjudicator – for the duties that one implicitly assumed when one accepted appointment as a tribunal adjudicator.

In a society committed to the rule of law, an individual's acceptance of an appointment as an adjudicator constitutes an agreement to become one of the select group that our society entrusts with the power to decide other people's legal rights. By agreeing to join that select group, one implicitly accepts a set of unique and imperative obligations that are, in fact, the keystones of our justice system. These are professional and ethical obligations that are now commonly addressed in tribunal codes of professional responsibility, but their binding nature is not dependent on one's explicit agreement to abide by a code or on any explicit oath. These obligations – these duties – arise implicitly from one's acceptance of this position of trust. Through your acceptance of your appointment you become, in a word, one of society's custodians of the rule of law – a trustee, if you will, of your neighbours' rights. And it is your respect for that role and for the responsibilities inherent in that role that will ensure that in a hearing – or in consideration of a written submission – you will be sure to be listening actively.

Experience suggests that, before accepting their appointment, few adjudicators will have had occasion to consciously consider the specifics of a tribunal adjudicator's professional and ethical responsibilities. And, in agency environments, in my experience, the occasion to examine the nature of those underlying responsibilities rarely arises. It seems to be a commonly shared perception that these responsibilities are so axiomatic that no discussion should be necessary.

But it is the level of your respect for the adjudicative role you have assumed and for the responsibilities inherent in that role that will determine the quality of your work – and the active nature of your listening – and I am going to

ask you to contemplate for a few moments the components of that role and of those responsibilities – a role and responsibilities which inherently commands the utmost respect from each adjudicator.

Integrity

It is with some hesitation that I start with the integrity component - that is, your responsibility to exercise your adjudicative role with integrity. I hesitate to mention it because, of course, it is inherently somewhat offensive for a lecturer to suggest to an audience of adjudicators that integrity might be an issue. I mention it, however, because, in my respectful view, in the interest of a healthy justice system, the fact that the ultimate prerequisite of justice is having adjudicators who act with rigorous integrity is not something that should always be allowed to go without saying.

And, of course, performing the adjudicative role with integrity is an adjudicator's paramount responsibility.

While an adjudicator without integrity is unthinkable – a viper, as it were, in the bosom of the justice system – there is not much to say about integrity. One has it, it seems, or not. However, what can, perhaps, be taught – or learned – about integrity are its implications, and the implications of one's respect for one's own integrity, for one's role as an adjudicator.

An Adjudicator's Responsibility for Independent Decision-Making

Beyond the *sine qua non* responsibility to act with integrity, the most important of the responsibilities of an adjudicator is clearly the duty to be *independent* in one's decision-making. Independence in decision-making is one of the critically important things that integrity demands of any adjudicator.

In the author's view, the last sentence of Article 51 of the *SOAR Model Code* captures the obligation of independent decision-making perfectly. "Adjudicators", it says, "must be prepared to go where the evidence and law fairly takes them"[1].

Having at the front of one's mind the responsibility for going wherever the evidence and law fairly takes one, one cannot help but be deeply interested in fully understanding the evidence and law that one is hearing.

Note that the reference here is to an adjudicator's responsibility for making independent decisions. This is not to be confused with an adjudicator being actually independent. One cannot be personally responsible for being independent. One cannot make oneself independent, it is something one is, or is not. In the administrative justice system, it is a status that is principally a function of re-appointment policies. Arguably, as long as re-appointment decisions remain arbitrary, no Canadian administrative justice adjudicator can be said to be actually independent.

It is apparent, therefore, that independent decision-making on contentious issues may intrinsically require more moral fortitude if one is a government-appointed, fixed term, administrative-justice adjudicator, than it would if one were a judge. However, as an administrative-justice adjudicator, the professional and ethical obligation to be independent in one's decision-making is nevertheless not qualitatively different.

One must be prepared to go, as Article 51 says, wherever the law and the evidence is fairly taking one, regardless of how personally uncomfortable that destination seems to be shaping up to be.

An American judge had an occasion a few years ago to address this obligation explicitly. The occasion arose in the strange circumstances where the judge was aware of severe public pressure on him to go where the law and the evidence was fairly taking him in any event.

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[1] The original source of this elegant and succinct rendering of an administrative justice adjudicator's obligation to be independent and unbiased in his or her decision-making is an unreported speech to a Conference of Ontario Boards and Agencies by the late Superior Court Justice Archie Campbell, circa, 1990.

Judge Zobel was the trial judge in the Louise Woodward case. Louise Woodward was a young, U.K. nanny unexpectedly convicted by a Massachusetts jury of the murder of an infant left in her care. Before the sentencing, counsel for Woodward applied to the trial judge to set the jury conviction aside as perverse. While Judge Zobel was considering that application, media coverage of the widespread, highly charged emotional criticism of the jury's murder conviction ran rampant.

Apparently concerned about the implications for the public perception of the integrity of the court of a decision that might be seen to have been responsive to this outside pressure, Judge Zobel considered it necessary to remind his audience of a judge's responsibility for independent decision-making. Recalling the 18th century words of John Adams addressing a jury in the defence of another British citizen on trial for murder in Massachusetts, Judge Zobel fashioned what has always struck me as a compelling statement of the quality of the independence expected of any adjudicator in his or her decision-making. It is a statement that, in my opinion, is worthy of any adjudicator's attention. Judge Zobel said this:

> The law, John Adams told a Massachusetts jury while defending British citizens on trial for murder, is inflexible, inexorable, and deaf: inexorable to the cries of the defendant; "deaf as an adder to the clamors of the populace". His words ring true, 227 years later. Elected officials may consider popular urging and sway to public opinion polls. Judges must follow their oaths and do their duty, heedless of editorials, letters, telegrams, picketers, threats, petitions, panelists, and talk shows. In this country we do not administer justice by plebiscite. A judge in short, is a public servant who must follow his conscience, whether or not he counters the manifest wishes of those he serves; indeed, whether or not his decision seems a surrender to the prevalent demands.

This statement pertains to any adjudicative decision-making – to the legally authorized determination of disputes about legal rights. And it pertains, in my view, whether the adjudicator is a fully tenured judge or a member of an administrative justice tribunal appointed to a renewable, three-year term.

An Adjudicator's Responsibility for Impartiality in Decision-Making

The next responsibility which commands an adjudicator's respect and strongly influences the quality of his or her listening is the responsibility to make an objective – that is to say, an unbiased or impartial – decision. It is important to note that a decision can be independent, but nevertheless still biased. Respect for the responsibility to go where the evidence and law fairly takes one encompasses not only a commitment to independent decision-making, but also a commitment to impartial – or unbiased or objective – decision-making. By definition, one is not impartial if one is not prepared to engage in independent decision-making, but one can be fully committed to independent decision-making but still not be impartial. Thus, one must not only be *prepared* to go wherever the evidence and law fairly takes one, one must also be *open* to going there and not determined to go, if at all possible, somewhere else.

The responsibility for objective decision-making requires an ongoing, genuine attempt at objectively assessing the evidence and law that one is hearing, and respect for that responsibility influences the quality of one's listening because it eliminates the filter between counsel's lips and the adjudicator's ear that an adjudicator's pre-determined personal preference for a particular outcome will otherwise have erected.

You will note the nod to the reality of the human experience in the phrase a "genuine *attempt* … at objectively assessing the evidence and law". It is fashionable to disparage even the possibility of objective adjudication. And it is certainly true that with respect to issues of importance, adjudicators will inevitably bring to any adjudication pre-conceived views and biases rooted in their own innate nature and developed through their personal and/or professional life experiences.

Objectivity in the pure sense of the concept is, in reality, impossible to attain, if indeed there is such a thing at all. However, when we say that the rule of law requires an objective assessment of the law and evidence as part of the prerequisites for a fair hearing, we do know what we mean.

On legal issues, the assessment the rule of law has in mind is one in which adjudicators acknowledge a professional duty to suppress personal policy preferences as to outcome, and to search assiduously for, and to be honour-bound to be governed in one's decision by, the intent of the legislature, or the effect of established doctrines of common law, as those are determined by a genuine, best-effort adherence to established cannons of legal reasoning.

To knowingly strive to achieve a personally preferred policy outcome through a clever manipulation of the rules of legal reasoning is the proper business of advocacy. Adjudicators who indulge themselves in an exercise of that kind are, in my view, acting in a manner that is incompatible with the rule of law and subversive of the integrity of our justice system. The bright-line question for an adjudicator as far as the law is concerned is this: *What is the principled legal reasoning I genuinely find most persuasive in these circumstances as to the intent of the Legislature or the meaning of the common law?*

So much for how one respects the responsibility to objectively assess the law. How does one respect the responsibility for objectively assessing the evidence? We do that by attuning ourselves to our own inherent prejudices, biases and cultural pre-dispositions and professionally committing ourselves to pushing those aside in a personal best-effort attempt at a fair assessment of the evidence – to be committed, in a word, to being on the lookout for intruding factors that are not fairly relevant to that assessment.

The Fair-Hearing Responsibility

Finally, in addition to the responsibilities to act with integrity, to be independent in one's decision-making, and to decide impartially, there is inherent in the acceptance of an adjudicative office one other foundational commitment – the commitment to the ensuring that parties receive a fair hearing in accordance with the established principle of natural justice. These principles are well known and I won't take your time to delve into those.

In summary, then, an adjudicator's respect for his or her own integrity and for the special justice-system responsibilities adjudicators assume when they accept their appointments – to act with integrity, to make decisions that are independent and impartial, to be prepared to go, and, as important, to want to go, wherever an objective analysis of the evidence and law fairly takes one, and to ensure fair hearings – must provoke in each adjudicator a deeply felt, self-interested need to truly understand the testimony and argument they are hearing. That need is the engine under the hood of an adjudicator's commitment to active listening. But, if that is the engine, what are the bells and whistles – the tactics – through which this felt need is actuated in the hearing process?

An Open Mind

Let me start with the most important tactic, the tactic of keeping an open mind. Part and parcel of the listening that respect for the responsibility to provide a fair hearing and make independent and objective decisions commands, is listening with an open mind.

You may be surprised to hear an open mind described as a tactic. But that is what it is. No one has a mind that is innately always open to the consideration of arguments and evidence that one finds from the outset intuitively unconvincing. Moreover, as has been famously noted, while one wants adjudicators to bring to a hearing a mind that is *open,* one does not want, nor can adjudicators be expected, to bring a mind that is empty, or worse, *vacant*. And, of course, it is obvious that, as a practical matter, adjudicators do, in point of fact, rarely come to a hearing without some preconceived opinions about the legal issues and/or about the probabilities respecting the alleged facts

However, it is important to appreciate that the reference to an adjudicator's need to have an open mind is not a reference to the mind's content. The reference is to attitude and technique; to the need to approach a hearing with one's mind truly *held* open to being persuaded to a different opinion by the actual evidence and by the quality of a party's or counsel's submissions on the facts and law. In a hearing environment it is, therefore, not a question of *having* an

open mind but of *keeping* an open mind, of, I repeat, *holding* one's mind open – and that is an attitude or approach to listening that must be deliberately adopted and maintained, and, thus, as I said, a tactic.

A few years ago, browsing casually, for reasons I no longer recall, in Bertrand Russell's *History of Western Philosophy*, I experienced an epiphany of insight into the judging process. I came across Russell's concept of "hypothetical sympathy".

In writing his history of philosophy, Russell had to decide which philosophers deserved to be included in the history. And, to make those decisions, Russell had to evaluate – if you will, to judge – the relative merits of a large number of philosophers. And, like most adjudicators approaching a hearing room, his mind was in fact far from open. He was an accomplished philosopher in his own right, with decided views. Furthermore, over the years he had developed casual notions about the theories of a number of the philosophers he felt obliged to consider as candidates for his history and those notions were not always flattering. However, as a scientist, he understood the importance of bringing to a judging process an open mind. What was required, he said, was an attitude of "hypothetical sympathy".

The relevant passage from the Introduction chapter (page 39 in the Simon & Shuster edition) reads as follows:

> In studying a philosopher the right attitude is neither reverence nor contempt, but first a kind of *hypothetical sympathy*, until it is possible to know what it feels like to believe in his theories, and only then a revival of the critical attitude… [This attitude of hypothetical sympathy]… should resemble, as far as possible, the state of mind of a person abandoning opinions which he has hitherto held.

During my years as Chair of the Ontario Workers' Compensation Appeals Tribunal, I had periodic occasions in training lectures to attempt to describe the judging process, and on those occasions frequently talked about the *respect* an

adjudicator must have – and show – during the hearing for both parties and their counsel. And, in recognition of the reality that sometimes respect proves, as a practical matter, difficult to muster, I would often say that, if, one could not actually summon the necessary respect, then one must *pretend* to have done so.

This was always an unsatisfactory expression of the thought, since it suggested the adoption in the hearing of a non-genuine posture. Russell's elegant concept of consciously and deliberately adopting at the beginning of a judging exercise a *professional* attitude of *hypothetical sympathy,* and maintaining that attitude until one truly knows what "it feels like" to believe in a party's case, and only then adopting the critical attitude, seems to me to capture perfectly this part of the judging process for which, in the past, I had struggled to find appropriate words. It is a concept that I believe seasoned adjudicators will find resonating with their own experience.

Without an adjudicator bringing to the hearing that attitude of hypothetical sympathy – or whatever else one might choose to call it (perhaps, just a "a mind that is actively held open") – parties and their counsel who come to a hearing with arguments that are at odds with the adjudicator's own preconceived views will not have, in fact, a fair opportunity to persuade – will not receive a fair hearing or the benefit of active listening from the adjudicator – and thus one of the principal tenets of the principles of natural justice which an adjudicator has agreed to uphold will have been subverted.

Respect on the Other Side of the Hearing Room

So far, I have been talking about how the respect adjudicators owe to their own integrity, and the respect for responsibilities inherent in the adjudicative office they have accepted influences their own approach to a hearing and commands attentive, open-minding listening by them. Now I propose to go to the other side of the hearing room for a moment and consider what motivates an unrepresented party or a counsel to listen actively – and productively – to the adjudicator – an important thing to have happen if the adjudicator is to be

successful in controlling the hearing and if the counsel and or party is to go away with the sense of having had a fair hearing.

Obviously, the motivation to *want* to hear what is said is innately high on that side of the hearing room. The vindication of the parties' rights – and often their reputations – is in the adjudicator's hands and they will perforce be hanging on his or her every word. But a hearing is a particularly stressful environment for counsel and parties and the potential for that stress to lead to a misinterpretation of what the adjudicator is saying – the potential for them to misunderstand or doubt the intent behind the words, for an adjudicator and counsel and parties finding themselves at cross purposes communications-wise – is high. Here again the essential lubricant for active and productive listening on the part of counsel and parties is respect, their respect for you and your role, and their perception of your respect for them.

I should mention in passing that an important influence on the respect that counsel and parties will have for the adjudicator will be the quality of the respect for the adjudicator's tribunal that counsel and parties have when they enter the hearing room. Since I have no reason to doubt that your tribunal is well respected within the community you serve, I will not dwell on that aspect of the respect issue, but will consider what an adjudicator can do, during the hearing, to optimize the active and productive listening on the part of counsel and their clients.

Of course, no individual adjudicator enters a hearing room with a clean slate. He or she comes with a reputation. This will probably not be true in the case of parties representing themselves, but, with professional counsel, the adjudicator will have a reputation – a reputation that is borne, if not of personal experience in previous cases, then of word-of-mouth reporting of the experiences other counsel have had with this adjudicator, and of the examination by counsel of this adjudicator's previous decisions (assuming these are available on the internet). Thus, it is important for adjudicators to be sensitive to the fact that the quality of their performance in any particular hearing and the quality of each decision they write have lasting implications for their general reputation as an

adjudicator, and that reputation will inevitably influence the quality of the hearing environments they encounter generally in their work.

Assuming a reasonable level of respect for the tribunal, and for the individual adjudicator going in, what can an adjudicator do to optimize the respect that the parties and counsel will have for the adjudicator during the hearing? Of course, inevitably part of that will depend on the innate competence and hearing skills the adjudicator is able to display. But another large part is the respect arising from the extent to which both counsel and the parties perceive that the adjudicator respects them and their role in the proceedings and also respects his or her role as a fair arbiter of their respective cases. To the degree that the parties and counsel are or become confident that the adjudicator knows his or her business and fully respects their respective roles and is intent on giving them a fair hearing, one can count on the listening on their part to become active and productive, whether or not they have taken courses on active listening.

How does one communicate one's respect of them to them? There are a number of obvious "tactics" that everyone knows: come prepared – every time – come on time - every time; consult in advance on the timing and length of the regular recesses; be fastidious about giving both counsel a fair opportunity to address any procedural issue that arises before you decide; invariably speak quietly and politely even when it is necessary to speak firmly; and, when it is necessary to rule against a party on an evidentiary or procedural point or to interrogate counsel or an unrepresented party concerning the merits of a submission, to couch your rulings and questions in a way that makes it clear that you are simply disagreeing with them, or seeking clarification – *on the merits* – not questioning their competence or good faith With that approach one can have very substantial disagreements with counsel without losing their respect.

But there is a particular tactical matter that does not always get the attention it deserves, that I propose to talk about for a bit. And that matter is the role an adjudicator's note-taking plays in projecting his or her respect for parties and counsel and in facilitating both the adjudicator's and counsel's and the parties' listening.

In the first place, even if a hearing is being taped, counsel will know that adjudicators do not have time to listen to the tape of a hearing and will not listen to that tape except in very unusual circumstances. So, if you are not seen to be taking notes – or sufficient notes – experienced counsel will take that to be evidence that you are not actually interested in what they are saying; that you have probably already made up your mind and are just waiting to get through the "formalities" of what you see to be a pro forma hearing before announcing your decision. If that is the impression your note-taking or lack thereof should happen to leave, you may expect that the hearing is about to become more difficult to "control", and that any hope of the parties and counsel perceiving that they are participating in a fair hearing will have largely dissipated.

Another important aspect of note-taking is the role it plays in controlling the pace of a hearing. If things happen too fast in a hearing, the parties and even counsel, and even the adjudicator, can lose their grip on understanding what is happening – what is being said, what was intended, what is about to happen. The resulting confusion or misunderstandings is obviously not conducive to a respectful hearing environment. For a hearing to proceed in a mutually respectful way, it is necessary that the development of everyone's understanding proceeds in step. When the adjudicator takes the time to write detailed notes, and asks, from time to time, for the process to be delayed for a moment to allow him or her to complete a note, or asks for something to be repeated so that he or she may be sure to have recorded it accurately, and when experienced counsel pace their submissions and their questioning of witnesses with an eye on the adjudicator's moving pen, the combined effect is to hold the progress of the hearing to a pace that enables all participants to keep up. Thus, the writing of the notes does not delay the hearing, it facilitates it.

The adjudicator's request for a pause in the proceedings while he or she completes a note of a submission may also serve as a tactical means of taking the heat out of an excited submission, or of giving a counsel who may be on the verge of something problematic a reminder that their statement, as excited as it may be, is being painstakingly recorded in the adjudicator's hearing book, and to

allow that counsel to see, in the adjudicator's demeanour in the course of his or her laboriously completing the note, some intimation of a subtle warning and to give that counsel a moment to collect themselves and to think again. Moreover, such a request may also serve the tactical purpose of giving the adjudicator additional time to think privately as to what in the world he or she is going to do in the face of some surprising or particularly difficult submission, request or objection.

Along the same lines, in the interest of keeping control of a hearing, it is very important that you do not pretend to understand something counsel has said or proposes to do, if you do not. Ask for an explanation. Risk embarrassing yourself if necessary, but do not let the flow of the information get away from you. If at any point you do not fully understand what counsel has said or why he or she has said it, chances are good that there is an underlying flaw in either your basic understanding of the case or in counsel's basic understanding of the case, and, either way, if the hearing is to progress sensibly and efficiently – if mutual respect is to be maintained – the possibility of such a lurking flaw needs to be cleared up. And, of course, such questions provide the best evidence of all of your inherent respect for the process in which you are engaged.

Conclusion

In summary then, the foundational prerequisites for active and productive listening by an adjudicator is the adjudicator's unflinching commitment to acting with integrity, to deciding without fear or favour, to making impartial decisions, and to ensuring a fair hearing. The tactics for achieving a respectful hearing and listening environment, once those prerequisites are in place are also straightforward:

- Be competent;
- Come on time;
- Come prepared;
- Keep and be seen to keep careful notes of the proceedings and, with the help of the note-taking, keep the pace of the hearing at a level

that reasonably allows for the comfortable development of understanding on the part of all – a galloping hearing is very apt to gallop right out of control;

- Until a party's case is complete, maintain an attitude of hypothetical sympathy – consciously holding one's mind open to persuasion in resistance to all the preconceptions, prejudices and pre-judgements that are conspiring to snap it shut;
- *Think* respectfully: firmly reject any tendency to attribute venal motives – or, if I may say it, stupidity – to what is being said or done, and when at times one's inner and smarter nature rebels against that rejection, hammer that nature into a tactical submission;
- *Speak* respectfully even when it hurts to do so and even when it is necessary to speak firmly.
- Do not be seen to look at your wrist watch mid-stream – ever;
- Be fastidious in inviting both counsel to have their say – and their right of reply – on any contentious issue, *before* you make up your mind;
- Be fastidious about consulting with counsel about hearing logistics; and
- Do not at the outset announce a time limit for the completion of a hearing.

Thank you for your attention and, I rather expect, also for your patience.

S. R. Ellis
April 2008.