Association of Community Legal Clinics of Ontario

AGM CONFERENCE

MAY 2014

AFTERNOON PANEL

Ron Ellis's Speaking Notes for a short Presentation of his book
"Unjust by Design: Canada's Administrative Justice System"

In the 10 minutes allotted, I hope to describe the book's significant themes, tell you briefly about the things that the book suggests need to be done if we are to fix this system, and conclude with a very short description of the structural reforms the book proposes for ensuring those things get done. I gather that I will have a chance to embellish all of this at greater length in this afternoon's workshop.

As its title suggests, Unjust by Design is a somewhat contentious book – it calls Canada's administrative justice system a train wreck – a scandal; takes issue with a number of the Supreme Court's iconic decisions; and demands radical, transformative reform – everywhere in Canada, that is, but in Quebec. (And it is now clear that Quebec's system also needs the same reform.)

The justice system in question is, of course, the system comprised of the executive branch tribunals that exercise judicial adjudicative functions – functions that are indistinguishable from the judicial adjudicative functions of our provincial civil-law courts. These tribunals are now commonly called adjudicative tribunals but they should be called "judicial tribunals" because they are surrogate courts, adjudicating justiciable, legal-rights issues and making judicial decisions.

I don't need to tell this audience what tribunals I am talking about, but it is important to remember that it is not just the tribunals that happen to be frustrating you personally every day. Every province and territory has approximately 30 such tribunals (Ontario by its own count, 37); the federal government has another 30 or so and each municipality has a number as well.

And, of course, it is now acknowledged that it is in these judicial tribunals that the majority of Canadian legal rights disputes are decided rather than in the courts. For most Canadians, the

only face of justice they will personally encounter is the face presented by the administrative justice system.

The book's major themes include the following:

1. That what tribunals decide matters – often in a life-altering way. The book references two Ontario suicides that are known to have been precipitated by judicial decisions of such tribunals. And since the book was published I have heard from readers that there are many more such instances.
2. That the failure over the years of the government – and of the courts – to distinguish between judicial tribunals and regulatory agencies – the conflation of judicial tribunals with regulatory agencies – is a primary source of the rule-of-law disorder within the system.
3. None of our judicial tribunals nor any of their members are independent, and neither tribunals nor members can possibly be seen to be impartial.
4. The blight on the system of patronage and partisan political influences on the appointment and re-appointment of tribunal chairs and adjudicators.
5. The problem of competence in the system and how to ensure that it is optimal.
6. That what we need in these tribunals are professional adjudicators but that governments are typically hostile to the idea of professional adjudicators and the system is currently so structured as to actively discourage anyone from seeing tribunal adjudication as a viable professional career.
7. That despite the inherent difficulty of distinguishing between *judicial* rights-determining functions and *administrative* rights-determining functions – and the SCC`s refusal to do so – the distinction must be made, for without the preservation of that distinction we have a justice system in which the rule of law is effectively optional.
8. That the Supreme Court's current view that tribunals' rights-determining functions are never judicial but only ever "quasi-judicial" is incongruent with the rule of law and with the inherent constitutional role of judicial tribunals and will have to be corrected.
9. That unlike a judge's decision, a judicial tribunal member's decision must be recognized to be a corporate tribunal decision, with the tribunal member acting as the tribunal's agent.

10. That the justice component of the administrative justice system must be harmonized with its administrative component. By this I mean that because a judicial tribunal decides all the rights disputes arising in a particular statutory rights enterprise, its day-to-day decisions ultimately determines much of the practical content and limits of the statute's policy. It is, therefore, necessary that line ministries be given rule-of-law compliant channels for influencing a judicial tribunal's decision-making.

That completes my account of the book's themes. And now here is the to-do list – the things we have to do if the system is to be fixed.

1. First we must persuade the Supreme Court to recognize that the independence and impartiality of any judicial tribunal or tribunal member is a constitutional necessity.
2. Next, we must expurgate ideological judging from the system. We must re-assert, and re-imbed in our law and in our justice culture, the fundamental principle that ideological judging is not natural or inevitable but in fact wilful, dishonest, and subversive of our democracy. Adjudicators are duty bound to go where the law and evidence actually takes them, not to some other place which they personally find more comfortable.
3. Then there is the problem of part-time adjudicators. We must recognize that the concept of part-time adjudicators is prima facie constitutionally invalid.
4. While it may be possible to imagine how the deployment of part-time adjudicators might be structured as to comply with the principles of judicial independence, they should be used only sparingly, if at all.
5. (Currently a large majority of Canadian judicial tribunal adjudicators are part time with no structural protections of their independence.)
6. We must provide competitive compensation levels, and structure that compensation so as to eliminate direct negotiations between chairs and members and their government respecting compensation adjustments.
7. We must stop the negotiation between judicial tribunal chairs and the government respecting the adjustments in tribunal budgets.
8. We must establish – and imbed in the law – a credible appointments process that is widely advertised, merit-based and competitive, and manifestly free of patronage or of partisan political influences.

9. We must remove the limits on the number of reappointments while at the same time making each end-of-term reappointment conditional on continued performance at a demonstrably acceptable level as determined by a reappointment process that is merit-based, evaluation-driven, objective, fair and independent.
10. We must persuade the courts to define "judicial function" more precisely, and to develop jurisprudence that will reflect a prescription for an administrative justice system that is authentically congruent with the rule of law.

STRUCTURAL REFORM PROPOSALS

So much for the to-do list. Now let me briefly describe the structural reforms the book proposes.

Because the existing system is so rule-of-law deficient, and so entrenched, the Book`s proposals for structural reform are necessarily bold.

They start with the proposal that we enact in each jurisdiction a quasi-constitutional Bill of Rights – an *Administrative Justice Bill of Rights* – that inter alia defines a judicial function as it applies in an administrative justice context, specifies that institutions or individuals exercising judicial functions must be manifestly independent and impartial, and requires the installation of five new structures in each jurisdiction.

These Bill of Rights mandated structures are:

A *Governing Council for Administrative Justice*

A *Ministry of Administrative Justice*

A *Tribunal Audit Board*

An *Omnibus Judicial Tribunal* and, finally,

a *Community Advisory Panel* for each tribunal.

The Bill of Rights will also mandate an independent and objective, patronage-free, competitive appointments process.

The Book also calls for the establishment of a *School of Applied Studies in Administrative Justice*.

You will find in Chapter 5 a fully detailed proposal for each of these new structures.

In response to the natural reaction that this is all too radical a reform for it to ever happen, I point out in Chapter Six that equally revolutionary reforms have in fact been accepted – been necessary – whenever existing administrative justice structures have been newly found to be constitutionally invalid – in Quebec, in 1996; in Canada's Military Justice System in 1998; and in the U.K. between 2001 and 2007.

Moreover, once one grasps how deeply unprincipled the existing system truly is, and how deeply imbedded and long-standing is the executive branch's disrespect for the rule of law in that system, it is then, I submit, necessary to acknowledge that a revolutionary reform is required – that a revolutionary reform is, indeed, a transcendent necessity.

The book is deficient in one very important respect and that is that it is preoccupied with the rule of law problems with the tribunals – the final deciders in our administrative law system – and effectively ignores the rule of law problems with the first deciders, which may well be in practical terms the more important problem.

I look forward to the workshop conversation later this afternoon.

And, in that connection, may I mention the invitation in the front of the book to a discussion at my website – administrativejusticereform.ca – and I hope that many of you will visit that site and join in the conversation.

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