

Rule of Law, Antidotes for the Ignis Fatuus Syndrome

July 25, 2014

INTRODUCTION

In my July 14, 2014, post respecting the Federal Court's decision in *Muhammad*, I characterized that decision as evidencing a danger that in the administrative justice system the rule of law was becoming an *ignis fatuus* (pronounced fah-oo-us) - a "fire" - a force - that appears to be there but isn't really.

Muhammad is not the only evidence of the administrative justice rule of law seemingly infected these days with the *ignis fatuus* syndrome. There are many other examples, including, of course, the other Federal Court decisions cited and relied on in *Muhammad*, and other decisions that have been featured in earlier posts on this site.

It therefore occurred to me that it might help to resurrect some classic statements about the importance and implications of the rule of law in the administrative justice system; statements that, brought newly to light, might serve as antidotes to the *ignis fatuus* syndrome currently undermining the rule of law in Canada's administrative justice systems.

THE ANTIDOTES

CHIEF JUSTICE LAMER

In a 1991 key note speech to the CCAT Conference in Ottawa* , Chief Justice Antonio Lamer drew what he saw to be an important distinction between "regulatory agencies" and "tribunals...created to operate essentially as adjudicators ...".

Such tribunals carry on the function of adjudicating disputes between individuals and the state in a manner that is similar to the function of the judiciary. ... These bodies are not 'regulatory agencies' but are created to operate essentially as adjudicators... in a manner that is similar to the function of the judiciary ... [and] *expected to dispense justice in the same sense as the courts of law.* ...

[T]he fairness of the administrative process in cases where a tribunal carries out adjudicative functions in individual cases is no less tied to the independence of the tribunal from the government than it is for the judiciary.

CHIEF JUSTICE McMURTRY

Six years later, the key note speech of the Honourable Roy McMurtry, then the Chief Justice of Ontario, to the annual Conference of Ontario Boards and Agencies, on November 20, 1997, included these passages: **

... It is for this reason - the potential enormity of the impact of decisions of administrative justice system agencies on people's lives, particularly the lives of the poor and disadvantaged in our society - that the actual and perceived independence and the actual and perceived fairness of our administrative justice system agencies must be seen to be fundamental to the rule of law and to the health of our society. Independence and fairness are the bulwarks of the rule of law and the essential counterweights to the always understandable push for more efficiency.

Independence means, of course, having administrative justice agencies and their adjudicators so positioned and organized that they see themselves and are seen by others as being free to decide undeterred by outside influences or fear of personal consequences. ...

... [I]ndependence in decision-making ... is undoubtedly the most important principle in the justice system. ...

It is clearly essential that the ... internal tribunal environment be not dominated by fear of non-renewal. ...

In my view, the legal principles were accurately stated by Ron Ellis in his address to the CBAO in September ... as follows:

1. Issues involving legal rights and obligations can at law only be validly determined by adjudicators who are independent and impartial and whose circumstances do not provide any reasonable basis for an informed observer to think otherwise.
2. The confidence of the adjudicator, and of the parties, that the adjudicator is free to make a decision in their case without fear of personal consequences is a fundamental prerequisite for any independent and impartial adjudication.

CHIEF JUSTICE McLACHLIN

A year later, in a key note speech to the 1998 annual BCCAT Conference in Vancouver, Supreme Court Justice Beverley McLachlin (as she then was) distinguished between two categories of decision-making bodies: 1) "regulatory or licensing bodies", and 2) "dispute resolving bodies". The latter, she said, are "doing what the courts have traditionally done," adding that "...a theory of the Rule of Law that cannot account for these [dispute resolving] bodies will have a very short life. The Rule itself will become illegitimate." ***

BC COURT OF APPEAL JUSTICE, CAROL MAHOOD HUDDART

The next year, at BCCAT's 1999 Conference, the Honourable Madam Justice Carol Mahood Huddart of the B.C. Court of Appeal took her turn. **** She put the question somewhat differently.

...we know that an impartial decision-making process is fundamental to a democracy and to the rule of law that permits people with different ideas of morality to live together in a peaceful community. It is from the perspectives of a decision-maker and of a client that I address you today about *the ethic of impartiality* that lies at the root of our legal system and the Rule of Law.

She goes on to say that:

... [E]ven as early as 1959 ... Canadians would have agreed that fair decision-making procedures require an impartial decision-maker, one free of bias in favour of or against a party to the dispute or a person affected by the decision being made. And they would have understood free of bias to mean manifestly so."

In her remarks, Huddart also examined the guarantors of impartiality. She referred to the *Valente* requirements of independence (security of tenure, financial security and freedom from administrative control by the executive on matters bearing on their adjudicative function) and said that the independence of any particular body must be examined "structurally", "that is, independently from the actual operation of the agency in a particular case" - a point of view that was, of course, central to the *Valente* and *Généreux* decisions, and that was, as we have seen, generally ignored in *Muhammad*.

SUPREME COURT OF CANADA IN PAUL

And, then, of course there is the Supreme Court's acknowledgement of the justice system role of tribunals in *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, at para 22:

While there are distinctions between administrative tribunals and courts, both are part of the system of justice. Viewed properly, then, the system of justice encompasses the ordinary courts, federal courts, statutory provincial courts and administrative tribunals. It is therefore incoherent to distinguish administrative tribunals from provincial courts for the purpose of deciding which subjects they may consider on the basis that only the latter are part of the unitary system of justice.

(An Ellis by-the-way question: For what other purposes might it be equally incoherent to distinguish administrative tribunals from provincial courts?)

SUPREME COURT OF CANADA IN VALENTE AND GÉNÉREUX

See references in my July 14, 2014 post.

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Footnotes:

* The Honourable Chief Justice Lamer, "Administrative Tribunals - Future Prospects and Possibilities" (1991), 5 Can. J. Admin. L. & Prac. 107.

** Published in Ellis, "Appointments Policies in the Administrative Justice System: Lessons from Ontario: Four Speeches" (1998) 11 Can. J. Admin. L. & Prac. 205 at 250-252.

*** The Honourable Madam Justice Beverley McLachlin, Supreme Court of Canada, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998) 12 Can. J. Admin. L. & Prac. 171.

**** The Honourable Madam Justice Carol Mahood Huddart, "Know Thyself: Some Thoughts About Impartiality and Administrative Decision-Makers From an Interested Observer" (1999-2000), 13 Can. J. Admin. L. & Prac. 147 at 148 and 150

DEFINITIONS

Look up "ignis fatuus" in Dictionary.com and here is what you find

:ig-nis fat-u-us [ig-nis fach-oo-uh s], *noun*,

1. Also called **friar's lantern**, **will-o'-the-wisp**. a flitting phosphorescent light seen at night, chiefly over marshy ground, and believed to be due to spontaneous combustion of gas from decomposed organic matter.

2. something deluding or misleading.

Origin:

1555–65; < Medieval Latin: literally, foolish fire

In other dictionaries one also finds: "a deceptive hope", an "illusion".)