

THE 2011 FAJ CONFERENCE – NEW HORIZONS: LEGAL ISSUES FOR TRIBUNALS

SEMINAR: HOW DO TRIBUNALS & CLIENTS MAKE THE PERFECT MATCH?

**PAPER: PRACTICE POINTER FOR APPEARANCES BEFORE ADMINISTRATIVE
TRIBUNALS**

PREPARED FOR: THE FOUNDATION OF ADMINISTRATIVE JUSTICE

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PRACTICE POINTERS FOR APPEARANCES BEFORE ADMINISTRATIVE TRIBUNALS

A. GENERAL STEPS

Research Details of Each Specific Tribunal

- (a) Unique Procedural Rules - Regardless of any general advice that can be given concerning advocacy before administrative tribunals, the most important thing to do is to research the specific rules, procedures, composition, mandate, etc. of the administrative tribunal you are appearing before. Each tribunal has its own enabling legislation and its own rules passed pursuant to that legislation. There can be tremendous differences in practice and procedure from one tribunal to another.
- (b) Membership of Tribunal - Composition of the tribunal could also have significant impacts on your strategy. Often, though not necessarily, tribunals without legally trained members tend to deviate from legal rules when those rules interfere with the member's sense of fairness or justice. As a result, applicants before tribunals should bear this in mind and alter the focus of their arguments based on the composition of the tribunal so that more emphasis can be placed on legal arguments in a tribunal with legal representation or knowledge. When appearing before a tribunal whose composition does not include members with legal training or experience, you may wish to place more emphasis on practical and factual issues.
- (c) Type of Tribunal - The mandate of the tribunal is an additional factor which also influences the behaviour of tribunals. Of particular importance is whether the tribunal adjudicates between two competing interests such as a Residential Tenancies Board might or if the tribunal adjudicates between individual and public interests such as professional disciplinary tribunals or a tribunal like the Alberta Energy Resources Conservation Board.

A tribunal which has an obligation to look out for the public interest often intervenes more in the proceedings than a tribunal which simply adjudicates between two competing interests. The latter tribunal generally allows the representatives of the two competing groups to provide submissions and then adjudicates on them. Where there is a public interest component, a tribunal often sees itself as protecting the public interest and will often intervene more as the representative of the public interest.

2. Follow The Rules But Prepare As If No One Else Will

Although tribunal proceedings are intended to have structure and most tribunals have set rules and procedures laid out, these are not always rigidly adhered to. Therefore, although there is a general pattern to administrative tribunal proceedings, there is no guarantee that such pattern will be followed. Accordingly, anyone appearing before an administrative tribunal ought to prepare as though the proceedings will follow the tribunal's established procedure but with the expectation that the rules may be altered or abandoned, and you must be prepared to deal with that.

3. Advance Your Interests but Refrain from Being Adversarial

One of the basic underlying roles of tribunals is to collect information so that they can make a decision or order. An effect of this is that civil rules concerning the admissibility of evidence generally do not apply. This is to facilitate the necessary information gathering so that the tribunal can make the right decision. As a result, tribunal proceedings are generally much less adversarial than are civil proceedings. Therefore individuals appearing before tribunals are well-advised to be respectful and non-adversarial as much as possible when advocating before a tribunal.

Courts are used to adversarial proceedings and do not take offence at such conduct, however, a person who appears before an administrative tribunal and is very adversarial in their approach risks alienating the hearing panel members. The key then, when advocating before an administrative tribunal, is to advance your case while also maintaining a friendly and professional rapport with the members of the panel. It is important to be polite and respectful. It will be easier for you to get your point across to the members of a panel if you are calm and courteous.

Administrative hearings are legal hearings that affect people's rights and the panel members will make sure that everybody has a chance to have their say, so do not speak over anyone or interrupt while another party is having their turn. Take notes if that will help you remember to say everything you want to say. If you feel too distressed to continue, ask to have a break. Many panels deal with highly emotionally charged situations and will grant you this opportunity.

B. PREPARING FOR A HEARING

Preparation for a hearing before an administrative tribunal involves many tasks and the precise nature of the tasks depends upon the particular tribunal and the matters in issue. There are, however, certain generic tasks applicable to preparing for most administrative tribunal hearings. Not surprisingly, these tasks are not all that different from what is done to prepare for a court hearing. Here are the basic steps in preparing for a hearing before an administrative tribunal:

1. Getting started – Gather facts, witnesses and legislation. Review jurisdiction.
2. Learn about the tribunal
3. Prepare the evidence
4. Prepare the law
5. Develop the theory of the case
6. Written briefs and submissions
7. Pre-hearing filing of evidence
8. Pre-hearing coordination among participants and procedural issues
9. Preparation of cross-examination
10. Final preparations

1. **Getting Started**

Ensure the proceeding has been properly brought before the tribunal. Does this tribunal have jurisdiction to hear this matter? Learn all of the relevant facts and issues. Sit down and think about what your desired outcome from this hearing is. Obtain all relevant available documents and names of people involved in the matter, including any outside experts who might be able to assist. Assemble and review all relevant legislation.

Learning About the Tribunal

Read the tribunal's governing legislation. Read the tribunal's rules. Browse the tribunal's website. The legislation and rules are often available here. Contact tribunal staff and talk to them about the process. Talk to others who have previous experience appearing before the tribunal. Determine if there are any particular requirements concerning evidence, particularly the filing of evidence, before the hearing.

Preparing the Evidence

There are two main stages in preparing the evidence. There is the initial collecting all relevant information stage, and then the evidence selection and honing stage. Evidence selection and honing usually occurs after you have developed your theory of the case.

Stage 1 – Collecting – Obtain administrative tribunal's full disclosure documentation. They are legally obligated to disclose all relevant information they possess. Ask prosecuting counsel or tribunal staff what evidence will be presented, which witnesses will appear and what they expect those witnesses will say. Interview potential witnesses. Determine if expert witnesses are required, and if so speak to potential expert witnesses. Review all documents you can obtain which were not in the tribunal's file. Spend some time looking for additional helpful information that may not be in the tribunal's file. Review potential physical exhibits, photos, etc.

Stage 2 – Selection and Honing – Select witnesses to be used, review and prepare for their evidence, select documents to be used in evidence, select physical exhibits. Review admissibility rules. These are often different than in civil proceedings.

Determine if any evidence should be presented in documents or via electronic means or by a Powerpoint presentation. Select any expert witnesses and have them prepare relevant written reports.

Be careful when using experts if:

- the tribunal has detailed knowledge of the matter upon which the expert will testify;
- the expert is a "lecturer"
- the expert has "expertise" in many subjects
- the matter really does not require an expert and an experienced person in the field or someone with direct knowledge of the events would be a better witness.

Preparing the Law

Assemble and read all of the relevant statutes and regulations. Review the *Administrative Procedures and Jurisdiction Act* as it may fill in gaps or cover matters not dealt with by the tribunal's legislation. Obtain copies of all relevant policies, guidelines or other documents of the tribunal which may be relevant to the matter before the tribunal. Research and review prior tribunal decisions and court decisions respecting decisions of this tribunal that are relevant. Prepare an outline of the main legal propositions in favour of your desired outcome. Be prepared to address these. Next, identify law and policies that are problematic for your desired outcome. Identify procedural and substantive issues that may give rise to arguments that the tribunal does not have jurisdiction and be prepared to deal with those.

Developing the Theory of the Case

Having determined what evidence exists and what the relevant law is, the next step is to develop the theory of the case. The *Theory of the Case* is a summary of your position. It is your game plan and your strategy. If you had to summarize your position in a page or so, what would you say? It may form part of your closing argument and is a story you could tell that is persuasive and will lead the tribunal to the obvious and necessary conclusion that is your position. Your theory of the case must persuade through sincerity, plausibility and simplicity. It is the context for the tribunal to understand your case. Develop your theory of the case as early as possible and then never do anything inconsistent with your theory of the case.

When developing your theory of the case, consider the following points:

- Why is the case before the tribunal?
- What are the main factual matters that need to be proven and why should the tribunal make findings of fact in favour of your position?
- What are the main legal issues and why should the tribunal interpret the law in favour of your position?
- What is the relief sought and why should it be granted by the tribunal?

Written Briefs and Submissions

Prepare written briefs and submissions if requested in accordance with the rules of the tribunal. Follow any prescribed format for written submissions and if none, then put your submission in a logical order such as introduction, facts, issues, law, argument, and remedies sought.

Where the hearing is a paper hearing, the written materials are critical! This will be your only chance. Start early, refine and rethink it. Give it to others to edit and comment.

Pre-Hearing Filing of Evidence

Determine if the tribunal's rules allow for this and if so, determine the format, number of copies needed, whether electronic copies are acceptable and mode of service of copies.

Determine if any evidence is confidential and make appropriate arrangements to safeguard it. Privacy legislation has made this an important issue to consider in today's environment.

Pre-Hearing Coordination Among Counsel and Procedural Issues

Call other parties involved to discuss:

- Procedural issues and amount of time needed for the hearing.
- Agreement on facts or to narrow the factual disputes.
- Agreement on legal issues or to narrow legal issues.

Where several parties are on the same side of a matter, call them to discuss:

- Witnesses and evidence available.
- Coordination of evidence and order of appearance at hearing.
- Coordination of legal arguments.

Consider and prepare for the potential motions you might make at a hearing:

- Jurisdiction of tribunal.
- Procedural issues.
- Production of evidence.
- Confidentiality
- Bias of tribunal members
- Credibility of witnesses
- Assessment of costs
- Standard of proof.

Preparation for Cross-Examination

Plan the cross-examination before the hearing based on:

- Evidence that has been disclosed.
- Any written statements and reports, including any experts.
- The theory of the case and what factual strengths of the opposing case need to be contradicted, undermined or neutralized.
- What information your witnesses have that could be used to contradict the other side's witnesses.

Final Preparation

Prepare an opening and a closing argument even if the tribunal's process doesn't seem to allow for it (closing argument will be subject to adjustment as the hearing proceeds).

Ensure all necessary documents have been filed.

Ensure all A.V. equipment that will be needed is working and that a back-up has been planned.

- Organize your case documents, notes, etc. in the order matters will occur at the hearing as follows:
 - Introductory and preliminary matters.

- Case in chief.
- Cross-examination
- Closing submissions.

Do final preparation of witnesses as close to the day of the hearing as possible.

C. CONDUCT OF A HEARING

The hearing must be fair as it is governed by the rules of natural justice. The term “natural justice” is used to describe the collection of duties which courts have imposed on tribunals even though those duties may not appear in any statute. There are two broad rules of natural justice which are:

- the rule against bias – this rule not only requires that the tribunal be unbiased, but they also appear to be unbiased.
- the fair process rule – this rule protects the right of a party to a full and fair hearing. It requires that the affected person receive full disclosure and be given an opportunity to be heard and to present their position.

Tribunals control their own process subject to statutory requirements and the rules of natural justice

Disclosure Issues

Disclosure of documents and information should have been provided well in advance of the hearing, however, at the hearing information may be introduced that was not disclosed and you must be prepared to deal with that or request an adjournment so you have an opportunity to deal with it. Often the tribunal’s rules set out the process to be followed if there has been improper disclosure.

Production of Evidence

There is likely legislative requirements to produce certain information and a power for the tribunal to compel production of evidence or records. You should have reviewed the legislative powers and obtained the assistance of the tribunal staff to serve witnesses with production of documents and Notices to Attend for witnesses.

Confidentiality

Generally speaking administrative proceedings are open to the public. The main issue therefore is to protect commercial or personal information, particularly personal information of vulnerable individuals. Often a hearing can proceed with names of individuals redacted, changed to initials, etc. You must be aware that documents introduced as evidence and statements of witnesses are going into the public arena and, if that is not acceptable, you need to take steps to protect it.

Excluding the Public

This will generally require an order from the tribunal unless the legislation permits private hearings. An application to exclude the public may be contested (particularly by the media). It is appropriate, however, to exclude witnesses until after they have provided their testimony.

Evidentiary Matters

Generally speaking, all evidence that is relevant and reliable is admissible unless specifically excluded because it is privileged or for some other legitimate reason. Administrative tribunals generally are not bound by strict rules of evidence. Procedures however will vary from tribunal to tribunal. Some tribunals may have very strict hearing and evidentiary rules. Evidence will generally be documentary or oral – oral evidence may be presented by lay witnesses or expert witnesses.

Tips for Presenting Evidence:

- Organize documents.
- Prepare a hearing book.
- Consider how many documents you actually need. Avoid overkill on a basic point.
- Present the documents in a logical and coherent order.

When preparing witnesses, ensure you explain the hearing room set-up and the process that will be followed. Make sure your witnesses are familiar with the issues upon which they will be examined and understand that they will be subject to cross-examination or questioning by the tribunal. Make sure witnesses are familiar with hearing “etiquette” and process.

Evidence can be excluded because it is not relevant, has little probative value, or is highly prejudicial. Similarly you can object if a lay person is giving opinion evidence which should be reserved to an expert, if the witness is not competent to speak to the matter, if the evidence is speculative, or if the information has not previously been disclosed to you and you are surprised by it.

Do not wait to object and ask that evidence be excluded. Object before the evidence goes in, whenever possible. Clearly state your concern and the prejudice that will arise if the evidence is allowed to go in. The tribunal will be required to stop and consider your submissions on the evidence and an order may be required with respect to the evidence before the hearing continues. It is better to deal with all such objection in advance if at all possible.

Presentation Order

- Opening Statements
- Applicant
 - witnesses and evidence in support
- Respondent
 - witnesses and evidence in support
- Reply/Rebuttal (applicant)
 - new issues arising
- Closing Statements

D. TIPS & TRICKS

- Do not attempt to speak privately with a panel member.
- The main thing to keep in mind as you prepare your case is that the panel can only use the evidence and submissions made to them to make their decision. Be sure to give them everything they need.
- Decide what the main points and issues are in your case and stick to those while presenting your case to the tribunal.
- Prepare a detailed outline of what you think the tribunal needs to know and then organize how you will be able to present those facts to the tribunal.
- Prepare your witnesses.
- Be courteous and make a good impression.
- Your appearance tells the tribunal that you respect the tribunal and care about your case.
- Be respectful to everyone in attendance, not just the tribunal. This includes the other side, their lawyer and witnesses. How you act is as important as how you look.
- Arrive early. Be organized and ready to start on time.
- Come prepared. Make sure you have all the documents with you and bring enough copies for the entire tribunal and the other side. Wait until you are asked to speak before talking. Address everyone by their last name.
- Tell the truth.