The Perfect Match: What Can the Tribunal Do To Improve the Date?

Introduction

Relationships are all about communication. Tribunals cannot expect parties to intuit how best to present their cases. Tribunals have an obligation to develop procedures that instruct parties about what the tribunal is looking for in both substance and form. Engaging parties in a dialogue on a case-by-case basis about the preferred way to put forward their interests will improve tribunal and party satisfaction and result in a better outcome.

Masters of the House

In *Prassad v. Canada (Minister of Employment & Immigration)*, [1989]1 S.C.R. 560, the Supreme Court of Canada considered the authority of administrative tribunals to develop their own procedures:

> We are dealing here with the powers of an administrative tribunal in relation to its procedures. **As a general rule, these tribunals are considered to be masters in their own house.** In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. (emphasis added)

As masters of their own procedures, subject to the rules of fairness and natural justice, administrative tribunals have considerable flexibility to craft hearings and pre-hearing procedures that permit them to best fulfill their statutory mandates in the unique circumstances presented by each case that comes before them. Instead, administrative tribunals tend to rely upon procedures developed by the courts. They do so in part due to a concern that procedures that do not mirror those of courts may violate the rules of fairness; in part, because of a desire to standardize rules of procedures that their constituents can rely upon; and, in part because they simply fail to step back and evaluate what procedures are best suited to the unique circumstances of the case before them.

In fact, the rules of fairness are not as great a constraint as they may perceive. Reviewing courts do not expect administrative tribunals to mirror the procedures of courts – otherwise, the matters the legislature delegated to them would have been delegated to the courts or adjudicators on administrative tribunals would all be lawyers or experts in procedural justice. Instead courts have consistently held that fairness is to be evaluated in a contextual or circumstantial way. The headnote of the Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, summarizes the majority reasons in part as follows:

> **The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected.** The purpose of the participatory rights contained within it

> is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker. Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive. (emphasis added)

In *Amalgamated Transit Union, Local 113 v. Ontario (Labour Relations Board)*, [2007] O.J. No. 3907, the Ontario Superior Court, after concluding the Ontario Labour Relations Board's functions resemble judicial decision making, said:

> However, the way in which procedural fairness is achieved must be considered against the backdrop of the types of matters the Board is required to decide as part of its unique jurisdictional mandate, including situations and degrees of potential strife and disruption to employers, employees and the broader community. **The content of procedural fairness is necessarily shaped by the context and circumstances of the particular matter under consideration.** (emphasis added)

This can only be interpreted as a judicial invitation to tribunals to craft procedures that are appropriate to the circumstances of the individual cases before them.

<u>Rules and Guidelines</u>

It is of course important that constituents know a tribunal's general procedures and can rely upon them. For that reason, administrative tribunals are encouraged to promulgate rules or guidelines of procedure and to publish them in a form that is accessible and understandable to their constituents. However, those rules and guidelines should also incorporate a degree of flexibility that permits some tailoring of the process to the individual circumstances of the case and constituents should be aware that the tribunal may exercise that flexibility to vary from the general procedures outlined in the rules or guidelines.

The Model Code of Powers and Procedures proposed in the Alberta Law Reform Institute's Consultation Memorandum No. 13 (Sept. 2008) (the "Model Code") includes provisions that specifically enable an administrative tribunal to take a contextual approach to its procedures:

> 2.2 THE POWER TO TAILOR MODEL CODE PROCEDURES OR TO VARY PROCEDURES OF GENERAL APPLICATION
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> (1) A tribunal may adopt rules of procedure of general application in

addition to or in substitution for those contained in the Model Code, subject to the requirements of procedural fairness and the enabling enactment.
(2) Notwithstanding that it has adopted procedures of general application, a tribunal may adopt particular procedures or vary existing procedures for a given circumstance, subject to the requirements of procedural fairness and the enabling enactment.

Pre-hearing Conferences

More and more administrative tribunals (as well courts) are recognizing the value of pre-hearing conferences. Typically, these conferences are intended to serve two purposes: 1) alternate dispute-resolution; and, 2) case management. However, frequently the emphasis is placed on mediation and the opportunity to discuss ways to craft an effective and efficient hearing is insufficiently exploited.

Administrative tribunals can avoid the frustrations caused when parties arrive without having had any prior discussion among themselves, no disclosure of relevant documents or will-say statements, or no effort to identify common ground, by addressing these matters in pre-hearing conferences. This is the place and time to use the flexibility tribunals are afforded to collaboratively craft a process that will best serve the parties and the tribunal's mandate. It is an opportunity to gain an understanding of the interests of the parties and what they expect to achieve from the hearing process and to manage those expectations if they are misplaced.

In many cases, the facts actually in dispute are very narrow. Parties should be encouraged to prepare agreed statements of fact. There is frequently resistance to do so, because parties worry, often obsessively, about advantages gained in the wording of the agreed facts. The tribunal can assist in neutralizing the language and assuaging unwarranted fears about the language proposed. If parties start with the basic uncontroverted facts, momentum can be built to tackle the more critical aspects of the dispute.

If the tribunal has not promulgated rules about pre-hearing disclosure, rules specific to the hearing should be discussed and if rules exist, compliance should be reviewed. A book of agreed documents can save considerable hearing time and should be filed with the tribunal before the hearing so it can have a preliminary familiarity with the documents.

If there are preliminary issues to be argued, directions can be given as to when and how those issues should be addressed. Often, a less formal conference call will suffice.

The exchange of will-say statements, witness background outlines and expert reports will all serve to expedite the hearing and permit the parties to focus their efforts on the real issues in dispute.

The preparation of joint books of authorities will not only reduce paper but will also frequently enlighten parties as to the legal principles that are agreed to and those that are not.

Time limits for the various stages of the hearing should be considered. Even if they are not strictly enforced but treated only as goals, they encourage parties to be more efficient. The highest court in our country has very strict time and page limits so it is not inappropriate for an expert tribunal with limited resources to place some limitations on the length of submissions or numbers of witnesses.

Most important, the pre-hearing conference permits the tribunal to explain its mandate and to tell the parties how they can best assist the tribunal in reaching its decision. What evidence is the tribunal likely interested in hearing and how can it most effectively be presented.

The Model Code includes the following provisions relating to pre-hearing conferences:

3.4 PRE-HEARING CONFERENCES

(1) A tribunal may, on its own initiative or at the request of a party, hold a pre-hearing conference with the parties and any other participants for one or more of the following purposes:

(a) to identify the issues in question and the position of the parties, and any other participants including, where applicable, matters relating to costs;

(b) to recommend the procedures to be adopted with respect to the hearing;

(c) to explore the possibilities for settlement or for referring the matter to alternative dispute resolution;

(d) if an oral hearing, video conference or teleconference is to be held, to set the date, time and place for the hearing and to fix the time to be allotted to the following persons to present evidence and arguments;

(e) to decide any other matter that may aid in the simplification or the fair and most expeditious disposition of the proceedings.

(2) A tribunal member who participated in a pre-hearing conference at which the parties attempted to settle issues may only participate in a subsequent hearing if

(a) the subsequent hearing is confined to issues that were not raised in the settlement discussion; and

(b) all parties provide their express written and informed consent to the member's participation in the subsequent hearing.

EXPLANATORY NOTE – PRE-HEARING CONFERENCES

Pre-hearing conferences are effective case management tools. They can be used to identify and simplify the issues to be considered and set the timetables for a hearing. They also can be used to assess the potential for and to make referrals for settlement or for decision by alternative dispute

resolution mechanisms.

To retain flexibility and accommodate limitations in tribunal staffing, a tribunal member who presided at a pre-hearing conference is not prohibited from participating in a subsequent hearing. However, to avoid the apprehension of bias, a tribunal member who participated at a pre-hearing conference at which the parties attempted to settle issues is not to preside at the hearing unless the parties give their consent. [See for example, *L.N. v. S.M.*, 2007 ABCA 258.]

The Hearing

In their text, "Hearings Before Administrative Tribunals", (3d), authors Robert Macaulay and James Sprague emphasize that "(t)he purpose of a hearing is to gather in evidence and argument that will allow the agency to fulfill it statutory mandate. A hearing which is conducted in a way that is not geared to this purpose is not being conducted properly. A hearing which is conducted in a way that obstructs the proper gathering of information by the agency is a waste of resources."

The learned authors expound further on this purpose:

> …one must keep in mind the ultimate hearing purpose of collecting relevant and useful evidence and argument. You hold a hearing in order to get access to individuals with information necessary or useful to the accomplishment of your mandate, and equally, to give them access to you. It should not be treated as some formal procedural gesture that must be gotten through, nor as a hindrance to the effective control of an agency's backlog. Thus, the extra time which may be necessary to hear out the unsophisticated applicant, to explain a process clearly, or to test the ability of a proffered expert, may be well compensated by the quality of the resulting decision. Equally, one should not adopt procedures or rules that are not geared to the ultimate mandate to be served by your agency and you should be ready to depart (always in a way that is fair) from the technicalities of any procedures which you adopt which may in an individual case be counterproductive to the collection of relevant and useful information.

The opening statement is the parties' roadmap for the tribunal. It should identify the issues, their position on each issue, the evidence they intend on calling to support their position, the witnesses who will testify and what they expect the witness to say relevant to the issues in dispute. If parties make thorough opening statements, it is often possible to further narrow the controversy among them. The opening statement provides the tribunal with a context to consider the evidence to be proffered. It is important not to overstate one's case. If the evidence does not rise to the level stated in the opening statement, there is a risk the tribunal will focus more on what was not proven than what was. Tribunals

should use the opening statement portion of the hearing to clarify positions, map out the hearing schedule and to finalize any outstanding procedural issues.

Agreed statements of fact should be tendered during opening statements, if not filed before the hearing commences, together with agreed exhibit books. Tribunals should take the time to familiarize themselves with the statements of fact and exhibits before witnesses commence testifying. It is difficult to take down notes of evidence and read exhibits at the same time.

It is routine for examination-in-chief to begin with a biographical sketch of the witness. A brief written summary is a more efficient way of providing this evidence. It is rarely contentious and it will save time and maintain focus if provided in written form. With the permission of opposing parties, witnesses should be led through evidence that is not likely controversial and tribunals should direct a party to do so.

Cross-examination is a matter of style and different counsel make effective use of varying cross-examination styles. Tribunals need to give parties some latitude to develop their cross-examination. However, it is not effective cross-examination to berate or belittle witnesses and questioning that is disrespectful impresses no tribunal and should not be tolerated.

In final argument parties provide the legal framework to consider the evidence the tribunal has heard. It is not necessary to provide copies of tribunal jurisprudence that is well known and often relied upon unless some unique aspect of the case is being emphasized. Highlighting important portions of case authorities is helpful to the tribunal. Tribunals are always interested in how the result a party is advocating for advances the tribunal's mandate or purpose.

If the evidence is fresh and did not take many days to put in, it is not necessary to undertake a thorough review of the evidence; rather it is best to highlight the evidence that fits within the legal framework advocated. If evidence is summarized, it must be done fairly and accurately or the party's credibility with the tribunal will be harmed.

Parties don't want to be surprised by the tribunal's approach to the case and most prefer if tribunal members engage them during final argument to test their theory of the case and to seek clarification. That does not mean argue aggressively with the parties or constantly disrupt the flow of argument. But like other relationships, passive-aggressive decision-making is not productive. If the tribunal is troubled by a party's submission, it should raise the concern while the party still has an opportunity to address it.

Conclusion

Tribunals have significant flexibility to develop procedures that permit them to best carry out their statutory mandate. It requires a high degree of engagement

with the parties early and throughout the process. The effort is rewarded by hearings that are efficient and that produce cogent evidence and focused submissions and by parties who feel their interests have been fairly and respectfully considered.

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