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MANAGING YOUR MULTIPLE ROLES AS TRIBUNAL COUNSEL

By Gilbert Van Nes, General Counsel & Settlement Officer
Alberta Environmental Appeals Board

I. INTRODUCTION

The issues facing administrative tribunals continue to become more complex. There are more and more administrative tribunals being established. Members of the public are becoming more aware of their rights before tribunals and the ability to participate before public interest tribunals such as those in Alberta like the Natural Resources Conservation Board, the Energy Resources Conservation Board, and the Environmental Appeals Board. This has led to more legal arguments and more complex arguments being presented before the tribunals.

Many tribunal members do not have legal backgrounds; they are appointed for their knowledge in other areas specifically relevant to the function of the tribunal. For example, members of the Environmental Appeals Board have backgrounds in risk management, soil science, water management, and engineering. These backgrounds allow for the members to assess the scientific evidence presented at a hearing, but it is still important to ensure the principles of administrative law and natural justice are upheld throughout the process from the time the issue is filed with the tribunal to the time it is completed in the courts, should a judicial review be filed. This is the main role of tribunal counsel.

The actual role of tribunal counsel will vary with each tribunal. In some tribunals, they may be required to be involved in administrative functions or in educating the public and stakeholders about the tribunal. However, the most important role for counsel is to ensure that his or her client, the tribunal, operates in such a manner as to ensure that the process is fair to all those that

appear before the tribunal. It is essential that counsel for the tribunal does not let his or her other functions interfere with this primary obligation, regardless of the other hats that he or she wears.

II. ACTING AS COUNSEL

1. Preparation for Hearing

From the time an appeal or an application is filed, and sometimes even before it is filed with the tribunal, tribunal counsel can take steps to promote the fair treatment of all participants. People interested in filing an appeal or complaint with the tribunal will often contact the tribunal staff to see what must be done and to understand that the process that will be initiated by the filing of an appeal. Although counsel can explain the process and how the tribunal has dealt with similar matters before, it is important that the members of the public understand that tribunal counsel is not there to give the public legal advice or to tell them how a tribunal will decide a specific matter. The decision making must be left to the tribunal members. It must be clearly explained to members of the public that the tribunal counsel is not the decision maker. (This is also an important understanding that counsel has to reach with the member of the tribunal. Tribunal members can not defer to counsel to make the decision or even appear to be deferring to counsel to make the decision.)

The principles of natural justice require that the person know the case against them and be given an opportunity to have their case heard by an unbiased panel. As a result, one of counsel's key roles is to make sure that all of the documents related to the issue are provided to the all of the parties to the decision-making process. This can create challenges where some information may be subject to claims of confidentiality.

In preparation for a hearing, counsel may prepare legal opinions for the tribunal. These opinions are subject to solicitor-client privilege, but there are exceptions. In *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 ("Pritchard"), the Supreme Court of Canada recognized the many functions of in-house counsel and how not all opinions prepared are subject to solicitor-client privilege. To be privileged information, the Court stated it must be "(i) a

communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.” The Court further stated:

“Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.

Where solicitor-client privilege is found, it applies to a broad range of communications between lawyer and client as outlined above. It will apply with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law. If an in-house lawyer is conveying advice that could be characterized as privileged, the fact that he or she is ‘in-house’ does not remove the privilege, or change its nature.”

In *Melanson v. New Brunswick (Workers’ Compensation Board)*, [1994 N.B.J. No. 160 (N.B.C.A.) (“Melanson”), counsel for the Workers’ Compensation Board prepared a document on the use of a claim as a test case without the applicant’s knowledge. The Court found:

“Legal opinions given in relation to the interpretation of legislation which is germane to a claim before one of the Board’s tribunals is not privileged. Such professional opinions are, in my view, for the benefit of employers, employees and dependents in the processing of claims by the Workers’ Compensation Board, not simply something for the exclusive use of the Board. When the W.C.B. is in an adversarial position or has caused the legal opinion to be generated for matters unrelated to claims, a solicitor-client privilege relationship arises vis-à-vis other parties. However, when the legal opinions relate to the interpretation of W.C.B. legislation or the duty or obligation to pay claims, they must not be withheld from the employers, employees or their dependents. Privilege does not attach. When the opinions were requested litigation was not contemplated nor in hand as between the administrator of the fund and the employer, employee or dependent.”

The Supreme Court of Canada in *Pritchard* noted *Melanson*, stating that “...comments made by the Court of Appeal, pertaining to the production of legal documents, were *obiter dicta*. The proper approach to legal opinions is to determine if they are of such a kind as would fall into the privileged class. If so, they are privileged.” The Courts require an assessment of the document produced on an individual basis to determine whether it is a privileged document.

There are also documents or records that are clearly not privileged. For example, where tribunal counsel is involved in the operations of the tribunal, records created in this capacity are not

privileged. For example, where tribunal counsel reports on financial matters to the tribunal or prepares a performance appraisal for one of the tribunal staff that reports to counsel, no solicitor–client privilege is attached. There may be other access and privacy issues, but these are created by other legislation and not the fact that it is tribunal counsel carrying out this function.

2. At A Hearing

Counsel’s role at a hearing is to ensure the process decided upon by the tribunal is adhered to and that the process remains for all participants. The level of participation of counsel at a hearing is based on the legislation and rules of practice of the tribunal, if one exists. At the end of the day, however, it is the fundamental rules of fairness that need to be complied with.

In some tribunals, counsel asks questions of the participants instead of, or in addition to, the questions asked by the panel members. If the tribunal does ask questions, he or she cannot take control of the proceeding. It is still the panel that makes the final decision, and it should not appear as though counsel took part in the decision making process. In *Adair v. Ontario (Health Disciplines Board)*, [1993] O.J. No. 2752 (O.C. G.D.), the Court found counsel did not restrict his role to that of advisor to the board, and that he took an active role by questioning counsel for the applicants and by making his views on the issue known. In the written reasons of the board, the Court found “...a substantial and material portion of the reasons of the board are in the very words of the solicitor to the board. Those words were passed on to the board as advice from the solicitor but in such form that they could be, and in fact were, placed in the reasons.” As a result, the Court set aside the decision of the board.

Tribunal counsel also cannot take control of the hearing. In *Brett v. Board of Directors of Physiotherapy*, [1991] O.J. No. 44 (upheld by the Ontario Court of Appeal, at *Brett v. Board of Directors of Physiotherapy*, [1993] O.J. No. 1253), the court found counsel participated in the proceedings without being asked to do so by anyone, and at times took over the running of the hearing, interfered with cross-examination of witnesses, and assisted the prosecution by alerting the prosecutor when to object to questions asked by counsel for the applicant, arguing the case for the prosecution, and supplying witnesses with the right answers for the prosecution. The

court found the applicant had been denied natural justice, the charges were quashed and were not sent back to the board for a rehearing, and the applicant should have costs on a party and party basis against the board.

For other tribunals, counsel will question the parties but only in limited circumstances. Once such example would be when the participant does not understand the question as it is being asked by the panel. Counsel may be able to ask the same question, using different phrasing, to get the answer the panel was seeking. In *Ahluwalia v. College of Physicians and Surgeons of Manitoba*, [1999] M.J. No. 55 (C.A.) (“*Ahluwalia*”), the appellant claimed board counsel had conferred with the panel and gave advice to the panel without the appellant present. The court found counsel’s intervention was balanced, and he confined his role to legal issues, clarifying matters of admissibility of evidence, resolving objections of lawyers, and from time to time asked witnesses to repeat or clarify their answers. The court found he did not participate in the substance of the decisions made by the panel. However, the court of appeal added “...that counsel for the panel ought always to direct the panel in the presence of all the parties, to answer all questions from the panel in the presence of the parties, and never to confer with the panel in the absence of the party charged.” This decision goes against what has normally been accepted by the courts in that counsel can be consulted by the panel during its deliberations.¹ In *Snider v. Manitoba Association of Registered Nurses*, [2000] M.J. No. 59 (C.A.), the court interpreted the obiter comments from *Ahluwalia* as to mean that even though it is preferable that the meeting occur in the presence of the parties, it does not mean that a decision is automatically invalidated if counsel confers with the panel in the absence of the parties. If a new issue or argument arises out of the meeting with the panel, it is important to give the parties the opportunity to respond.

Tribunal counsel can assist in keeping parties focused on the issues, but his or her actions must be consistent with the principles of fairness and natural justice. Where there are any concerns, remember the axiom that discretion is the better part of valor.

¹ See: *Khan v. College of Physicians and Surgeons of Ontario*, [1992] O.J. No. 1725 (C.A.).

3. Post Hearing

The issue of whether counsel should retire with the tribunal panel when it is deliberating has been the source of judicial review of the tribunal's decision. The issue is predicated on the basic tenet of administrative law that "the person who hears the case decides the case." The panel, whether it consists of one, three, or more members, is appointed with the responsibility of determining the specific issue before it. It is not the role of tribunal counsel to make the decision or to make recommendations on how the tribunal should decide or deal with findings of fact. Counsel is there to respond to legal questions that occur, but it is important that counsel does not act in a manner that can raise an apprehension of bias. In *Bovbel v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 563 (F.C.A.), the Court recognized outside sources involved in the decision making process may cause problems, but "...when the practice followed by members of an administrative tribunal does not violate natural justice and does not infringe on their ability to decide according to their opinion even though it may influence that opinion, it cannot be criticized."

Tribunal counsel is often required to review the drafted decision. This provides some assurance that the decision made by the panel does not violate any legislated regime and that the decision remains within their jurisdiction. It can also be a method of ensuring consistency between decisions, but care must be taken that each decision is made on its merits and that the panel is not pressured to conform to existing precedents. Counsel cannot interfere with the independence of the decision-makers and the decision is written to reflect the panel's thoughts and reasons. Counsel cannot prepare the reasons, but he or she can assist in drafting the reasons.² Any draft of the decision must go back to the panel for their review and comments, and the actual decision should be in the decision-maker's wording.

One of the key aspects to ensuring that these requirements are met, is the working relationship that counsel has with the tribunal members. Particularly with lay members, counsel must ensure that the tribunal members understand that it is their decision and that all tribunal counsel can do is provide advice within the proper scope of his or her duties. For example, tribunal counsel can

² See: *Carlin v. Registered Psychiatric Nurses' Association of Alberta*, [1996] A.J. No. 606 (Q.B.).

bring to the tribunal members attention past cases that have been decided by the tribunal, relevant legislative provisions, and advice on how these provisions have been interpreted in the past. A healthy counsel/member relationship includes the member challenging the advice of counsel, or even from time to time choosing not to accept it. A healthy counsel/member relationship does not include a member accepting something simply because that was the advice.

4. Judicial Review

When a tribunal's decision is judicially reviewed, counsel for the tribunal may have to appear to speak to the tribunal's process. The extent of the tribunal's participation will depend on the type of tribunal and the decision it is required to make, but in the past, participation has often been limited to producing the record the tribunal relied on to make its decision and to making submissions on limited areas, normally process related issues and jurisdictional issues. In the case of *Imperial Oil Limited and Devon Estates Limited v. Alberta (Minister of Environment)*, (2003) ABQB 388, the issue of the level of participation of the decision makers was assessed. In this case, the applicant, Imperial Oil Limited and Devon Estates Limited ("Imperial") raised the issue of the level of participation of the Director whose decision was appealed, the Environmental Appeals Board (the "EAB"), whose report and recommendations were sent to the Minister of Environment, and the Minister of Environment, whose final decision was being judicially reviewed. Imperial argued the Director should not make any representations other than to answer the Court's questions, and the Minister's involvement should be restricted. Imperial had no issue of the level of participation offered by the EAB in its brief. In her decision, Mme. Justice Nation stated:

"Practically speaking, the participation of a tribunal in a judicial review has to be fashioned by reference to the structure of the body whose application is under review, and the issue being reviewed. For instance, if a body is the arbitrator between two opposing parties, and one party appeals, it makes sense that such a board would merely provide a record, and have less participation, as one would expect the two opposing parties to adequately raise the issues. There would still be a role, however, for that body to explain its constituent legislation, any policies or workings of the tribunal that bear on the issues, and to make submissions on its jurisdiction, if that was in issue. This should be done without favouring, or presenting arguments on behalf of, either of the two sides....

In the situation where a government body actively starts a process and makes an order or directive, and the recipient asks for a judicial review of that order, different considerations are present. To allow that body only to file the record may result in the Court not having the benefit of the institutional knowledge of that body, which is charged with the administration of certain legislation. It is incorrect to suggest that an applicant would be able to bring forth that information....

It is noteworthy that with the functional and pragmatic approach, the Supreme Court of Canada has provided factors that this Court must consider to decide the level of review. The cases of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, and *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, require that certain information be considered that can only be provided by the body under review, such as the expertise of that body. Administrative bodies may also have submissions to make about policies and the workings of that body that is particular to them. They must have standing to allow a court to have the information to make a proper determination on the factors set out by the Supreme Court of Canada.”

In the decision, Mme. Justice Nason found the Director, the Board, and the Minister could participate in the judicial review proceedings, and with respect to the Board specifically, she stated:

“The Board, as an appeal board, should be restricted to comments about its jurisdiction, the standard of review, and its policies and procedures in general, where those are under attack. It is not to justify the correctness of its recommendations to the Minister or to enter the fray on natural justice issues. It is entitled to explain, for example, whether it sets limits on cross-examination in every case and why.”

Counsel for the Board was there to answer specific questions from the Court, and not enter into the substantial arguments presented to the Court by the applicant. The Board, as well as the Director and the Minister were instructed to “...keep a pragmatic and functional focus on their representations.”

On a more practical basis, counsel for the tribunal can to some degree act as a “friend of the Court,” offering assistance to the Court where it is permitted. To a large degree, this is dependant on building a positive relationship with the Court; knowing where your clear legal boundaries are and knowing when you are only being of assistance to the Court. As long as you

clearly know which side of the line you are on, and “shut up” when the Court does not want to hear from you, this is frequently one of most effective approaches to take.

Another practical aspect is whether “in-house” legal counsel should represent the tribunal at a judicial review. In essence, the question is whether you should conduct your own judicial review or is it preferable to retain outside counsel or have another in-house counsel undertake the judicial review. There is little in the case law that discusses this directly, but in all likelihood unless your own conduct is the subject of the judicial review, there is nothing legally wrong with conducting your own judicial review. However, in my view, where the tribunal has the resources, it is preferable to have another counsel carry out the work. It provides a distance and perspective that makes presentation of a neutral case more effective, and prevents the surprise of half-way through the judicial review discovering that it is really your conduct or your advice that is under scrutiny.

III. CONCLUSION

The role of counsel for a tribunal is continuing to involve and is never dull. As new issues and circumstances come before the tribunal, the expertise of counsel in administrative law and jurisprudence becomes increasingly important.

Gilbert Van Nes
General Counsel and Settlement Officer
Alberta Environmental Appeals Board
306 Peace Hills Trust Tower
10011 – 109 Street
Edmonton, AB T5J 3S8
E-mail: gilbert.vannes@gov.ab.ca