Administrative Tribunals

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Update Pending

This practice note explores administrative tribunal powers and procedure. This practice note covers such topics as the ways in which administrative tribunals differ from courts, enabling statutes and associated regulations, tribunal procedure, specifically, parties, notice, disclosure obligations and hearing mechanics. In addition, the practice note examines the different avenues that may be used to review the decision of a tribunal, including re-hearing, statutory appeals, judicial review and political appeals.

For more information on administrative tribunal procedure, see Application for Relief Checklist and Intervention Checklist. For information on judicial review, see the practice notes: Judicial Review (ON) and Judicial Review: Standard of Review. See also Common Judicial Review Application Mistakes Checklist (ON) and Considerations Before Challenging a Tribunal Decision Checklist.

General

An administrative tribunal is established by federal or provincial statute and derives its power from the express language of its constituting statute. Tribunal members typically are appointed by the federal or provincial cabinet. Administrative tribunals play an important role in our society.

> They regulate many aspects of our life, from beginning to end. Hospital and medical boards regulate the methods and practice of the doctors that bring us into this world. Boards regulate the licensing and the operation of morticians who are concerned with our mortal remains. Marketing boards regulate the farm products we eat; transport boards regulate the means and flow of our travel; energy boards control the price and distribution of the forms of energy we use; planning boards and city councils regulate the location and types of buildings in which we live and work. In Canada, boards are a way of life. Boards and the functions they fulfil are legion.

(*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] S.C.J. No. 21 at para. 17 (S.C.C.).)

Tribunal and Court Differences

While many regulatory tribunals perform adjudicative functions resembling those of a court, regulatory tribunals differ from courts in several respects:

- The power of a tribunal is limited to what its statute empowers it to do or powers that are "necessary by implication" to its statutory powers. Unlike a court, a tribunal does not possess any inherent jurisdiction.
- The issues before regulatory tribunals typically involve more than just the interests of two adversarial parties; for example, the mandates of many regulatory tribunals include the protection of the public interest. As a result, regulatory tribunals are frequently called on to decide what the Supreme Court of Canada has described as "polycentric" questions that require a balancing of interlocking and interacting interests.
- Many tribunals develop policies in addition to adjudicating cases. Regulated companies must devote resources on an ongoing basis to follow and participate in policy initiatives undertaken by regulators so that they have a voice in the development of the policies concerning their industries.
- Regulated companies deal frequently with tribunal staff in order to keep the tribunal informally informed about applications or requests that the companies propose to make to the tribunal.
- Tribunals generally employ more flexible procedures than courts; they are not bound by the strict rules of evidence that are used in court litigation.

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- The composition of many regulatory tribunals is not limited to members with legal backgrounds; members may include people with technical expertise in the regulated industry, representatives of government and people who represent the interests of the community at large.

Enabling Statutes

Tribunals are creatures of statutes; as a result, the starting point for understanding what a particular tribunal can or cannot do is a close examination of its enabling statute and associated regulations. Statutes that create regulatory bodies typically do not contain comprehensive procedures for the commencement and conduct of tribunal proceedings. A tribunal's statute (or other legislation) may authorize it to create its own rules of procedure. Some provinces have enacted legislation that sets down basic rules of process for all tribunals operating within the province. Alberta, British Columbia, Ontario and Quebec have general administrative procedural legislation governing all provincial administrative tribunals. The relevant statutes are listed below:

- **Alberta.** *Administrative Procedure and Jurisdiction Act*, RSA 2000, c. A-3.
- **British Columbia.** *Administrative Tribunals Act*, S.B.C. 2004, c. 45.
- **Ontario.** *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22.
- **Quebec.** *An Act Respecting Administrative Justice*, CQLR c. J-3.

In addition to rules of procedure, many regulatory bodies adopt policies that govern aspects of their operations, ranging from conflict-of-interest codes to guidelines for the filing of confidential information with the regulator. You may wish to consult a tribunal's website for information on their procedures.

Duty of Procedural Fairness (Natural Justice)

In addition to adhering to any statutory rules of procedure, Canadian administrative tribunals must abide by the common-law rules of fairness or natural justice, which apply to all administrative decisions of public authorities that are not of a legislative nature. Traditionally, administrative law required a tribunal to conduct hearings in accordance with the principles of "natural justice". Courts now talk more about the obligation of tribunals to operate in accordance with "procedural fairness".

As the Supreme Court of Canada has noted, "[T]he concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". In the leading case of *Baker v. Canada (Minister of Immigration and Citizenship)*, [1999] S.C.J. No. 39, the Supreme Court set out the following five non-exhaustive factors as relevant to determining what is required by the common-law duty of procedural fairness in a given set of circumstances:

- The more the function of a tribunal resembles that of a court, the more the procedural protections closer to the trial model would be required by the duty of fairness.
- Greater procedural protections will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted.
- The more important the decision is to the lives of those affected and the greater its impact on those persons, the more stringent the procedural protections.
- The legitimate expectations of a person challenging the decision may also determine what procedures the duty of fairness requires. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness.
- Courts must take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances.

The bottom line of the requirement of procedural fairness was put as follows by the Supreme Court in *Baker v. Canada (Minister of Immigration and Citizenship)* at para. 22:

> ... underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness 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 by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

Administrative Tribunal Procedure

Parties

Generally, a person whose legal rights or interests will be directly affected by a decision may participate in a tribunal's decision-making process. "Directly affected" has been interpreted to mean a personal and individual interest as distinct from general interest which pertains to the whole community (*Corp. of the Canadian Civil Liberties Assn. v. Ontario (Civilian Commission on Police Services)*, [2006] O.J. No. 4699 at para. 8 (C.A.), leave to appeal refused [2007] S.C.C.A. No. 40 (S.C.C.)).

Intervenors

Given the polycentric nature of tribunal decision-making, parties other than the applicant may be affected by decisions. The right of an affected party to participate in a tribunal proceeding may be set out in the following instruments:

- the provincial general administrative procedural legislation (in Alberta, British Columbia, Ontario and Quebec);
- the tribunal's governing legislation; or
- the tribunal's rules of practice.

The scope of an interested person's participation in a proceeding generally is left to the discretion of the tribunal. For further information on intervening, see Intervention Checklist.

Directions

After the tribunal has determined who may participate in a case, it will issue some form of direction or procedural order advising the parties of the steps leading up to the hearing. The direction may address the following:

- **Issues.** Some tribunals will review a party's application and determine what issues are raised without consulting the participants in the proceeding. Others will elicit the views of the participants on what issues should be considered. This may be done through either a written or oral process. The tribunal may have to adjudicate contested issues where participants are unable to agree on whether they should form part of the hearing.
- **Understanding the Applicant's Case.** Tribunals will use a variety of methods to assist the tribunal's staff and interested parties in gaining a better understanding of the applicant's case. The methods may include the following:
    - *Technical Conferences.* Presentations by the applicant about its case. Participants may ask the applicant questions on its evidence. The tribunal may treat the questions as informal or as a formal part of the record in the proceeding.
    - *Information Requests.* Participants may be given the opportunity to ask written questions of the applicant on its evidence; the answers would form part of the record.
    - *Further Filing of Evidence.* A tribunal may direct an applicant to file further evidence on particular points to assist the tribunal in understanding the application.
- **Evidence from Intervenors.** A tribunal may permit intervenors to file evidence on issues that affect their interests, and intervenors may be asked to respond to information requests on the evidence.

Opportunity to be Heard

A tribunal must give a party affected by the decision a reasonable opportunity to present its case. This obligation is commonly referred to as the *audi alteram partem* rule. Although the content of this rule may vary from case to case, its key principles can be summarized as follows:

- **Hearing.** There is no absolute requirement that a tribunal must hold an in-person hearing before making a decision. A tribunal's statute may specify the circumstances when a party is entitled to an oral hearing, but regulatory bodies often ask an applicant and affected persons whether the matter should proceed by way of an oral or written hearing. In deciding whether to request an oral or written hearing, several factors should be taken into account:
    - ○ Will there be disputed issues of fact that must be decided by the decision maker? Oral hearings tend to be better suited to determine contested issues of fact, especially if the credibility of witnesses may play a role in deciding the matter. Written hearings are well suited to deal with matters of policy and law.
    - ○ Does the matter involve a routine application of the regulatory body's policies or of the applicable law?
    - ○ Is the matter time sensitive? Tribunals sometimes face difficulties in convening panels on short notice for oral hearings; written hearings may prove a more expeditious way to proceed.
- **Notice.** Persons who may be affected by a tribunal's decision are entitled to receive notice of the proceeding. Usually, tribunals have flexibility in selecting the kind of notice that an applicant must give to affected parties.
- **Pre-Hearing Discovery.** Persons affected by a proceeding are entitled to know the case they have to meet. If a regulatory body is proceeding against a person, it must make sufficient disclosure of the allegations and supporting evidence in order to enable that person to respond to the case. If a company applies for relief from a regulator, such as setting rates for the services it sells, affected parties are entitled to obtain from the applicant sufficient details of its case in order to enable them to comment on the applicant's request.
- **Contrary Evidence.** A fair hearing not only requires an affected party to know the case it has to meet, but the party must also be able to file contrary evidence in support of its position.
- **Right to Representation at the Hearing.** Although there is no absolute right at common law to representation by an agent or counsel at oral tribunal hearings, the invariable practice of Canadian regulatory bodies is to permit an applicant or affected person to be represented. The scope of the counsel's participation will depend on the complexity of the issues and the interests at stake in the proceeding.
- **Public Hearings.** The general rule is that hearings should be held in public in order to preserve the appearance of an impartial tribunal. On occasion, a tribunal may have to consider commercially sensitive evidence; most tribunals employ procedures that allow a party to seek an *in camera* hearing in order to deal with such information. Where an *in camera* hearing is held, typically counsel for interested parties are permitted to attend the session after signing an undertaking of confidentiality.
- **Cross-Examination.** Although there is no absolute right to cross-examination at a hearing, fairness would dictate that right for an affected party if complex facts are in issue or credibility is an important factor in assessing the evidence.
- **Reasons for Decision.** It is now widely accepted that the rules of fairness require a tribunal to give reasons for their decisions, either oral or written.

Notice

Persons who may be affected by a tribunal's decision are entitled to receive notice of the proceeding. Providing notice serves two purposes:

1. to alert persons whose legal interests may be affected so that they may take steps to protect their interests; and
2. to communicate what matters are in issue and the proposed action to be taken so that the parties and the decision maker know what is to be decided.

Generally, tribunals have flexibility in selecting the kind of notice that an applicant must give to affected parties.

Hearing

There is no single standard form of hearing in a tribunal proceeding; administrative tribunals have considerable discretion over their procedures. Unlike the relatively rigid structure of a civil trial, an administrative hearing can take many forms and its structure will depend on the tribunal's mandate, as well as the number and sophistication of the parties involved. When determining the appropriate procedure for a particular hearing, regard must be given to satisfying the requirements of the governing statute, any general administrative procedural legislation and the applicable rules of fairness. An administrative hearing may be oral or written, or a combination of both.

Oral hearings tend to resemble court proceedings in terms of the order of presentation of evidence and the sequence of questioning on the evidence, but display several notable differences:

- witnesses may testify as part of a panel structured around a particular issue, rather than individually (this can make it more difficult to cross-examine the witnesses, since there can be "safety in numbers");
- members of the tribunal panel may question witnesses extensively on their evidence, both with respect to specific facts and with respect to the policy implications of the evidence; and
- the rules of evidence generally are not strictly applied unless specifically provided for in a tribunal's governing statute (*e.g.*, s. 15 of the Ontario *Statutory Powers Procedure Act*, sets out the general approach to evidence applicable to tribunals by providing that a tribunal may admit as evidence sworn or unsworn evidence relevant to the subject matter of the proceeding).

See also Application for Relief Checklist.

Absence of Bias

A person is entitled to have a matter decided by an administrative tribunal that is impartial and open-minded to the evidence. A biased tribunal can be enjoined from hearing a matter or, if a biased tribunal has decided a matter, its decision may be set aside. The law recognizes two types of bias: actual bias and reasonable apprehension of bias.

Actual bias requires a demonstration that a member of the tribunal is totally closed-minded or has a pecuniary or other material interest in the outcome of the proceedings. Actual bias arises infrequently in practice.

Reasonable apprehension of bias may exist whether or not there is actual bias. Canadian law operates on the basis that justice must not only be done, but also be seen to be done. A reasonable apprehension of bias on the part of a tribunal member may arise from certain circumstances, including:

- a previous relationship between a tribunal member and one of the parties to the proceeding;
- statements made by a tribunal member outside of the hearing on matters relating to issues in the proceeding;
- conduct by a tribunal member during a hearing that displays a hostility to, or favouring of, one party; and
- a meeting with one party to the proceeding in the absence of the other parties.

Where a concern arises during a proceeding that a tribunal member may be biased, a request can be made for the member to recuse himself from the hearing. If the request is denied, bias can form the grounds for a subsequent challenge to the tribunal's decision.

Settlement

A number of administrative tribunals now require parties to participate in pre-hearing or settlement conferences. These conferences vary in nature. Some are informal, providing an opportunity for tribunal staff and the parties to discuss procedural issues in advance of the hearing. Others are formal, without-prejudice settlement conferences, presided over by an independent facilitator, that are designed to facilitate the settlement of some, or all of the issues raised in a proceeding. Any settlement resulting from such a conference is normally subject to final approval by the tribunal, but as a general rule, tribunals are reluctant to interfere with settlements reached by the parties as long as they are supported by the evidence filed in the proceeding.

Where a regulated entity files frequent applications before a tribunal, the regulatory may adopt a form of standing settlement conferences for the entity. For example, the National Energy Board requires TransCanada PipeLines ("TCPL") to maintain a task force composed of affected parties that discuss TCPL proposals in advance of their filings with the regulator, in an effort to achieve consensus on proposals.

Review of an Administrative Tribunal Decision

Broadly speaking, four different avenues exist in seeking a review of a decision made by a regulatory body:

- a motion to the tribunal for a variance or re-hearing of its decision;
- a statutory appeal to the courts;
- an application for judicial review to the courts; and
- a political review, by way of a petition to the federal or provincial cabinet.

Motions for Variance or Re-Hearing of the Tribunal's Decision

A number of administrative tribunals possess the statutory power to vary or reconsider their decisions. Such a power to vary may be found in the tribunal's statute or in provincial administrative procedures legislation (*e.g.*, s. 21.2 of the Ontario *Statutory Powers Procedure Act*). Although the grounds for variance can be ascertained from the statute or rules of a specific tribunal, often the availability of a variance or re-hearing is limited to the following circumstances:

- demonstration that the tribunal made an error in fact;
- a change in circumstances since the decision was made;
- the emergence of new facts since the decision was made; and
- facts have come to light that were not previously placed in evidence and could not have been discovered by reasonable diligence at the time.

While some tribunals will accept a motion to vary or reconsider within a reasonable time after the decision is made, others may set limitation periods for bringing such a motion.

Statutory Appeals

A regulator's governing statute may provide for a right of appeal to a provincial superior or appeal court, or in the case of federal tribunals, to the federal courts. Such rights of appeal are in many cases explicitly limited to questions of law and jurisdiction. As a general rule, appeals are not permitted to review a regulator's findings of fact.

Statutory appeals may be as of right or leave of the appeal court may be required to bring the appeal.

The power of the appeal court usually is set out in the tribunal's statute and may range from setting aside the decision and remitting the matter for a re-hearing to the tribunal, to substituting the court's opinion for that of the tribunal. For additional guidance, see the practice notes: Divisional Court: Commencing and Perfecting an Appeal (ON), Divisional Court: Obtaining Leave to Appeal (ON), Divisional Court: Responding to an Appeal (ON) and Appeals and Judicial Reviews Pitfalls Checklist.

Judicial Reviews

Historically, superior courts have possessed the jurisdiction to review the legality of the actions of administrative tribunals by way of their traditional prerogative remedies of *certiorari*, prohibition, *mandamus*, *habeus corpus* and *quo warranto*. Under the *Federal Courts Act*, R.S.C. 1985, c. F-7, virtually all applications for judicial review of federal boards, commissions and other tribunals are within the exclusive original jurisdiction of the Federal Court.

A judicial review application is not an appeal, and the reviewing court has limited power to substitute its own view for that of the regulator. Generally, the court's review will be limited to an assessment of whether the regulator acted within the scope of its jurisdiction or in a procedurally fair manner.

British Columbia, Ontario and Prince Edward Island have passed specific legislation detailing the applicable procedures for applications for judicial review. In other provinces and territories, the applicable provisions are contained in the rules of court. The table below references the provisions governing applications for judicial review for each jurisdiction.

Jurisdiction	**Legislation**
Federal	*Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1
Alberta	Alberta Rules of Court, Alta. Reg. 390/68, r. 753.03
British Columbia/Yukon	*Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, ss. 2(1), 14
Manitoba	Court of King's Bench Rules, Man. Reg. 553/88, r. 68.01
New Brunswick	Rules of Court of New Brunswick, N.B. Reg. 82-73, r. 69.02
Newfoundland and Labrador	Rules of the Supreme Court, 1986, SNL 1986, c. 42, Schedule D, r. 54.02
Northwest Territories/Nunavut	Rules of the Supreme Court of the Northwest Territories, N.W.T. Reg. 010-96, r. 594(1)
Nova Scotia	Civil Procedure Rules, N.S. Reg. 420/2008, r. 7.05
Ontario	*Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(1)
Prince Edward Island	*Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, ss. 2, 3(1)
Quebec	*Code of Civil Procedure*, CQLR, c. C-25, ss. 834.1, 844, 846
Saskatchewan	King's Bench Rules, r. 664(1)

For further guidance on judicial review, see Judicial Review (ON), Judicial Review: Standard of Review, Appeals and Judicial Reviews Pitfalls Checklist, Common Judicial Review Application Mistakes Checklist (ON) and Considerations Before Challenging a Tribunal Decision Checklist.

Political Appeals

Some governing statutes of tribunals permit appeals or petitions of the board's decision to be made to the federal or provincial cabinet. This avenue of review is not frequently invoked and generally is used when a party wishes to challenge a policy determination by the tribunal.

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