

Innovative Strategies for Resolving Cases:

Are Tribunals Falling Behind?

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I–Introduction¹

Chief Justice Warren K. Winkler’s recent article on judicial mediation² contains an anecdote about how Mr. Justice Edson Haines once settled cases in the early 1960s:

Inevitably, at some point during a trial, he would summon counsel to his chambers. With few exceptions, the parties would emerge with a settlement. What transpired behind those hallowed walls was confidential, but we may infer, I think, that what went on in Justice Haines’s chambers was probably a process not unlike what we now call judicial mediation.³

The anecdote also shows that 50 years ago parties, legal counsel and decision makers were prepared to engage in less formal dispute resolution.

This paper will examine the mutual interest for lawyers, parties and tribunals to continue exploring innovative ways of resolving disputes. The civil courts have undertaken various recent initiatives to improve access to their dispute resolution process.

Are administrative tribunals similarly focussed? The paper will also summarize some of the recent strategies the Canada Industrial Relations Board (CIRB) has implemented to resolve cases more efficiently.

¹ The comments in this paper are solely those of the author and do not bind the Canadian Industrial Relations Board or any of its members.

² The Honourable Warren K. Winkler, “Some reflections on judicial mediation: Reality or Fantasy?” (2010) 29:3 The Advocates’ Journal 3

³ *Ibid*, page 4

II–The Mutual Interests

In many administrative hearings, there are mutual interests for:

- 1) parties, including the self-represented;
- 2) tribunals, with limited resources and increasing caseloads; and
- 3) legal counsel⁴.

There are clear advantages for all three groups to consider consenting to procedures which may push the adjudicative envelope beyond the usual oral hearing.

For parties, whether represented or not, the reality is they prefer to have their essential disputes adjudicated quickly and with a minimum of cost. They have other urgent demands on their time and resources. It is doubtful they are mesmerized by legal counsel’s cross-examination or final argument, despite the war stories which may later result from them.

For tribunals, their *raison d’être* is to resolve cases without necessarily following a court-like oral hearing. Given the theory that administrative tribunals employ subject-matter experts to decide cases, the application of this expertise should not be limited to writing decisions at the conclusion

⁴ This paper will focus on legal counsel given this is an LSUC conference, though many party representatives at tribunal hearings are not lawyers.

of oral hearings. Informal dispute resolution will increase a tribunal's efficiency and reduce its workload.

For legal counsel, openness to the innovative strategies that some administrative tribunals use may help improve career-long relationships with their clients. While counsel understandably enjoy the thrill of a well-pleaded case, clients prefer results. Obtaining such results, at a fraction of the anticipated cost, may be among a lawyer's more effective marketing strategies.

For example, many labour lawyers in private practice have a strong personal and professional bond with clients. This bond is often stronger than the one the client may have with the law firm itself. It is arguable that the various ways labour tribunals resolve cases may play a part in promoting this client bond.

III–Court Initiatives

The civil courts have been working consistently to make their services more affordable and thus available to average Canadians.

Chief Justice Finch of the British Columbia Court of Appeal⁵ recently described legal fees as being the “elephant in the room” when confronting access to justice issues. The Chief Justice opined that a failure to deal with fees puts at risk the legal profession’s continuing ability to remain independent and self-governing:

[13] While other changes aimed at increasing access to justice, including simplified court procedures, alternative dispute resolution, legal aid and multi-disciplinary practices, have helped or will help to increase access to justice, consultation with a lawyer or legal advisor is still fundamental. High cost is a disincentive to obtaining legal advice. High cost discourages people from consulting lawyers early, when there may be more opportunity to avoid or minimize legal problems.

Amendments to Ontario’s *Rules of Civil Procedure (Rules)*, which came into force on January 1, 2010, introduced the concept of proportionality by linking the cost of the process with the value of the dispute before it⁶. Rule 1.04 specifies:

⁵ Chief Justice Lance Finch, “Access to Justice: The Elephant in the Room” (Delivered to the Canadian Bar Association - B.C. Branch at Scottsdale, Arizona, November 20, 2010). Online: The Courts of British Columbia <http://www.courts.gov.bc.ca>.

⁶ For comments on the amended *Rules*’ first anniversary, see Christopher Guly, “New civil procedure rules ‘step in right direction’”, *The Lawyers Weekly* (December 10, 2010), page 2.

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1). Proportionality

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. O. Reg. 438/08, s. 2.

(emphasis added)

The amended *Rules* also increased a judge's powers on summary judgment motions to decide cases, despite evidentiary and credibility issues (*Rule* 20.04):

20.04 (1) Revoked: O. Reg. 438/08, s. 13 (1).

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment. O. Reg. 284/01, s. 6; O. Reg. 438/08, s. 13 (2).

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence. O. Reg. 438/08, s. 13 (3).

*Liu v. Silver*⁷ (*Liu*) examined this new approach. In *Liu*, the trial judge weighed evidence and drew inferences which allowed her to determine that the civil action had been filed outside the limitation period:

11 The amendments to *Rule* 20 allow the court a broader authority than allowed under the predecessor *Rule* to weigh evidence, evaluate the credibility of witnesses, and/or draw any reasonable inference from the evidence. The test under *Rule* 20.04(2)(a) is whether there is "genuine issue requiring a trial".

⁷ [2010] O.J. No. 1608, aff'd [2010] O.J. No. 4636 (C.A.)

...

18 I accept Dr. Silver's position, as expressed in *Soper* and subsequent cases that the fact the discoverability doctrine is at issue does not in itself mean there is a genuine issue requiring a trial. Subsequent to *Aguonie*, courts have held it is appropriate on a summary judgment motion to inquire whether there are facts supporting negligence that might have been discovered at a point in time outside the limitation period.

19 It is also important to note that the amendments to the Rules offer judges on summary judgment motions broader scope to deal with evidentiary issues. Pitt, J. of this court posited in a recent decision, and I agree, that the issue whether it is appropriate to address the issue of discoverability on a summary judgment motion needs to be revisited in light of the broader powers afforded judges under the amended Rules the authority to weigh evidence, evaluate credibility, and draw any inference from the evidence. [*Zwaigenbaum v Scher*, 2010 ONSC 559, Court File No. 09-CV-369646].

Chief Justice Winkler, in an earlier article on mediation⁸ emphasized the need for the judiciary to adopt more judicial mediation, but also set out the challenges that mediation created:

As judges have become more facilitative in their approach to mediating cases within the court system, other concerns have surfaced. Should judges caucus with the parties separately? How interventionist should judges be? Even though the judge acting as mediator will not decide the case if it goes further, is mediation consistent with the role of the judge as a decision maker? How forceful should judges as mediators be in urging a settlement, given that the office of a judge may create unintended pressures on the parties to accept a solution with which they would not otherwise agree? These are only some of the questions that must be asked and answered. Many judges are still struggling to find the proper balance when performing the role of judicial mediator.

(emphasis added)

In a recent interview, Chief Justice Winkler, who was a highly successful labour lawyer in private practice prior to his appointment to the bench, acknowledged that not all judges are comfortable with judicial mediation⁹:

⁸ Access to Justice, Mediation: Panacea or Pariah, 2007 Canadian Arbitration and Mediation Journal 16(1); 5-9.

⁹ Cristin Schmitz, "Ont.'s chief justice calls for judges to expand their role as mediators", *The Lawyers Weekly* (September 3, 2010), page 1.

He goes on to advocate that “judicial mediation should be expanded beyond its present form” because “the judiciary is well situated now to meet this pressing demand within our civil justice system, even despite the views of those within the judiciary who would resist this development”.

Nevertheless he acknowledges that some judges don’t want, or have, mediation skills. Some also fear they must make “the dreaded descent into the arena” to “broker deals”, a role they see as conflicting with their core mandate to decide cases above the fray.

The Chief Justice described his “core belief” on the necessity of judicial mediation:

Here, finally, is my present and core belief: any tenable civil justice system in this relatively new century will meet the needs of the public only if it provides effective judicial mediation as an integral part of its process. Despite the real hurdles, no part of judicial mediation need remain a fantasy. Continuing integration of judicial mediation into the panoply of services provided by our civil courts will only enhance access to justice.¹⁰

¹⁰ *Ibid*, note 2, page 5.

IV–Access to Justice And Administrative Tribunals

Certain labour tribunals, be they arbitrators or boards, employ some innovative procedures to streamline the handling of their cases. But this is not to suggest that labour tribunals have a monopoly on such practices.

Nonetheless, some of the current labour tribunal practices may be of interest to other administrative tribunals that adjudicate cases, as well as to legal counsel and parties.

1. Mediating Cases

Judicial mediation, as described by Chief Justice Winkler, separates the role of mediator and judge. Interestingly, 50 years after Mr. Justice Haines' successful mediations in cases he was actually hearing, that civil court practice still appears to be limited to meetings with counsel in chambers, if at all.

In the labour law area, at least in some provinces, the decision makers themselves now regularly mediate cases they are hearing.

While mediation by a decision maker is dependent upon the parties' implied or explicit consent, as is any discussion with a trial judge in chambers, parties, counsel and tribunals in labour law cases

have for years accepted this process. Section 15.1(1) of the *Canada Labour Code (Code)*, demonstrates Parliament's encouragement of this process at the CIRB:

15.1(1) The Board, or any member or employee of the Board designated by the Board, may, if the parties agree, assist the parties in resolving any issues in dispute at any stage of a proceeding and by any means that the Board considers appropriate, without prejudice to the Board's power to determine issues that have not been settled.

(emphasis added)

If the parties consent to having a CIRB panel explore a mediated settlement, those efforts will not impact the panel's statutory duty to decide the case.

This labour law concept, while not yet universally adopted across Canada, continues to gain adherents. Nova Scotia is the latest province considering adopting a similar provision for its labour relations legislation¹¹.

Interestingly, the practice of labour arbitrators mediating their own cases predated any explicit legislative authority to do so. Labour legislation at both the Ontario and federal levels simply caught up with arbitral practice.

If the parties consent to the process, much like in a discussion in chambers with a judge, then legislation is not a necessary condition precedent. But it does help to legitimize the process for those who may retain some healthy scepticism.

¹¹ "New law would allow arbitrators to mediate labour issues", *The Chronicle-Herald*, 2010-12-03.

2. Requiring a *prima facie* Case

Roughly 25% of the CIRB's workload comes from duty of fair representation (DFR) complaints. Upon certification, a trade union acquires the exclusive right to represent members of the bargaining unit. A bargaining unit member can file a DFR complaint if he or she alleges the trade union failed to respect its representation obligations under section 37 of the *Code*.

37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

However, the applicable "test" in section 37 comes from the terms "arbitrary", "discriminatory" and "bad faith".

In order to focus complainants, the Board created a detailed form to explain the concepts of "arbitrary", "discriminatory" and "bad faith", as those terms are used in section 37 of the *Code* and the jurisprudence.

The CIRB has adopted a *prima facie* case analysis for DFR complaints. This analytical process resulted from the fact that many DFR complainants contested differences of opinion they had with their trade union, such as how the collective agreement ought to be interpreted.

Under a *prima facie* case analysis, the CIRB accepts as true the material facts the complainant pleaded. It then analyzes whether those facts make out a case to which the respondents must respond.

Unless a complainant establishes a *prima facie* case, the CIRB will not require responses from the other parties. Instead, the CIRB will dismiss the matter.

In *Blanchet v. the International Association of Machinists and Aerospace Workers, Local 712*, 2009 FCA 103, the Federal Court of Appeal accepted the CIRB's use of the *prima facie* case analysis as a screening tool:

[17] As a general rule, when a court presumes the allegations to be true, they are allegations of fact. That rule does not apply in findings of law: see *Lawrence v. The Queen*, (1978) 2 F.C. 782 (T.D.). It is for the court, not the parties, to determine questions of law: *ibidem*.

[18] It is true that, in the passage quoted, the Board did not specify that it was referring to the applicant's allegations of fact. However, the reference to the applicant's allegations cannot be anything other than a reference to allegations of fact. Otherwise, a complainant would need only to state as a conclusion that his or her union's decision was arbitrary or discriminatory for the Board to be forced to find that there had been a violation, or at least a *prima facie* violation, of section 37 of the Code and rule on the merits of the complaint. Thus, the complaint screening process would become a thing of the past.

While rejecting a complainant's case at the start of the process might initially appear unfair, it is far preferable than allowing an unmeritorious complaint to continue, only to be dismissed many months or even a year later. Access to justice does not mean guaranteed access to a long oral hearing process, especially where there was never any initial chance of success.

3. Written Pleadings

In the 1999 amendments to the *Code*, Parliament granted the CIRB a discretion whether to hold an oral hearing:

16.1 The Board may decide any matter before it without holding an oral hearing.

While the CIRB always holds a “hearing” before rendering a decision, the majority of its cases will be done by way of a written hearing, as opposed to the traditional oral hearing.

Ironically, the ability to decide whether to hold an oral hearing requires the CIRB to ask for detailed written pleadings in its cases. These submissions go far beyond traditional pleadings in the courts, such as a Statement of Claim or a Statement of Defence.

The Federal Court of Appeal¹² has confirmed the importance of the CIRB’s written record:

[11] The scheme of the legislation and Regulations indicates that the Board will decide on the basis of the material filed unless it decides to hold an oral hearing or specifically requests additional evidence. No authority was provided to the Court for the proposition that the Board cannot do so, or that in order to treat the material filed as evidence, the Board must give notice to the parties of this intention.

Similarly, the Court has confirmed that credibility issues do not automatically oblige the CIRB to hold a traditional oral hearing¹³:

[4] Counsel for the applicant, who was not his counsel before the Board, recognizes that the Board enjoys discretion in that regard; however, relying on the decision of our colleague Justice Décary in *Raymond v. Canadian Union of Postal Workers and Canada Post Corporation*, 2003 FCA 418, he submits that, in exceptional circumstances, it is possible to review the Board’s decision to proceed

¹² *NavCanada v. International Brotherhood of Electrical Workers, Local 228*, 2001 FCA 30

¹³ *Nadeau v. United Steelworkers of America (F.T.Q.) and Garda Security Group Inc.*, 2009 FCA 100

solely on the basis of the evidence in the record, without holding an oral hearing. He referred the Court to paragraph 4 of that decision, which reads as follows:

[4] Section 16.1 of the Code provides that the Board may decide any matter before it without holding a an oral hearing. This section was introduced by Chapter 26 of the Statutes of Canada, 1998, which repealed the former subsection 98(2) that allowed for circumstances in which the Board could refuse to hold a hearing on a complaint based on section 37. Therefore, the Board now has greater discretion in this respect and the Court must henceforth be more respectful of the Board's decisions about holding hearings, which was not the case prior to the statutory amendment of 1998. This is a matter of internal policy that is beyond the scope of judicial review barring exceptional circumstances.

[5] Counsel for the applicant submits that, in this case, the exceptional circumstances lie in an issue of the credibility of a witness, specifically, the applicant's mother, who denies having received a telephone call from her son's employer informing her that he had dismissed her son, as claimed by the employer.

[6] With respect, I do not agree that, in the context of a section 37 complaint, credibility issues generally constitute exceptional circumstances requiring the Board to hold an oral hearing and that the failure to do so may be used as a basis for a valid application for judicial review. Credibility issues almost inevitably arise in antagonistic employer-employee relations, such that section 16.1 would then be rendered completely meaningless and deprived of Parliament's intended effect.

(emphasis in original)

Even in the absence of legislative authority making oral hearings discretionary, tribunals can be innovative on how to "hear" the parties, while still acting expeditiously¹⁴.

¹⁴ For example, the Ontario Labour Relations Board may adjudicate a case using a "Consultation", rather than a regular oral hearing, with the stated goal: "...to allow the Vice-Chair or panel to expeditiously focus on the issues in dispute and determine whether any statutory rights have been violated."
(www.olrb.gov.on.ca/English/hearing)

V–Conclusion

The courts are actively exploring different ways to improve access to justice, such as through the use of proportionality principles and judicial mediation.

One of the challenges for administrative tribunals is to find ways to apply their expertise without mechanically resorting in every case to a formal oral hearing. A fair “hearing” remains an essential principle, but not every hearing must resemble what occurs before the courts. Indeed, not only are the courts trying to change, but they accept, where appropriate, the innovative techniques some administrative tribunals employ.

The civil courts and certain administrative tribunals are both exploring the same concepts. Mediation by a decision maker, as used by labour tribunals, is not that different from what occurs occasionally with a trial judge in chambers. Judicial mediation as it develops is similar to the mediation assistance many administrative tribunals now offer.

A prima facie case analysis, such as that at the CIRB, or deciding a case based on the written record, rather than after an oral hearing, is not that different from Ontario judges’ new authority to resolve conflicts in evidence and credibility when deciding summary judgment motions.

Oral hearings remain necessary for many cases. But the courts, and some administrative tribunals, appear open to exploring ways to resolve cases fairly, but not necessarily in traditional ways.

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