Efficient Administrative Tribunals: Why Insist on a Cadillac when a Smart Car will do?

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I - Introduction[1]

The pressure to resolve disputes in an affordable, meaningful way continues unabated. One cannot read any law-related publication without noticing the ever increasing number of lawyers offering alternate dispute resolution (ADR) services, including mediation and/or arbitration.

The courts have embraced case management techniques for a number of years, including the use of Case Management Masters. In Ontario, as of January 1, 2010, new amendments to the Rules Of Civil Procedure are designed to improve access to justice.

For example, the Small Claims Court's jurisdiction will increase from $10,000 to $25,000. The monetary limit for the Simplified Procedure[2] will increase from $50,000 to $100,000. Examination for Discovery will also be time limited, while the costs awarded at the end of a civil case will henceforth be proportional to the amount at stake.

The underlying theme in all these initiatives is that disputes can be resolved more efficiently, without unduly limiting procedural fairness. Procedure should not prevent parties from having the substance of their dispute considered, or force settlements for reasons unrelated to the merits of the case.

Administrative tribunals also need to examine continually their processes to ensure an appropriate balance between procedure and substance.

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[1] The comments in this paper are solely those of the author and do not bind the CIRB or any of its members.

[2] The Simplified Procedure, among other things, uses affidavit evidence and limits discovery.

This paper will review several ways tribunals can better serve the parties which are obliged to come before them.

Improvements may come from statutory amendments, a focus on dispute resolution rather than legal technicalities, as well as improved work practices. Some recent developments at the Canada Industrial Relations Board (CIRB or Board) illustrate the types of improvements tribunals can implement.

II - Backgrounder: The Canada Industrial Relations Board

The *Canada Labour Code (Part I - Industrial Relations)* (the *Code*) created the CIRB, and gave it jurisdiction over federally-regulated private employers.[3] Section 4 of the *Code* describes generally the Board's jurisdiction over federal works, undertakings and businesses:

> 4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.

The Board does not have jurisdiction over employees of Her Majesty:

> 6. Except as provided by section 5, this Part does not apply in respect of employment by Her Majesty in right of Canada.

[3] Sections 3 - 6 of the *Code*.

The CIRB is a "representational" labour board. Any three-person panel will have a neutral Chair, as well as one representative each from management and labour.[4] The Legislator provided the Board with the flexibility to meet its workload by allowing the neutral Chair and Vice-Chairs to sit alone on certain cases.

Since amendments to the *Code* in 1999, the CIRB has had a significant discretion whether to hold an oral hearing. The Board decides the vast majority of cases via the parties' written submissions:

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

[4] *Code* section 14. The Board also uses one-person panels for situations covered by section 14(3):

> 14.(3) The Chairperson or a Vice-Chairperson may alone determine a matter that comes before the Board under this Part with respect to
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> (a) an uncontested application or question;
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> (b) a question referred to in paragraph 16(p);
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> (c) a complaint made under subsection 97(1) in respect of an alleged contravention of section 37 or 69 or any of paragraphs 95(f) to (I);
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> (d) a request for an extension of time for instituting a proceeding;
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> (e) a preliminary proceeding; or
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> (f) any other matter, if the Chairperson determines that it is appropriate because of the possibility of prejudice to a party, such as undue delay, or if the parties consent to a determination by the Chairperson or a Vice-Chairperson.

The Federal Court of Appeal[5] recently confirmed the importance of section 16.1 in enabling the Board to carry out its mandate, even in the face of credibility issues[6]:

> [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.

The Board's *Regulations*[7] impose important requirements on parties pleading a case before the Board. For example, an applicant must provide full particulars of the facts and grounds in support of the application[8]:

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[5] *Nadeau* v. *Métallurgistes Unis D'Amérique* (F.T.Q.), A-502-07 (March 31, 2009)

[6] Unofficial translation

[7] *Canada Industrial Relations Board Regulations, 2001* (SOR/2001-520)

[8] Regulations s.10:. An application filed with the Board must include the following information:

(a) the name, address and telephone and fax numbers of the applicant and of the applicant's counsel or representative, if applicable;

(b) the name, address and telephone and fax numbers of any person who may be affected by the application;

(c) reference to the provision of the *Code* under which the application is being made;

(d) full particulars of the facts, of relevant dates and of grounds for the application;

(e) a copy of supporting documents;

(f) the date and description of any order or decision of the Board relating to the application;

(g) whether a hearing is being requested, and if so, the reasons for the request; and

(h) a description of the order or decision sought.

The Board's correspondence reminds the parties that it may decide any case based solely on the written submissions and without holding an oral hearing. The parties, including unrepresented complainants, bear the onus of determining the extent of their submissions[9].

The *Code* encourages the Board to hold pre-hearing conferences and mediate disputes.[10]

Code section 14.2(2) illustrates the Legislator's desire for efficiency by suggesting that decisions should generally be issued within 90 days.[11]

In sum, the Legislator can provide an administrative tribunal with innovative flexibility to assist it in carrying out its mandate.

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[9] The philosophy behind this stance will be examined, *infra*.

[10] *Code* section 15.1(1) and *Regulations* section 25(1):

> 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.
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> 25.(1) The Board may convene a pre-hearing conference to inquire into:
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> (a) the possibility of a settlement;
> (b) the simplification of the issues;
> (c) the estimation of the duration and dates of a hearing;
> (d) whether a notice of constitutional question must be served under section 57 of the *Federal Court Act*; or
> (e) any other matter that may promote the timely and just determination of the application.

[11] 14.2(2) The panel must render its decision and give notice of it to the parties no later than ninety days after the day on which it reserved its decision or within any further period that may be determined by the Chairperson.

III - The Conduct of a Labour Case

The various stages in a labour board case no doubt mirror those at other administrative tribunals.

A - Pleadings Stage

1) How much detail?

Labour boards follow a more detailed procedure compared to that of labour arbitrators. Labour boards generally demand a significant amount of initial, detailed work from the parties in their pleadings.[12]

By contrast, a labour arbitrator may arrive at the first day of an arbitration hearing with little or no knowledge of the case between the parties.[13]

Each regime has its strong points.

a) Labour arbitration

In a majority of cases, an arbitrator starts a case from scratch on the first day of the hearing. Depending on the practice in the jurisdiction, the arbitrator may initially attempt to mediate a

[12] Section 10 Regulations, *supra.*

[13] An arbitrator may become involved earlier if a party requests a pre-hearing order such as for the production of documents.

settlement.

If the parties always had to prepare detailed, written submissions for every grievance going to arbitration, then the process could become overly complex and expensive. Generally, parties will have far more cases before a labour arbitrator than before a labour board.

Nonetheless, the absence of pleadings identifying the issues may lead to vague cases spiralling out of control. Such cases can take numerous hearing days, spread out over several years.

Proper pleadings might have identified the issues and avoided some of these problems. But the cost to the arbitration system could be too high.

b) Labour board

A labour board's requirement for written submissions admittedly places an initial burden on the parties.

However, those submissions allow a tribunal, like the CIRB, to get an immediate grasp of the overall dispute. Tribunal staff, armed with the submissions, may be able to broker or mediate a settlement given their significant knowledge about the case. Just as importantly, the detailed submissions allow the CIRB to analyze whether the case requires an oral hearing pursuant to section 16.1 of the *Code*.

The requirement for full submissions means that parties who fail to respond, or respond in only a summary way, run the risk of having the Board decide the case based solely on the materials

in the file. A party cannot "reserve" a right to provide further submissions at a time of its choosing. In *Canadian National Railway Company*, 2009 CIRB 461, the Board acknowledged the significant up-front work required of parties, but explained why that requirement was essential to its process:

> [21] The Board recognizes that the parties' pleadings in a matter require a significant amount of preparatory work. Since the Board is not required to hold an oral hearing given section 16.1 of the *Code*, this long-standing detailed application process allows it to deal more expeditiously with the cases that come before it.

Requiring detailed pleadings also allows the Board to decide a special category of cases using a *prima facie* case test.

2) Practical Example: Duty of Fair Representation Cases

Over the last five years or so, Board staff and members have re-visited several procedural practices that had existed for decades. They established new practices which improved the time required to resolve cases.

Section 37 of the *Code* is a duty of fair representation (DFR) provision. Because certification provides trade unions with the exclusive right to represent all members of the bargaining unit, the *Code* allows bargaining unit members to file a complaint if they believe their bargaining agent has acted in an arbitrary, discriminatory or bad faith manner with regard to their rights under the collective agreement.[14] Approximately 25-30% of the Board's workload comes from DFR complaints.

[14] Section 37 reads as follows: 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.

Many layperson complainants do not understand fully the DFR concept and the role of a trade union. A trade union has to make difficult decisions. Not everyone in the bargaining unit will agree with the union's interpretation of the collective agreement.

The Board does not second guess the trade union when it decides whether to take a grievance to arbitration or how to resolve a dispute about members' seniority. Rather, the Board examines a trade union's process to ensure it did not come to its conclusion in an arbitrary, discriminatory or bad faith manner.

Due to the high number of DFR complaints, the Board adopted several years ago a "*prima facie* case" test to weed out complaints which, even if all the material facts were assumed to be true, did not establish a case that the trade union had to meet.[15]

The *prima facie* process was not designed to eliminate all DFR complaints. However, there were a large number of complaints which, even if every alleged fact were accepted as true, would still not amount to a violation of the *Code*. Rather than ask the respondent union, and the employer, to file their submissions automatically, and then prepare a full investigative report, as was its previous practice, the Board instead considered whether the respondents had any case to meet.

a) Experience elsewhere

The British Columbia Labour Relations Board (BCLRB) had earlier examined how it dealt with DFR complaints.

[15] For further detail on the *prima facie* case analysis for DFR complaints, see *Abubakar Kasim*, 2008 CIRB 432.

Section 13 of the British Columbia Labour Relations *Code*, RSBC c. 244 (BC *Code*) sets out explicitly how the BCLRB must treat a new DFR complaint:

> 13.(1) If a written complaint is made to the board that a trade union, council of trade unions or employers' organization has contravened section 12, the following procedure must be followed:
>
> (a) a panel of the board must determine whether or not it considers that the complaint discloses a case that the contravention has apparently occurred; ...

The legislature added section 13 to the BC *Code* in 1993.[16] Despite that amendment which was designed to streamline the process, some felt that the BCLRB still allowed too many DFR complaints to pass the initial threshold.

The BCLRB's decision in *Re Judd*, [2003] B.C.L.R.B.D. No. 63 (*Judd*) examined the situation. In a change of its practice, the BCLRB resolved to apply section 13 of the BC *Code* in a tighter fashion despite the fact that most DFR complainants were individuals without legal knowledge or representation (para. 99):

> While trying to be accessible to individuals who are unrepresented is very important, simply passing these types of complaints through to the next step without fully engaging the Section 13 requirements is, in our view, inconsistent with the legislative emphasis of that section. ...

The BCLRB also suggested that allowing unmeritorious complaints to proceed would be worse for a complainant than dismissing it at first instance (para. 100):

> Experience has also tended to cast doubt on whether passing such complaints through the Section 13 threshold is, ultimately, beneficial to complainants. In our experience, the vast majority of complaints are still dismissed, but after a full process of exchanging written submissions, potentially holding a hearing or engaging in other processes with the parties, and all the cost and delay associated with this.

[16] The BCLRB has an additional power, found at section 133(4) of the BC *Code*, to dismiss any complaint which "is without merit".

In *Judd*, the BCLRB adopted the position that tightening up access to the DFR process was in the interest of all parties, including complainants (para. 111):

> In conclusion, we believe that complainants, the other parties, and labour relations in the province are better served by more efficient Section 12 decisions. Along with Section 12 complainants receiving more timely decisions, unions and employers, for their part, are entitled by Section 13 not to be engaged in section 12 litigation unless the complaint discloses sufficient evidence to establish an apparent contravention. The Board will direct its efforts toward these ends.

The complainant did not ask for judicial review in *Judd*. However, in *Budgell* v. *British Columbia (Labour Relations Board)*, [2003] B.C.J. No. 2662, the BC Court of Appeal gave deference to an earlier BCLRB decision on whether a DFR complaint raised a *prima facie* case:

> [13] Whether one agrees or disagrees with the Board's determination that Mr. Budgell did not make out a *prima facie* case on the facts he alleged, its decision was clearly explained. The panel applied the proper test. It considered the appropriate factors. It considered Mr. Budgell's submissions. It did so in accordance with its understanding of the duty a Union owes its members under s. 12.
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> [14] The extent of that duty is a question the Board is uniquely qualified to determine.

The Manitoba Court of Appeal reached a comparable conclusion regarding a Manitoba labour board decision to dismiss a DFR complaint that lacked merit.[17]

b) The CIRB Experience

The CIRB's *prima facie* process examines DFR complaints in order to determine if the Board needs to hear from the respondent trade union and the employer. In order to make this decision, the CIRB has implicitly decided that complainants, despite usually being laypeople, must nonetheless file sufficiently particularized complaints in order to raise a *prima facie* case.

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[17] *Rowel* v. *Hotel and Restaurant Employees and Bartender's Union, Local 206*, [2003] M.J. No. 462.

In order to explain the process, the CIRB created a detailed section 37 form for complainants to complete. The Board also issued an Information Circular.

In *Virginia McRaeJackson*, 2004 CIRB 290, the CIRB conducted an extensive review of the legal principles applying to DFR complaints. The Board indicated the need for complainants to raise a *prima facie* case but also commented on the CIRB's role:

> [49] The Board is an independent and adjudicative body whose role is to determine whether there have been violations of the *Code*. Although the *Code* gives the Board broad powers in relation to any matters before it, it is not an investigative body. Accordingly, it is not mandated to go on a fact-finding mission on behalf of the complainant, to entertain complaints of poor service by the union, to investigate the union's leadership or to investigate complaints against the employer for alleged wrongs suffered in the workplace. Employees who allege that their union has violated the *Code* and wish to obtain a remedy for that violation must present cogent and persuasive grounds to sustain a complaint.

The Board also described the onus on complainants to file particularized complaints:

> [50] A complaint is not merely a perceived injustice; it must set out the facts upon which the employee relies in proving his or her case to the Board. A complaint goes beyond merely alleging that the union has acted "in a manner that is arbitrary, discriminatory or in bad faith." The written complaint must allege serious facts, including a chronology of the events, times, dates and any witnesses. Copies of any documents that are relevant, including letters from the union justifying its actions or decision, should be used to support the allegations.

In *Prince Rupert Grain Ltd. and British Columbia Terminal Elevator Operators' Association*, 2006 CIRB 361 (*Prince Rupert*), the Board reviewed the various tests used to reject a case without calling on the respondents to adduce evidence. While *Prince Rupert* concerned a motion for non-suit, the applicable principles remain the same when examining whether a *prima facie* case exists.

The panel adopted the following passage from Sopinka, Lederman and Bryant in The Law of Evidence in Canada (second ed., 1999) at page 139:

> The judge must conclude whether a reasonable trier of fact could find in the plaintiff's favour if it believed the evidence given in the trial up to that point. The judge does not decide whether the trier of fact should accept the evidence, but whether the inference that the plaintiff seeks in his or her favour could be drawn from the evidence adduced, if the trier of fact chose to accept it.

The panel in *Prince Rupert* described the *prima facie* case test as follows:

> [39] The Board looks to see whether there is evidence before it that, if believed, would form the basis for a *prima facie* case. The Board agrees with the conclusion that is found in The Law of Evidence in Canada and that was referred to earlier in this decision, to the effect that a *prima facie* case is no more than a case for the defendant, or the respondent, to answer. If a *prima facie* case is established, the non-suit motion will be dismissed. If it is not, the motion will be granted, and the overall case will be dismissed.

In the past, even prior to the 1999 *Code* amendments, the Board has required a complainant to establish a *prima facie* case: Air Canada (1975), 11 di 5; [1975] 2 Can LRBR 193; and 75 CLLC 16,164 (CLRB no. 45). The 1999 amendments to the *Code*, and particularly section 16(o.1)[18], have provided further authority for the CIRB to take this proactive approach.

The Federal Court of Appeal[19] recently confirmed the Board's *prima facie* case process. In that case, the applicant had alleged that the Board made an unreasonable decision when it rejected a complaint, despite the fact the file contained an allegation that the union had acted arbitrarily by relying on an erroneous legal opinion.

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[18] *Code* section 16(o.1): The Board has, in relation to any proceeding before it, power

> (o.1) to summarily refuse to hear, or dismiss, a matter for want of jurisdiction or lack of evidence.

[19] *François Blanchet* v. *Association internationale des machinistes et des travailleurs et travailleuses de l'aérospatiale, Section locale 712*, A-349-09 (April 1, 2009)

The applicant argued, if the Board accepted all the allegations as true under the *prima facie* case test, then in this situation how could it find no violation of the *Code*?

The Court confirmed that while the Board accepts a party's *factual* allegations as true in the *prima facie* case analysis, it was not bound to accept a party's *legal* conclusions:

> (18) It is true that, in the excerpt cited, the Board did not specify that it was referring to the applicant's allegations of fact. However, the reference to the applicant's allegations could not be anything but a reference to allegations of fact. Otherwise, anytime a complainant concluded that his or her union's decision was arbitrary or discriminatory, the Board would have to arrive at a finding of a violation, or at least a *prima facie* violation, of section 37 of the *Code* and consider the merits of the complaint. This would negate the complaint screening process.[20]

c) Summary

The Board's *prima facie* case process, while requiring full submissions from the layperson complainant, ensures fairness to DFR complainants while simultaneously saving trade unions and employers the significant expense associated with responding to unmeritorious complaints.

The adoption of the *prima facie* process also relieved the Board's Industrial Relations Officers (IRO) from having to investigate and file a formal written report for every DFR complaint. While those reports were a helpful luxury, the time is now better spent on other urgent applications, such as those relating to certification.

[20] Unofficial translation.

B - Resolving cases after the close of pleadings

1) Initial settlement efforts

Board staff resolve a significant number of cases prior to adjudication. If that were not the case, the Board would have significant difficulty dealing with all the applications or complaints it receives.

Staff serve a vital role by providing important information to potential parties, such as that relating to the Board's jurisdiction and jurisprudence, as well as by conducting sophisticated mediation or other settlement services. Their success is significant; in 2005 - 2006, two thirds of the CIRB's cases were resolved without adjudication.

The success of the Board's regional offices in settling cases arises in part from the fact that settlement discussions are strictly privileged.[21] Parties are able to speak frankly to an IRO without the fear that their settlement position will later be communicated to the panel deciding the case. If parties did not have this confidence in the Board's staff, then far more cases would have to be adjudicated.

The importance of without prejudice settlement discussions is further illustrated by the fact that the *Code* prevents staff from being compellable witnesses either before the Board or elsewhere.[22]

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[21] See *Mohammad Mughal*, 2008 CIRB 418

[22] *Code* section 119: No member of the Board or a conciliation board, conciliation officer, conciliation commissioner, officer or employee employed by the Board or in the federal public administration or person appointed by the Board or the Minister under this Part shall be required to give evidence in any civil action, suit or other proceeding respecting information obtained in the discharge of their duties under this Part.

Board staff and appointed adjudicators also realize that they directly impact the other's efficiency.

The best way for adjudicators to help tribunal staff's effectiveness is to decide promptly the cases they receive for adjudication. This enhances the staff's credibility when they advise the parties that only a limited window exists for their submissions and settlement discussions/mediation. If a file that is sent for adjudication instead disappears into a black hole, then, despite staff members' best efforts, they will have difficulty getting all of the parties' attention if the resolution of the matter appears too far off.

The reverse is also true. If a file takes too long to move from staff to the adjudicative arm, then even a quick decision or hearing will not convince the parties that the Board handled the matter efficiently.

2) Pre-screening cases

If a case does not settle, a panel of the Board, after reviewing the parties' submissions, decides either to hold an oral hearing or to draft a decision.

The Board has no preference for proceeding one way or the other; rather, the facts in the case itself usually dictate how the matter must be handled. If the panel decides that the decision can be prepared based upon the written submissions, then the focus turns to drafting. This paper will consider later some suggested ways to speed up the drafting process.

If the matter requires an oral hearing, then the panel will consider the appropriate case management techniques for the file.

3) Practical Example No. 2: Certification cases

The Board certifies a trade union to represent a specified bargaining unit if it is satisfied the union enjoys majority support. This is shown usually by way of signed membership cards. While many provinces now have mandatory certification votes, the Board will only order a vote in certain situations.[23]

Up until 2004, the Board took on average 170 to 180 days to process certification applications. The Sims' Task Force[24] had criticized undue delays and suggested labour boards could complete the certification process in 30-40 days. In 2004, the Board streamlined its certification system.

Several changes took place in the CIRB's internal procedures to give priority to certification applications. The following are just a few of the changes:

a) Use of a fixed schedule

The Board now creates a detailed timeline for parties which sets out the exact dates by which they must complete certain steps. Rather than telling parties they have 15 days to complete a step, the Board now provides them with the exact due date.

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[23] See section 29 of the *Code* which mandates a vote where a trade union's membership evidence exceeds 35% but is less than 50%.

[24] Seeking A Balance: Canada Labour Code Part I: Review (Public Works and Government Services Canada, 1995)

b) No extensions

The Registrar no longer grants extensions beyond two days for the filing of materials in certification applications. Only a Board panel, in extreme situations, may grant a further extension. This insistence on respecting a tight schedule is no different from that demanded by the Ontario Labour Relations Board when it schedules its mandatory certification votes.

Parties can and do respect tight time lines for priority matters. Certification applications fall within this category.

c) Reduced Process

The Board's IROs no longer prepare a written "Investigating Officer's Report" summarizing each certification application. They instead send a much shorter "letter of understanding" to the parties. The elimination of a full investigation has allowed the IROs to devote more attention to other areas. One of their prime duties in certification applications remains the verification of membership evidence.[25]

d) Disputes about inclusions and exclusions

If an applicant has sufficient support, the Board will certify a bargaining agent, even if some inclusions and exclusions from the bargaining unit remain outstanding.

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[25] See *Genesee & Wyoming Inc., cob as Huron Central*, [2007] CIRB no 388 where the Board dismissed a certification application after the investigating officer found irregularities in the applicant's membership evidence.

The Board has produced a new Information Circular on certification.[26] This document informs the parties of the certification process and the updated procedures being followed.

The lessons learned from re-examining certification are the same as those for DFR cases. A review of the process found that enormous effort was being spent preparing reports when ultimately they were not always needed. By eliminating those reports, except for exceptional cases, the speed of the process improved considerably.

C - Case management procedures

If the Board decides that it cannot draft a decision based only on the parties' written submissions then the formal hearing process is set in motion.

The CIRB holds hearings across Canada. Despite the geographic challenges, the Board strives to ensure that this distance does not prejudice any particular region of the country from receiving comparable services to those offered elsewhere.

The Board employs case management techniques including pre-hearing conferences and mediation. The goal is to offer various dispute resolution services to the parties.

There is nothing novel in holding a case management conference with the parties. Various courts and tribunals have used case management techniques for years. Surprisingly, however, not all administrative tribunals have used them as consistently as the courts.

[26] The document is available on the CIRB's website at www.cirb-ccri.gc.ca

The case management conference allows the Board to identify objections and issues which could potentially derail the upcoming hearing. A panel can make useful procedural rulings at the conference or request written submissions from the parties.

The case management conference also serves as a forum to help the Board understand clearly the issues that the parties want decided. The panel will be well-versed in the case given its review of the parties' written submissions. This allows the panel not only to explore routine questions such as document production, the length and number of witnesses, and preliminary objections, but also whether the parties are aware of some of the Board's recent developments.

For example, nothing prevents the Board from identifying any *Code* sections that were not commented upon in the submissions and asking the parties if they have any relevance to their issues. The Board might also refer to recent decisions in order to canvass the parties' views on the relevance of a particular case.

While Board initiated queries are not mandatory, and do not prevent the Board ultimately from deciding the case based on its overall jurisprudence, it is preferable to raise these issues in advance, rather than ask about them for the first time during final argument when the parties may be unprepared.

After a case management conference, the Board often sends a follow up letter to the parties confirming the tasks to be completed prior to the actual hearing. For example, the letter might establish a clear timetable for submissions about any issues, such as production or confidentiality orders, which remain unresolved.

The case management process helps avoid surprises at the start of an oral hearing. This allows the Board to make the best use of its limited hearing time.

D - Mediation

A labour board's use of mediation/arbitration procedures was explored in a paper presented at last year's edition of this same conference.[27]

Mediation remains a dispute resolution technique available to the parties at any time, even though the matter has been scheduled for a hearing.

Often, Board staff mediate a settlement before the matter reaches the adjudication stage. A panel's representative members and/or the neutral panel Chair can also mediate, usually at the beginning of the hearing. The *Code*, in another legislative development designed to make the Board more efficient, has specified that a panel's involvement in settlement attempts does not restrict its ability to decide the case on the merits[28].

The involvement of the panel in settlement efforts is perhaps the most significant innovation in the labour law field of the last 20 years. Innovative arbitrators, particularly in Ontario, started

[27] Clarke, G., *Labour Boards' Use of Mediation-Arbitration Procedures*; Advanced Administrative Law and Practice; The Canadian Institute, Ottawa (October 28-29 2008). A copy of that paper is currently available on the CIRB's website.

[28] *Code* section 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.

mediating disputes armed with nothing but the consent of the parties. Labour laws were later changed to catch up to this ongoing practice. The concept of a decision maker mediating is slowly gaining acceptance in areas of the law other than labour. This reflects the demands of clients who want to deal with cases in a more expeditious way.

For many labour lawyers who have practised extensively before labour arbitrators and labour boards which offer this type of mediation, the process is not only expected, but demanded. It promotes acceptable resolutions for the parties at a fraction of the cost and time associated with a long hearing.

E - The Hearing

The running of an effective hearing falls outside the scope of this paper. Briefly, however, certain self-evident, but not always followed, practices can improve the hearing process.

1) Set Dates

Adjudicators may not always appreciate the importance of quickly setting dates for both pre-hearing conferences and the hearing itself. Given the incredible pace at which lawyers practise law these days, often the only way to get the parties to focus on a particular case is to set dates by which certain steps will be completed. Dates work equally well in getting the Board panel itself to focus on an upcoming case.

The earlier the parties know about a hearing, the more willing they will be to explore the possibility of settlement with Board staff or the panel. On the other hand, if cases simply sit after

being referred to the adjudicative arm, then it is highly unlikely that the parties will focus their attention on early resolution.

2) Adjudicators are not potted plants either

An adjudicator is not a "potted plant"[29]. Just as a good litigator starts thinking about his or her final argument at the very beginning of a case, so should an adjudicator immediately consider how best to run a new file to ensure a fair hearing, but without undue delay.

Adjudicators at an oral hearing are not passive actors just taking notes for as long as the parties decide to speak. Adjudicators must be proactive. Indeed, given the CIRB's discretion whether to hold an oral hearing or not, a panel may decide to hear some evidence, but only on one particular issue. Similarly, it may decide only to hear oral argument.[30]

3) Be the catalyst

On more than one occasion, clients have remarked what an easy job an adjudicator has when the parties resolve their differences themselves on the morning of the hearing. However, what this observation does not appreciate is the role of the adjudicator as a catalyst in getting the parties to talk together.

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[29] In the Iran-Contra hearings, a US Senator suggested that Oliver North should speak for himself rather than have his lawyer speak for him all the time. Mr. North's lawyer responded "what am I, a potted plant? I'm here as a lawyer. That's my job".

[30] See, for example, *British Columbia Maritime Employers Association*, [2007] CIRB 397; and 150 CLRBR (2d) 224 at para 18.

An adjudicator's proactive approach, by setting hearing dates, holding a case management conference, setting due dates to settle procedural issues and being prepared to proceed on time on the morning of the hearing, helps drive these settlement discussions.

4) Be on time

Hearing time is incredibly valuable, especially where a small number of people need to cover a country the size of Canada.[31]

Therefore, it is the panel's responsibility to run the hearing on time. If the parties require time to discuss settlement or other issues, then they can explain that need to the panel. But the panel should otherwise be ready to start on time in the morning and should set and respect the time provided for breaks and lunch. The parties will follow the panel's lead on timeliness.

It seems so simple, yet experience shows that the practice is not necessarily followed at every tribunal.

F - Writing the decision

A tribunal's efficiency will usually be judged on the speed with which it issues its written decisions.

[31] A neutral Vice-Chair, or the Chair, must be on every Board panel. Including the Chair, who also runs the Board as its CEO, the CIRB currently has six neutrals.

Even the most efficient lawyers can have challenges with procrastination. Often procrastination results when the case is difficult or the decision writer has perfectionist tendencies.

Just as a lawyer has to understand the needs of his or her client in private practice, so too should an adjudicator examine the parties' expectations for the written decision. If the parties do not want a legal treatise, it seems rather incongruous to draft one.

1) What do the parties want?

Labour law has evolved greatly over the last 20 years. While at one time labour firms might have prepared long legal opinions for clients, the cost and later budget cutbacks made those practices somewhat archaic. So labour lawyers adapted.

They did so in many ways, such as by becoming more and more specialized in different areas of labour law. Indeed, being a labour lawyer may not necessarily be a specialty anymore. Rather, many labour lawyers have become experts in just one area such as arbitration; collective bargaining; pensions; human rights; occupational health and safety; or workers' compensation.

Structurally, labour law boutique firms expanded in order to have the specialized bench strength that clients demanded. Clients no longer wanted the legal generalist who could figure out the law and plead a good case; they instead wanted someone who usually knew the legal answer when they phoned.

Competition has no doubt caused a similar flight to specialization in other legal areas.

Have administrative tribunals considered whether their current practices reflect these changes?

Parties usually want a short, reasoned decision. Lawyers' clients may only read the last page to determine "who won". They will usually not pay their lawyer for a long analysis of the decision, unless they are considering their chances on judicial review.

If the fear of judicial review is behind overly long decisions, then that fear is misplaced. The parties' needs should be paramount. In addition, at least at the CIRB, court intervention has been limited as long as the Board properly motivated the conclusions it reached.

At a hearing, experienced legal counsel may submit only one or two key cases in order to support an essential proposition. Their experience tells them that if there is a case on point, their position does not get stronger by adding 10 more cases saying the same thing. Given this reality, does a tribunal always need to conduct a detailed legal review when reaching its conclusion?

The realization that many parties[32] are not expecting an academic treatise, but just want a quick reasoned decision, can lessen the burden on any decision writer. If drafting expectations are lowered, procrastination may be easier to overcome.

This is not to say that a written decision should simply state a few conclusions and then end. A bare conclusion is not a decision[33]. However, a conclusion followed by an explanation of the

[32] Experienced parties and their legal counsel can have the same expert knowledge as the administrative tribunal before which they appear frequently.

[33] For a recent decision on the sufficiency of reasons, see *Clifford v. Ontario Municipal Employees Retirement System*, [2009] O.J. No. 3900 (Ont. C.A.)

reasons which led the tribunal to that conclusion can be done succinctly and will satisfy the applicable legal requirements.

2) Tribunal Administration

A tribunal's administration has the task of promoting an environment conducive to the efficient writing of decisions. For example, is time allowed for the individual writing the decision to start that decision immediately upon returning from an oral hearing? Does the tribunal keep tabs on its workflow to ensure a prompt turnaround of drafts? If too much time passes between drafts, this will kill the decision writer's momentum and encourage procrastination.

There is little as frustrating, or inefficient, as being obliged to review a file again from scratch because of the time it took to get a draft decision back for further editing.

Not everyone works in the same way. A tribunal's administration should ensure that it is equipped to accommodate differing working styles as long as they are demonstrably efficient. If every work practice is reviewed from the perspective of how it speeds up the decision rendering process, then greater efficiency will result.

3) Getting Started

The decision will never be easier to write than immediately following oral argument. Both the facts and the legal issues should be clear in the adjudicator's mind. The longer it takes an adjudicator to get started, the more the facts will disappear from memory. Similarly, once comprehensible hearing notes will start to appear cryptic.

In order to benefit from this optimal time to start the decision, a decision writer should attempt to do something, indeed anything, on the decision. For some reason, getting something down on paper reduces the problem with procrastination. By contrast, doing nothing will make it continuously harder with each passing day to start the decision.

An initial step may be to review the parties' final argument. This allows the decision maker to visualize what information will go into the well known sections of a decision such as the introduction, the facts, the issues, the analysis and the conclusion.

A useful tool to employ when reviewing the notes from oral argument is the Outliner feature available in any word processor. An Outliner organizes the disparate facts, argument and law in a logical way. Material that initially appeared random suddenly becomes clearer when placed in a logical order.

Other useful file management practices exist as a case progresses to encourage "getting started".

In order to keep control over a long case, adjudicators may want to prepare "memos to file" after a series of hearing days. Legal counsel who plead long cases often dictate a stream of consciousness memo about the evidence and legal points they eventually will want to consider.

If an adjudicator keeps track of this vital information as the hearing progresses, rather than trying to remember everything at the end, getting started on the decision will become much easier.

4) Bottom line decisions

There is an initial attractiveness to the apparent speed associated with issuing "bottom line" decisions. The parties often want to know "who won".

This may be a useful technique for very clear cases and for decision makers who write quickly.

However, there can be drawbacks.

The drafting stage is also an analytical process. A review of the parties' arguments and the reading of the cases submitted can sometimes change initial impressions. This can cause difficulty if a bottom line decision, based on initial impressions, has already been issued to the parties.

More importantly, a bottom line decision may take some pressure off a decision maker who feels that something has been accomplished. That lack of pressure may make it more difficult for some drafters to write the reasons promptly. If the parties do not get the reasons within a reasonable time, then this could prejudice their ability to ask for reconsideration[34] or judicial review.

IV) Conclusion

This paper has considered efficiency at administrative tribunals. Just as the courts seek to provide greater access to justice at an affordable cost, so too must administrative tribunals examine the relevance of their long standing practices.

[34] Section 18 of the *Code* gives the CIRB the power to review its own decisions. The Board only exercises this power in exceptional situations: See *Ted Kies*, 2008 CIRB 413.

Statutory provisions can go a long way to improving a tribunal's performance. Is a tribunal regularly reviewing the powers of other tribunals in order to see which statutory amendments might improve its efficiency? For example, is a requirement always to hold an oral hearing exhausting resources which could be spent better elsewhere?

But improvements do not end with changes to the governing legislation. Rather, the tribunal itself must embrace the changes. For example, if the Legislator wants the actual decision makers to settle cases, then the tribunal needs to use and encourage this new found power.

In a time of decreasing or static budgets, tribunals also need to examine their work practices. Could the concept of a *prima facie* case analysis help other tribunals which are faced with a particular type of file that takes a significant portion of its resources? Are too many resources being spent on traditional reports when they could be better utilized elsewhere?

The Board's improvement in its DFR and certification case processing demonstrates that improvements remain available. However, much work remains.

Ultimately, while some might still insist on a Cadillac approach for each case, a Smart Car may be more than sufficient to meet the needs of the parties. After all, while the Smart Car is small, it may be just the type of Mercedes required for the job at hand.

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