

EVIDENCE

Are the old ways the only ways?

Moderator: Adrian C. Wright, Phillips and Wright

Panel: Carol Zukiwski & Julie Gagnon RMRF LLP

Foundation of Administrative Justice

5th Annual Conference

Edmonton, Alberta

April 30, 2009

Introduction and Overview

- Interactive discussion session
- Opportunities for questions/comments
- How we researched this presentation
- Introduction of the panel
- Introduction of the seminar participants

Introduction and Overview

- Typical Hearing Procedure
- Administrative Tribunals – underlying principles
- Rules of Evidence – underlying principles
- Overlying Framework – Natural Justice
- Balancing Act
- Sampling of Tribunals and Hearing Procedures
- Pre Hearing Conferences / ADR / Preliminary Hearings
- How would other hearing procedures work?
- Conclusion

Discussion Point – Typical Hearing Procedure

- complaint / appeal / application filed
- hearing date set
- exchanges of material in advance
- opening Statement
- one side testifies
- Q's by opposing side and the Board
- other side testifies
- Q's by opposing side and the Board
- summaries

Discussion Point – Typical Hearing Procedure

LOOK FAMILIAR?

OTHER IDEAS?

Administrative Tribunals – Underlying Principles

- More efficient / timely than court
- More accessible than court
- Decision maker with technical expertise
- Flexible processes

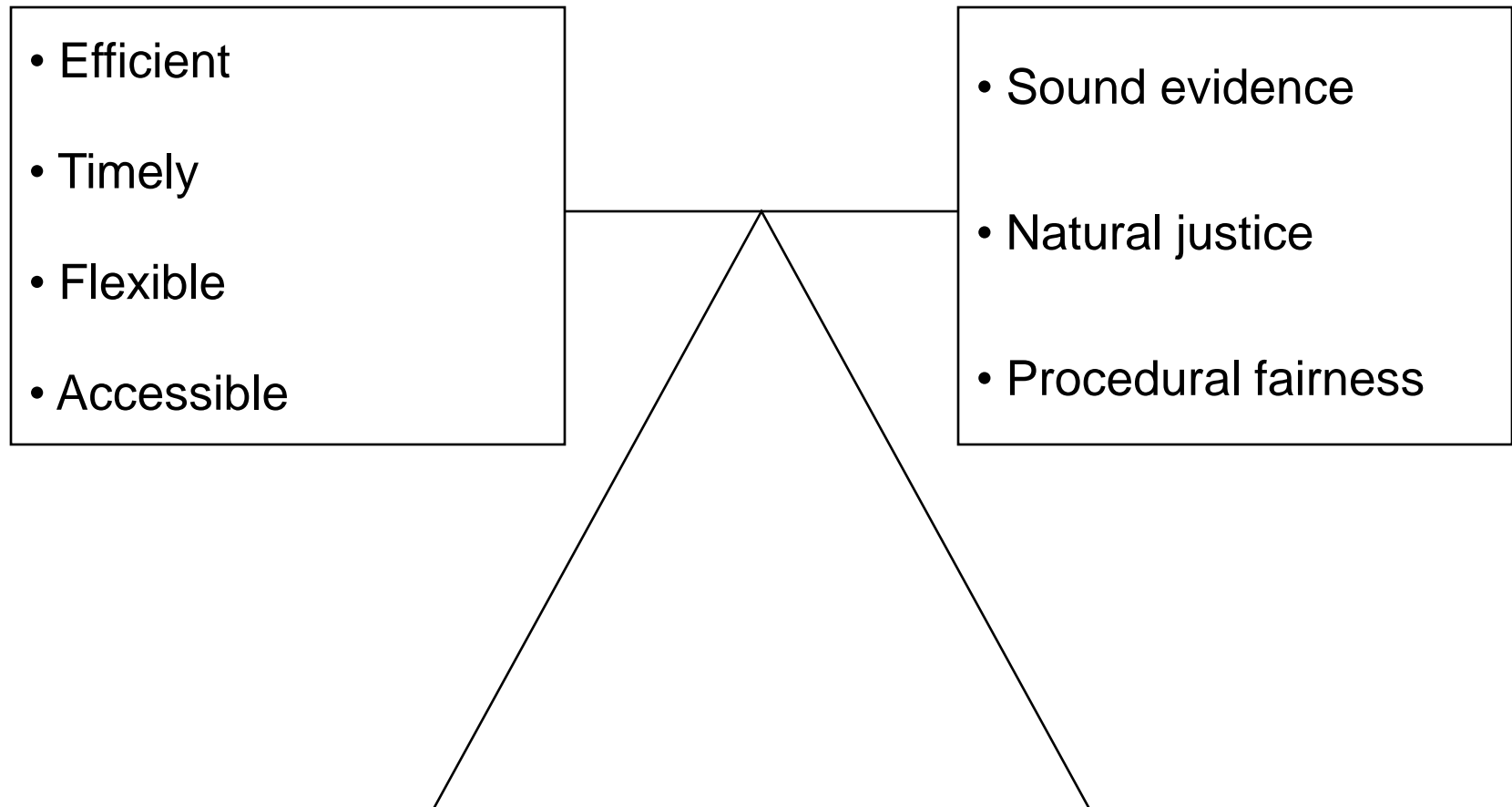
Rules of Evidence – Underlying Principles

- Test the evidence
- Determine weight
- Determine relevancy
- Resulting in sound evidence on which to base decisions

Overarching Framework – Natural Justice / Procedural Fairness

- Not bound by rules of evidence
- Control procedure
- Act within scope of enabling legislation
- Choice of procedure – *Baker* principles

Balancing Act



Sampling of Tribunals & Hearing Procedures

Alberta Utilities Commission (Formerly Energy Utilities Board)

- Large staff with technical and legal expertise
- Most parties appear regularly
- Legal counsel and expert witnesses
- Extensive written material in advance of the hearing
- Written Q's and A's of witnesses in advance
- Witnesses do not give evidence in chief
- Witnesses are cross examined as a panel
- Transcript of proceeding & written decisions

Sampling of Tribunals & Hearing Procedures

Alberta Human Rights Commission

- Multi-tiered process involving conciliation, investigation and settlement attempts
- Appeal investigators report to Chief Commissioner who may appoint a hearing panel
- Parties sometimes represented by counsel
- Exchanges in advance of panel hearing
- Interpreters provided by Commission
- Expert witnesses are sometimes present
- Evidence taken under oath

Sampling of Tribunals & Hearing Procedures

Professional Associations (Discipline Hearing)

- Lawyer for Association prosecutes; member is often has lawyer
- Full disclosure by Association to member (no similar obligation of disclosure by member, however, Association obtains information through investigation)
- Use of ADR
- Generally, no pre-hearing conferences
- Lay witnesses and experts
- Association generally has staff member to schedule and coordinate the hearing
- Hearing follows traditional format

A Sampling of Tribunals and Hearing Procedures

Municipal Government Board

- Majority of hearings relate to property assessment
- Case managers assigned for complex matters
- Minimum evidentiary exchange requirements in legislation
- Use of Pre-Hearing Conferences, Preliminary Hearings, teleconferences
- Unrepresented parties, agents, legal counsel
- Hearing follows traditional format
- Lay witnesses and expert witnesses

A Sampling of Tribunals and Hearing Procedures

Alberta Children and Youth Services (Appeal Panels)

- Parties sometimes represented by lawyers
- Full disclosure in advance of the hearing
- Lay witnesses
- Limited use of expert witnesses
- Traditional questioning of witnesses (examination, cross-examination, questions by the tribunal)
- Appeal Secretariat staff coordinate scheduling, pre-hearing conferences, and disclosure of evidence

Procedure Alternative – Pre-Hearing Conferences

- Set exchange and hearing schedule
- Clarify issues and grounds
- Who's in attendance?
- Facilitate disclosure
- Narrow or resolve issues
- Confidential / without prejudice?

Discussion Point – Pre-Hearing Conferences

- How have you used them?

Procedure Alternative – Alternate Dispute Resolution

- Process by which parties meet with a mediator / facilitator to try to come to a mutually satisfactory resolution of the issues
- Generally held before the hearing, but after the disclosure and exchange of information between the parties
- Flexible process which can be constructed to meet the parties' objectives
- Generally is confidential and without prejudice
- Parties are present (with or without counsel)
- Mediator / facilitator leads the discussion
- Can use this process as a means to get better disclosure of information
- Mediator / facilitator can assist in exchange of evidence

Procedure Alternatives – Preliminary Hearings

- Issues to be decided by the Board before the main hearing
- Witnesses / documents?
- Points of law / jurisdiction
- Submissions (including legal argument in advance)

Procedure Alternative – Witness Tells a Story

- Less formality / more accessible
- Not the traditional examination / cross examination format
- Best suited to tribunals where parties not represented by counsel
- Would still need to give the opposing party the opportunity to ask questions
- The tribunal may need to be more actively involved in asking questions
- The tribunal would need to review the materials in advance

Discussion Point – Witness Tells a Story

Have you seen this procedure?

Would this work for your tribunal?

Procedure Alternative – Witnesses Interact

- Would need to have a format suited to a “panel of witnesses”
- Would need some structure/format in place to ensure the tribunal retains control of the hearing
- May be suitable for tribunals where there are several witnesses giving evidence on the same issue (ex. panel of experts)
- However, not a mediation; the tribunal must still make findings and determinations at the conclusion of the hearing
- The tribunal would need to review the materials in advance of the hearing
- The tribunal may need to be more actively involved in asking questions

Discussion Point – Witnesses Interact

Have you seen this procedure?

Would this work for your tribunal?

Discussion Points

- Can flexibility and accessibility be achieved within the traditional hearing model?
- Are flexibility and accessibility primarily useful in Pre-Hearing procedures?

Procedure Alternatives

- Written evidence before the hearing
- Pre-Hearing Conferences
- Conciliation / Mediation / ADR
- Preliminary Hearings
- Written Interrogatories
- Agreed Statement of Facts
- Panel of Witnesses
- ?
- ?
- ?

Procedure Alternatives – Reasons to Use

- Reduce hearing time / clarify issues
- Resolve issues without need for hearing
- Less costly for parties and Board
- Potential to be more timely
- Less formal / more flexible
- Can be tailor made to the issues / parties

Procedure Alternatives - Cautions

- Board staff / Board members walk a fine line with unrepresented parties
- Training needed to control the process
- Training needed to ask questions in a neutral manner
- Board needs to be very familiar with the evidence, issues, legislation
- Type of tribunal and issues

Are the old ways the only ways?

The old ways may not be the only ways, but they are primarily the only ways in practice.

Evidence

Are the old ways the only way?

Thank you for your attention, questions, comments and involvement.

Moderator: Adrian C. Wright
awright@phillipsandwright.yk.com

Panel Members: Carol Zukiwski RMRF LLP
czukiwski@rmrf.com
Julie Gagnon RMRF LLP
jgagnon@rmrf.com