

Relatively Relevant

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Countless tribunals, agencies or boards have been created to implement and regulate a diverse array of government programs at federal, provincial and municipal levels. In addition there are innumerable boards and committees established pursuant to statute in universities, schools, colleges, hospitals and most institutions that are creatures of statute.

Since many of these instrumentalities regulate programs and implement government policy they cannot be described as merely adjudicative in their functions. Many investigate, consult, recommend, regulate or research. However, some are truly quasi-judicial in the traditional sense in that they hear evidence on the record and decide, on the basis of the evidence before them whether a case has been made out or not. Good examples of this type of agency are disciplinary bodies in the various professions. However, no matter what type or function an agency performs, enabling legislation setting it up usually provides that the agency is not bound by the laws of evidence. A typical example is as follows:

16(4) A board of inquiry shall give the parties the opportunity to be represented by counsel, to present relevant evidence, to cross-examine witnesses and to make submissions.

(5) A board of inquiry may receive and accept on oath affidavit or otherwise evidence or information that it, in its discretion, considers necessary and appropriate whether or not the evidence or information would be admissible in a court of law.¹

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The above quoted provision is fairly formal insofar as the board of inquiry has power to call and examine witnesses under oath. Not all tribunals have these powers. Nevertheless the evidentiary clause is fairly common no matter what the mandate.

Given that the rules of evidence have been crafted over many centuries and have been considered to be useful in the court system, one may wonder what point there is in freeing a tribunal from the need to apply them. This point is made in the following comment by a distinguished Australian jurist as follows:

Even if a statute had exempted a tribunal from any duty to comply with the rules of evidence it did not follow that all the rules of evidence could be ignored as if of no account. They represent after all the attempt made through many generations to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can without grave danger of injustice set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the other party. In other words although the rules of evidence as such do not bind, every attempt must be made to administer substantial justice.²

Generally the reasons given for excluding tribunals from the necessity to abide by the rules of evidence relate to the rationale for entrusting certain decisions to tribunals rather than courts. In most cases tribunals need greater flexibility, a degree of informality, and the ability to tailor procedures in a way that ensures fulfillment of their mandate. The rules of evidence fashioned for trial by judge and jury are rarely appropriate for a tribunal. Tribunal evidence should also recognize the expertise of tribunal members and their ability and need to bring their own expertise to their task in informing themselves in matters of which the tribunal members are expert. Tribunal expertise enables it to take official notice of a much wider range of matters than would a judge in a court hearing.³

There is also the recognition that not all proceedings are adversarial in nature. There are investigations, public inquiries and general ongoing regulatory matters (which have been called polycentric in nature) where a tribunal is instructed to decide what is best in the public interest and

not necessarily to decide on a winner based on evidence coming before the tribunal at a formal hearing. Many tribunals must take into account matters referred to them from other sources, from staff, and so forth, and use the hearing process as one part of an overall structure, but not the only one. To accommodate these different procedures tribunals have adopted rules for disclosure to enable all parties to know the case they have to meet.

The final and perhaps most important reason given for freeing tribunals from following the rules of evidence is that the role of the superior courts as supervising bodies by way of judicial review ensures that tribunals afford participants a fair process; otherwise their decisions can be quashed on the basis of the denial of natural justice or an abuse of discretion. Paradoxically it is because of the courts reviewing role that tribunals should be wary of straying too far from many of the established evidentiary rules.

The question is whether the principles of natural justice or fairness are sufficient in themselves to render the need to abide by the rules of evidence unnecessary or even irrelevant to the work of tribunals or whether concern for fairness, particularly in adjudicative processes, demands that we heed the warning of Evatt J. "that no tribunal can without grave danger of injustice set them [the rules] on one side".

This paper argues that because of the requirements of fairness in terms of procedure and exercise of discretion, tribunals should be slow to disregard the rules of evidence particularly in situations where tribunals are involved in fact finding and determining disputed issues of fact.

It may be that we have neglected the proper role of the law of evidence for administrative tribunals. Instead, by ignoring it, we have added to the time and expense, thus detracting from the fairness of the hearing process.

Once free from the discipline provided by the rules of evidence a tribunal can lose the structure and focus of the hearing, thus making it more difficult for the participants to know in

advance how the evidence will be evaluated by the tribunal. The tendency of tribunals to admit most evidence and state that they will listen to it all and determine the weight to be given it makes the task of the tribunal and the participants more difficult and less focused.

The tendency to admit evidence for what it is worth can very easily expand the record, dissipate the energies of the parties and the adjudicator and distract attention from the central issue. The central issue can be buried in a mass of information which may be of dubious weight. This in turn can result in a court on judicial review expressing concern about the fact finding processes of a tribunal.

Certainly since *Nicholson*⁴ the courts seem to have been taken a much more active interest in the fact finding processes employed by tribunals. Speaking for the Court, Laskin C.J.C. said:

*The board itself, I would think, would wish to be certain that it had not made a mistake in some fact or circumstance which it deemed relevant to its determination.*⁵

The interest of the court in fact finding processes and good administration generally gives warning that tribunals may, by admitting evidence of dubious weight be exposing themselves to greater scrutiny by the court and leaving themselves open to having decisions quashed on the basis that they have wrongfully admitted evidence and therefore taken irrelevant considerations into account.

Such was the determination made by the Court in *Re Dallinga v. The City of Calgary*⁶ where the Court asked itself whether irrelevant determinations affected the decisions reached. The corollary of this is that it could be that evidence has been wrongfully excluded and therefore deny the parties fair opportunity to know the case against them and have a chance to meet it.

A recent case to this effect is *Hamilton v. Alberta Labour Relations Board*.⁷ Under the relevant legislation the Alberta Labour Relations Board is not bound by the rules of evidence.

Notwithstanding this, the Board applied the rules of evidence in order to reject evidence by way of rebuttal on the grounds that it could have been introduced at an earlier part of the hearing. In quashing the decision, the Court noted that the appellant had further evidence to bring before the Board and whether it was of a rebuttal nature or not, it was a matter of discretion for the Board to admit or reject evidence. The Board's overriding consideration should be that it acted fairly and not that it followed the rules in order to adopt an inflexible formalistic approach to the acceptance of evidence which would, and did, in this case, limit its ability to consider the facts and act fairly.

The court by way of review can also look at the evidence for the purposes of ascertaining whether, that which is admitted, is not of sufficient probative weight and therefore, no reasonable tribunal could come to a conclusion given the weight of such evidence. This ground raises the question of what basis will a reviewing court determine the weight given to a tribunal of the various elements of the evidence. How will a court assess the tribunal's assessment of weight?

Although the rules of evidence give guidance as to admissibility, they give no guidance as to the merit of weight. We must rely on the human factor, the intelligence and the logic of the decision-makers.

Where courts review weight of evidence before tribunals, recent developments in a related area should be a caution to decision-makers. I refer to the cases where tribunals have had the veil of deliberative secrecy lifted from their determinations for the purpose of determining whether there has been a denial of natural justice in institutional decision making.

In *Tremblay v. Quebec Commission des Affaires Sociales*,⁸ the Court listened to evidence from one of the tribunal members as to the manner in which a decision was arrived at. In writing for the Court Gonthier J. said:

It is the very nature of judicial review to examine (inter alia) the decision-makers' decision-making process (Accordingly, it seems to me that) by the very nature of the control exercised over their decisions administrative tribunals cannot rely on deliberative secrecy

*to the same extent as judicial tribunals. Secrecy remains the rule but it may be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice.*⁹

The valid reasons that gave rise to the concerns in this case were raised by the tribunal member himself who voluntarily took the stand at the hearing.

After *Tremblay* two additional cases have gone somewhat further by suggesting that tribunal members can be subpoenaed as witnesses to inform the court of the decision-making processes. The Ontario Divisional Court did just this in *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*.¹⁰ Here an application was brought seeking attendance of the Chair, Vice-chair and other members of the Ontario Labour Relations Board to subject them to questioning before an official examiner as to the procedures followed at a full Board meeting to consider a decision. In this case there were doubts about the fairness of the process given that there had been a change in factual finding between a draft and a final decision of the tribunal.

The second and similar example is provided by *Glengarry Memorial Hospital v. Ontario (Pay Equity Hearings Tribunal)*.¹¹ In this case the matter came to the attention of the Court because the management member of the panel which heard the case stated in his dissent that "there have been events which call into serious question whether the parties' rights to natural justice have been respected".¹² The member then went on to say that because of his oath of office and obligations of confidentiality he could say no more. O'Leary J. said the tribunal member has sent out a call for help.

*The Court has an obligation to discover what he is concerned about; decide whether or not the source of his concern has caused the tribunal to act in excess of jurisdiction so that if there is a problem it will be corrected.*¹³

O'Leary J. in his reasons indicated that it was appropriate for the member to be questioned about the deliberative process that the panel had followed. Before examining the deliberative

processes of the panel, the threshold of "valid reasons" for questioning a tribunal member must be crossed. Generally, the information which enables one to cross the threshold will presumably be information that is officially in the reasons as in the case of *Glengarry* or information that is leaked, overheard or subject to some other chance encounter. In other words, review by examination of tribunal members will be fairly random. For this reason, it is suggested that a court should be cautious before becoming involved in this type of inquiry.

If tribunals are responsible for their own procedure and if they do have a discretion to disregard the rules of evidence, it is suggested that the presumption of validity of proceedings should make the threshold for disregarding deliberative secrecy a formidable one. However, it does appear that tribunals although encouraged to experiment with procedures and to be innovative and flexible in the hearing process, should be slow to disregard the rationale for many of the well established rules of evidence.

Legislators in freeing tribunals from slavish adherence to the rules never suggested that they should lose sight of the fundamental requirement of affording a fair procedure to participants. To slavishly follow all the rules may prevent this but so too will a cavalier disregard of them. If tribunals do not address this carefully, then the courts will.

FOOTNOTES

1. *Human Rights Act*, S.B.C. 1984, c. 22, ss. 16(4) and (5).
2. *J. Evatt, R. v. War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933), 50 C.L.R. 228 at 256.
3. See G.A. Fleck, *Natural Justice*, ch. 4 and J. Smiley, "The Problem of Official Notice" [1975] P.L. 64.
4. *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311.
5. *Ibid.* at 320.
6. *Re Dallinga v. The City of Calgary* (1976), 62 D.L.R. (3d) 433 (Alta. S.C.).
7. *Hamilton v. Alberta Labour Relations Board* (1993), (Alta. S.C.) [unreported]. Note: I am grateful to Andy Sims, Q.C. for drawing this case to my attention.
8. *Tremblay v. Quebec Commission des Affaires Sociales* (1992), 90 D.L.R. (4th) 609, (S.C.C.).
9. *Ibid.* at 610.
10. *Ellis-Don Ltd. v. Ontario (Labour Relations Board)* (1993), 95 D.L.R. (4th) 56 (Ont. Ct. Gen. Div.).
11. *Glengarry Memorial Hospital v. Ontario (Pay Equity Hearings Tribunal)* (1993), 99 D.L.R. (4th) 682 (Ont. Ct. Gen. Div.).
12. *Ibid.* at 704.
13. *Ibid.*