

Advocacy Before Administrative Tribunals

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I. Introduction

Advocacy is the art of persuasion. Does the art of persuasion before administrative tribunals differ from advocacy in civil and criminal courts? Does it vary from tribunal to tribunal? While there are obvious similarities, the answer to both questions is “yes.”

This book aims to situate administrative law in context. The earlier chapters illustrate that appreciating the different contexts in which various tribunals operate is the key to understanding many administrative law concepts. For example, the content of the duty of fairness varies depending on a number of factors, including the nature of the tribunal.¹ Differences between administrative tribunals and courts, as well as among administrative tribunals, also dictate different techniques of advocacy. The cardinal rule of advocacy before administrative tribunals is, therefore, know the tribunal. The focus of this chapter is on adjudicative tribunals, which decide cases in which two or more parties appear before the tribunal. In adjudicative tribunal settings, a party may be represented by counsel, a law student with a legal clinic, a paralegal, or may be unrepresented. Each of these present different challenges for lawyers. A more complete discussion of these issues is set out by Lorne Sossin in Chapter 7, *Access to Administrative Justice and Other Worries*. Administrative advocates may also make submissions before a range of other kinds of tribunals—for example, ministers, public inquiries, or advisory councils. Advocacy techniques must be adapted accordingly.

Rather than discussing substantive administrative law principles, this chapter aims to provide a practical review of what advocates need to know and should consider when presenting a case. In a sense, we are building on the substantive principles you will learn from the rest of the textbook and demonstrating how to apply substantive administrative law principles in the practice of law. The chapter is divided into three parts: first, the sources of administrative law that are essential to the presentation of a case; second, pre-hearing issues; and third, advocacy at administrative hearings, including ethics, civility, and professionalism in the practice of administrative law.

¹ Grand Huscroft’s Chapter 5, *From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review*, and Laverne Jacobs’s Chapter 8, *Caught Between Judicial Paradigms and the Administrative State’s Pastiche: “Tribunal” Independence, Impartiality, and Bias*, contain a thorough discussion on the contextual aspects of procedural fairness.

II. Sources of Administrative Law

In any administrative law proceeding, the advocate will have to consider which of the following sources of law apply, and how each of these will affect the nature of the advocacy:

- the governing statutes, regulations, and the general regulatory context;
- tribunal rules, policies, and guidelines;
- statutory procedural codes such as the *Statutory Powers Procedure Act* (SPPA)² (Ontario) or the *Administrative Tribunals Act* (ATA)³ (British Columbia);
- common-law principles of procedural fairness;
- *Canadian Charter of Rights and Freedoms*⁴ and other constitutional law principles; and
- other applicable laws, particularly the rules of evidence.

A. Governing Statutes and Regulations

It is critical to start with the tribunal's governing statute or statutes. It is important to remember that the statute that establishes the administrative decision-maker may not be the same statute pursuant to which the particular proceeding arises. For example, in Ontario, most administrative pension proceedings arise under the *Pension Benefits Act*.⁵ However, the tribunal that hears those matters—namely, the Financial Services Tribunal—is established under a separate statute—that is, the *Financial Services Commission of Ontario Act*.⁶

The governing statutes and accompanying regulations should be examined not only for provisions that create unique procedural requirements but also to *characterize* the tribunal. Is it primarily adjudicative, deciding disputes between two parties? Is it a regulatory tribunal governing an area of activity? Is it a licensing tribunal deciding whether persons can engage in particular livelihoods? Does it review government decisions with respect to various benefits? The characterization of the administrative decision-maker will often dictate the type of advocacy that will be required, as well as procedural protections that may be available at common law.

The regulatory context is a key factor in advocacy before administrative tribunals. An administrative case is generally argued in the context of a particular statute, before a statutory decision-maker with statutory jurisdiction. In addition to legal constraints, these statutes (often supplemented by tribunal rules and guidelines) reflect normative policy choices—for example, providing income for injured workers, protecting investors and the stability of capital markets, encouraging competition, and protecting the public. The good advocate

² R.S.O. 1990, c. S.22 [SPPA]; in the discussion below, reference is made to the SPPA as an example of general legislation conferring procedural powers on tribunals.

³ S.B.C. 2004, c. 45 [ATA].

⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁵ R.S.O. 1990, c. P.8.

⁶ S.O. 1997, c. 28.

will discern these normative policy choices and use them to support all of his or her advocacy choices in the context of a specific administrative setting.

A good advocate will reread the tribunal's constituent statute and the statute under which the particular proceeding arises each time a new file is opened. Rereading the statute or statutes and regulations in the context of a specific file can shed new light on what may seem to be familiar provisions.

It is important to be familiar with all the sections that are relevant, because the statutory decision-maker must make a decision in accordance with his or her statutory mandate. The burden is on the advocate to ensure that all statutory preconditions are met and that the appropriate evidence is called to establish what the statute requires. As part of this, the advocate should take time to think about the purpose of the statute. Perhaps one of the fundamental distinctions between criminal and civil advocacy, on the one hand, and administrative advocacy, on the other, is the importance of the purpose of the statutory scheme. A good advocate will present a case that the decision-maker will think is just and in accordance with the purpose of the statute.

The statutory context, including the purpose of the statute, also provides a theme within which the case will be argued. For example, the *Workplace Safety and Insurance Act, 1997*,⁷ an income replacement system for injured workers, has a purpose clause that reads:

1. The purpose of this Act is to accomplish the following in a financially responsible and accountable manner:
 1. To promote health and safety in workplaces.
 2. To facilitate the return to work and recovery of workers who sustain personal injury arising out of and in the course of employment or who suffer from an occupational disease.
 3. To facilitate the re-entry into the labour market of workers and spouses of deceased workers.
 4. To provide compensation and other benefits to workers and to the survivors of deceased workers.

Advocacy literature teaches that cases are built around the development of a "theme." In administrative law, it is important to use the statute to develop a theme that will resonate with the administrative decision-maker. The purpose clause in the *Workplace Safety and Insurance Act, 1997*, set out above, provides the advocate with a significant set of themes that should be used to develop the case from inception to conclusion. In a dispute between the worker and the employer over whether, when, and how return to work should take place after an accident, each side could use these themes to structure their presentation. From the employer's perspective, the theme could be "financially responsible" decision making—for example, the injured worker is asking for too much. From the injured workers' perspective, emphasis might be placed on the importance of accountability for "facilitating re-entry" into the labour market.

⁷ S.O. 1997, c. 16, Sch. A, s. 1.

B. Tribunal Rules, Policies, and Guidelines

Statutes, regulations, and statutory procedural codes are the obvious sources of a tribunal's authority.⁸ These are "rules" that have been imposed on administrative tribunals from the outside—that is, the common law by courts and statutes and regulations by the legislature and the executive, respectively.

There may also be rules promulgated by tribunals themselves.⁹ Although it was initially not without controversy, there is now general agreement that rule making by tribunals is a good thing. Rule making is advantageous for the same reason that it is appropriate to have different statutory provisions for different tribunals—that is because of the diversity of administrative tribunals.

Even the most informal of tribunals has likely engaged in rule making in a number of areas. Tribunal rules typically deal with such basic topics as the circumstances in which the tribunal will grant an adjournment, service of documents, motions, and prerequisites for reconsideration of decisions. Because the tribunal will be intimately familiar with its own rules, it is crucial that the advocate have the same degree of familiarity. Failure to comply with a tribunal's rules may cause delay and expense for the client and will erode the patience of the tribunal.

Tribunals also have various other sources of internal law, set out in policies, directives, guidelines, precedents, procedural orders, or notices of hearing.¹⁰ Often, such materials may be found only at the tribunal's offices. The registrars or secretaries of tribunals and their in-house counsel are good sources of information about the tribunal's internal laws.

Externally, administrative tribunals are accountable to a ministry or department of government. Their constituent statutes are administered by a ministry or department of the government. Tribunals may be overseen by various means, such as memoranda of understanding or ministerial policy statements. The statute creating the government ministry or department may also shed some light on the context in which the tribunal operates. A good advocate will understand the policy behind the creation of the tribunal and the role it is intended to fulfill in the broader scheme.

C. Statutory Procedural Codes

Some provinces have statutory procedural codes that establish procedural requirements for administrative proceedings—for example, the Ontario SPPA,¹¹ the Alberta *Administrative Procedures and Jurisdiction Act*,¹² the Quebec *Administrative Justice Act*,¹³ and the B.C.

⁸ See the discussion of substantive issues regarding rules by Andrew Green in Chapter 4, Regulations and Rule Making: The Dilemma of Delegation.

⁹ See *ibid.* Many statutes or procedural codes provide tribunals with rule-making authority. See e.g. SPPA, *supra* note 2, s. 25.1.

¹⁰ See the discussion of "soft law" by Andrew Green in Chapter 4, Regulations and Rule Making: The Dilemma of Delegation.

¹¹ *Supra* note 2.

¹² R.S.A. 2000, c. A-3.

¹³ R.S.Q., c. J-3.

Administrative Tribunal Act.¹⁴ Of note, the federal system does not have a statutory procedural code. These procedural codes are important in administrative law.

Alberta's procedural code does not contain a provision that provides for its general applicability. Instead, the tribunals that are subject to it are designated by regulation. Its provisions are not comprehensive. In contrast, Quebec's procedural code is detailed. There are different procedural requirements for "adjudicative" and "administrative" tribunals.

The approach of British Columbia's procedural code is to empower tribunals to make their own rules. There are few procedural requirements prescribed by the ATA. Reference must be had to the tribunal's enabling statute or statutes to ascertain which, if any, of the procedural provisions of the ATA apply.

Ontario's procedural code also recognizes the differences among administrative tribunals. It does not adopt a one-size-fits-all approach. The SPPA was a compromise between inserting detailed procedural provisions into each statute under which a hearing is required and having one set of procedural rules for all tribunals.¹⁵ The former approach was too unwieldy. The latter was too inflexible to take into account the differences among tribunals. The SPPA applies to the exercise of a "statutory power of decision" where a hearing is required by or under a statute or "otherwise by law."¹⁶

Specific procedural provisions are often set out in a tribunal's enabling legislation. It is important to note that a tribunal may be established under one statute, but its proceedings may be governed by another, and that there may be applicable procedural provisions in both.¹⁷

Different procedural codes relate to the procedural provisions in enabling statutes in different ways. Alberta's procedural code says that it does "not relieve an authority from complying with any procedure to be followed by it under any other Act relating to the exercise of its statutory power."¹⁸ In Ontario, if the procedural provisions in a tribunal's enabling legislation conflict with the SPPA, the SPPA prevails unless it is expressly provided in the other statute that "its provisions and regulations, rules or by-laws made under it apply despite anything in the [SPPA]."¹⁹ However, the SPPA itself continues or restores the primacy of the tribunal's enabling legislation in certain cases.

What is the relationship between procedural codes and the common law? Because the procedural codes represent "minimum rules," the common law may operate to require greater procedural protections than those set out in the procedural codes.

¹⁴ *Supra* note 3.

¹⁵ *Royal Commission Inquiry into Civil Rights Report* (McRuer J.C., Chair) (1971), vol. 1, c. 14, at 209-10.

¹⁶ SPPA, *supra* note 2, s. 3(1); exceptions are listed in s. 3(2).

¹⁷ For example, in Ontario, the Social Benefits Tribunal is established under the *Ontario Works Act, 1997*, S.O. 1997, c. 25, Sch. B, but it conducts hearings under the *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sch. B.

¹⁸ *Supra* note 12, s. 2(8).

¹⁹ SPPA, *supra* note 2, s. 32.

D. Common-Law Principles of Procedural Fairness

In any administrative proceeding, the types of procedural protections to which one is entitled vary widely depending on the context. Does procedural fairness require a full oral hearing, or is the nature of the decision such that the affected party's rights are protected by the ability to make written submissions? What level of disclosure is required? Has the administrative body created "legitimate expectations"? Does "the right to state one's case" require cross-examination and representation by counsel? None of these questions can be answered in the abstract. They all require a careful examination of the type of interest at stake, the regulatory context, and the impact of the decision. One of the chief duties of an administrative advocate is to consider what level of procedural protections should be sought pursuant to common-law principles of procedural fairness.

The Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*²⁰ established the modern common-law approach to the duty of fairness. This case is the subject of extensive commentary in this book.²¹ One of *Baker's* legacies is that administrative decision making is now seen as falling somewhere on a spectrum between quasi-judicial and legislative decision making, with procedural entitlements varying according to placement on the spectrum. Once an individual's "rights, privileges or interests" are at stake, the duty of fairness applies and the question then becomes one of degree.²²

The five *Baker* factors attempt to balance the need to give effect to legislative intention in crafting administrative processes, which include accessibility, efficiency, informality and cost, with the need to ensure that those processes protect individual interests. In any administrative proceeding, the advocate must be prepared to argue about the procedural protections being sought on the basis of the five *Baker* principles, making reference to fundamental principles of administrative law.

The question who may be a party to a proceeding is a good example of the interaction among enabling statutes, statutory procedural codes, and the common law.²³ The starting point, as always, should be the statute or statutes governing the tribunal. The different functions of tribunals often dictate different provisions with respect to who may be a party. For example, in professional discipline cases, the statute may provide that, in addition to the governing body and the professional, the complainant may be a party. In environmental or planning cases, the tribunals may have the statutory authority to admit interveners in the public interest.

If the statute expressly sets out who may be a party and does not provide authority to add others as parties, it appears that the tribunal has no authority to do so.²⁴ However, many statutes provide that persons who are "interested" or "affected" by the proceeding may be

²⁰ [1999] 2 S.C.R. 817 [*Baker*].

²¹ See, in particular, Grant Huscroft's Chapter 5, From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review.

²² *Baker*, *supra* note 20 at para. 20.

²³ See the discussion on standing by Lorne Sossin in Chapter 7, Access to Administrative Justice and Other Worries.

²⁴ *Re Ontario (Royal Commission on the Northern Environment)*, [1983] O.J. No. 994 (QL), 144 D.L.R. (3d) 416 at 419 (Div. Ct.).

parties. The SPPA provides that any person “entitled by law” may be a party, thereby incorporating the common law. Depending on the nature of the decision and the statutory decision-maker, the common law of procedural fairness provides that a person seeking party status demonstrate that “the subject-matter of the inquiry may seriously affect” him or her. Therefore, the good administrative advocate must consider whether his or her client is or should be a party, whether other parties should be added or provided with notice of a hearing, and whether he or she should oppose the addition of parties in a proceeding. It is important to recognize that clear legislative restrictions will oust the procedural protections that would typically be afforded at common law. In such circumstances, only the Charter or constitutional rights can override legislative restrictions.²⁵ In other words, if a tribunal’s enabling statute expressly disavows any right to a hearing, the common law does not override express statutory language and no hearing will be required. However, courts tend to narrowly interpret rights-limiting statutory provisions.

E. Charter of Rights and Freedoms and Constitutional Law

It is important to consider whether there are any Charter or constitutional rights in issue and, if so, whether the tribunal has jurisdiction to entertain a Charter or constitutional argument or whether it must be brought before a court.²⁶ Many tribunals now have jurisdiction over Charter and constitutional questions, following the Supreme Court of Canada’s decisions in *R. v. Conway*²⁷ and *Nova Scotia (Worker’s Compensation Board) v. Martin*.²⁸ In British Columbia and Alberta, however, the ATA and the *Administrative Procedures and Jurisdiction Act*, respectively, expressly distinguish those tribunals with jurisdiction to decide constitutional questions from those that do not. The tribunal’s constituent statute may also address whether it can hear Charter issues.²⁹ If the constitutional validity or applicability of an Act is raised in an administrative hearing, notice, generally, must be provided to the appropriate attorneys general.³⁰

If both the tribunal and the court have jurisdiction, counsel is no longer required to make a strategic decision as to which ought to be asked to decide the question. Rather, the tribunal is obliged to exercise its jurisdiction. However, the advocate must ensure that the remedy sought is within the tribunal’s jurisdiction, because courts retain jurisdiction over certain remedies.³¹

²⁵ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781.

²⁶ See the discussion on administrative law issues and the Charter by Evan Fox-Decent and Alexander Pless in Chapter 12, *The Charter and Administrative Law: Cross-Fertilization or Inconstancy?*

²⁷ 2010 SCC 22, [2010] 1 S.C.R. 765 [*Conway*].

²⁸ [2003] 2 S.C.R. 504; see also *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585 and *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513.

²⁹ See e.g. *Ontario Disability Support Program Act*, S.O. 1997, c. 25, Sch. B [ODSPA].

³⁰ See e.g. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 109.

³¹ See Cristie Ford’s Chapter 3, *Dogs and Tails: Remedies in Administrative Law*; on Charter remedies, more generally, see *R. v. Conway*, *supra* note 27.

III. Pre-Hearing Issues

While the law underlying the duty of fairness is discussed by Grant Huscroft in Chapter 5, *From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review*, each aspect of this legal standard gives rise to important questions of advocacy. We discuss a number of aspects of procedural fairness below, together with the strategic questions they raise for the advocate. The decisions at each step will be a product of judgment and the strategic assessment of the case.

A. Notice

The proceeding has presumably been commenced by the client's receipt of a notice of a hearing or another administrative decision. The fundamental question is whether the notice is sufficient. Does it comply with the requirements of the tribunal's enabling statutes and rules, if any, and the requirements of any procedural code? It must also comply with the common-law requirement to provide sufficient detail to enable the party to know what is at stake in the hearing. The proper parties must be identified and the notice must have been properly delivered.

Failure to provide the necessary notice may give rise to a pre-hearing motion, a challenge to the tribunal's jurisdiction, or a judicial review or appeal. However, the advocate should consider what can be accomplished by an objection to the sufficiency of the notice. If the client is genuinely prejudiced, then an objection at the outset of the hearing is necessary and appropriate and the proper remedy is a deferral of the decision or an adjournment of the hearing pending the delivery of notice adequate to permit the client to respond.

B. Disclosure

Disclosure is an increasingly complex issue in administrative hearings. The word "disclosure" is used here as a generic term and includes the obligation of one party to provide particulars or to produce documents or witness statements, the mutual exchange of particular documents and witness statements, and the oral or written examination of a party prior to the hearing.

It is incumbent on an administrative advocate to turn his or her mind to the myriad issues involved in disclosure. The starting point is the constituent statute and the statutory procedural code. However, it is rare for statutes and procedural codes to address disclosure, except to provide that the tribunal may issue orders to control its own process or that the tribunal may make rules governing disclosure.³² This has resulted in some questions about the jurisdiction of tribunals to make disclosure orders.³³

³² SPPA, *supra* note 2, ss. 23(1) and 5.4.

³³ See *Canadian Pacific Airlines Ltd. v. Canadian Air Line Pilots Association*, [1993] 3 S.C.R. 724; but see also *Ontario (Human Rights Commission) v. Ontario (Board of Inquiry into Northwestern General Hospital)* (1993), 115 D.L.R. (4th) 279 (Ont. Div. Ct.).

Tribunals commonly make rules governing the exchange of documents by the parties, the exchange of witness statements, the provision of expert reports, and the provision of particulars. Some tribunals have rules providing for interrogatories, or establishing discovery-like pre-hearing procedures. However, rules do not generally address all of the issues regarding disclosure—for example, issues about investigative files containing informant information and redactions to notes and files. If there are third-party records at issue, an *O'Connor*³⁴ application may be required.

In addition to the tribunal's rules, the extent of the disclosure obligation is governed by the common law. At common law, the degree of disclosure required varies depending on the nature of the tribunal and the nature of the interest affected.³⁵

In the case of licensing or regulatory tribunals, a representative of the regulator acts as a “prosecutor.” Because such decisions may result in a “loss of livelihood and damage to professional reputation,” the duty of disclosure may be similar to the duty placed on Crown prosecutors in the criminal context.³⁶ This standard, described by the Supreme Court of Canada in *R. v. Stinchcombe*,³⁷ requires disclosure of “all evidence that may assist the accused, even if the prosecution did not plan to adduce it.” The evolution of disclosure obligations in the professional discipline context is in contrast to the more traditional administrative law test, which is disclosure of the case to be met. The advocate must therefore characterize the tribunal and the nature of the interest affected in order to make the case for a higher degree of disclosure.

There are other ways of obtaining information that may be helpful to the case. Increasingly, advocates are using freedom of information requests to obtain documents that may be relevant to a case. Even if the statutes or rules do not provide for it, a simple request for disclosure may suffice. It is the advocate's responsibility to consider all of these avenues to obtain information relevant to the case.

If the disclosure is insufficient, the advocate should consider bringing a pre-hearing motion before the tribunal. Again, if the client is genuinely prejudiced, then a motion is necessary and appropriate and the proper remedy is a deferral of the decision or an adjournment of the hearing pending proper disclosure.

C. Oral or Written Hearing

Generally, the tribunal's constituent statute will simply state that a party is “entitled to a hearing.” Procedural codes like the SPPA contain general provisions to the effect that a party is entitled to present evidence and make submissions.³⁸ However, the right to a hearing or to present evidence does not necessarily include the right to an oral hearing. The statutes, procedural code, or rules governing a tribunal may also permit hearings to be held electronically or in writing. The factors governing the determination of which form of hearing

³⁴ *R. v. O'Connor*, [1995] 4 S.C.R. 411.

³⁵ *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809.

³⁶ *Sheriff v. Canada (Attorney General)*, 2006 FCA 139, [2006] F.C.J. No. 580 (QL); see also *Waxman v. Ontario (Racing Commission)*, [2006] O.J. No. 4226 (Div. Ct.) (QL).

³⁷ [1991] 3 S.C.R. 326.

³⁸ See e.g. s. 10.1 of the SPPA, *supra* note 2.

is required may or may not be listed or may be expressed in general terms only. For example, the SPPA provides that a tribunal “shall not hold a written hearing if a party satisfies the tribunal that there is a good reason for not doing so.”³⁹ In that case, whether an oral hearing will be required (if requested) is determined by the common law. Whether an oral hearing is required at common law depends on the application of the five *Baker* factors.

The advocate must always consider whether to request an oral hearing—that is, whether an oral hearing is necessary or desirable in the circumstances of the particular case. The case law suggests that whether an oral hearing is required at common law depends on the seriousness of the interest at stake and whether there is a significant credibility issue.⁴⁰ Administrative law principles requiring the balancing of fairness and efficiency inform this issue. An oral hearing is a burden on an administrative decision-maker. There may also be other competing interests apart from the interest of the party requesting the oral hearing—for example, the protection of alleged victims in a harassment or discrimination case.⁴¹

From an advocacy perspective, the considerations also include the relative strengths and weaknesses of the various witnesses, whether the public interest that may be generated by an oral hearing would be helpful to the client’s cause, and the expense and time required for an oral hearing.

Finally, a tribunal may impose conditions when adding a party, restricting the party’s evidence and argument to the party’s specific interest. Faced with a request from a person to be added as a party, the advocate for another party should consider whether to seek such an order.

D. Agreed Statement of Facts

Many tribunals expect parties to cooperate in preparing an agreed statement of facts as well as an agreed book of documents. This will expedite the hearing process, reflecting administrative law values of efficiency and expeditiousness. This exercise also forces the advocate to think about those issues that are truly contentious and deserve to be argued and those that are not. It is good discipline, and helps in case planning, to turn one’s mind to an agreed statement of facts. It will help to build a reputation as a good counsel and save the client time and money. However, the advocate cannot agree to any facts unless he or she has conducted a complete factual and legal examination of the case. Even if an agreed statement of facts is not achieved, the effort will not be wasted. The draft agreed statement of facts will serve as the advocate’s own chronology of the events. Often, much is revealed about a case by a review of a chronology—for example, whether there is a cause-and-effect relationship between certain events.

³⁹ *Ibid.* s. 5.1(2). See also s. 5.2(2), which states that a “tribunal shall not hold an electronic hearing if a party satisfies the tribunal that holding an electronic hearing rather than an oral hearing is likely to cause the party significant prejudice.”

⁴⁰ *Khan v. University of Ottawa* (1997), 34 O.R. (3d) 535 (C.A.).

⁴¹ *Masters v. Ontario* (1994), 18 O.R. (3d) 551 (Div. Ct.).

E. Witnesses

Regarding witnesses, two important issues need to be considered in advance of the hearing: which witnesses to call and how to secure their attendance. In some circumstances, witnesses may be represented by counsel, which may complicate the hearing.⁴² The decision whether to call a witness relates to the determination of what must be proved at the hearing. Is this witness essential? The good advocate must ruthlessly consider whether the witness has undesirable information or qualities. If so, don't call the witness. Seek an agreed statement of facts, so that the weak witness does not have to be called, or find an alternative source for the evidence. There are ethical issues involved in the evidence that an advocate may call. For example, an advocate must not make reckless suggestions to a witness or suggestions that he or she knows to be false, dissuade a material witness from giving evidence, or advise such a witness to be absent.⁴³

Particularly before more sophisticated administrative tribunals, the advocate must turn his or her mind to whether expert evidence is required. If an expert is required, one must locate the best expert possible, retain and instruct him or her properly and ethically, and tender his or her evidence in accordance with tribunal rules and practice. Most tribunals require expert reports to be circulated well in advance of a scheduled hearing.

Generally, tribunals have the ability to summons witnesses to appear before them. Although procedures differ, often counsel is expected to obtain the executed summons from the hearing officer in advance of the hearing and serve the summons together with the necessary fees and allowances.

F. General Conduct

Once the advocate has attended to all procedural and substantive issues that he or she anticipates will arise in the case, is there anything else to do before the case is argued before the tribunal? A good advocate will observe a tribunal in action before his or her first appearance before it. At an attendance to observe a proceeding, the advocate learns basic things—for example, whether counsel slips are required, whether it is the practice to rise when the tribunal enters the hearing room, whether the tribunal makes preliminary remarks, whether opening statements from counsel are expected, and even where to sit. Lack of familiarity with a tribunal's practices betrays an advocate as a novice in the forum and can impair the confidence of both the client and the tribunal in the advocate's abilities.

This is not to say that the advocate should adhere to the tribunal's practices when it is not in the client's interest to do so. For example, if the hearing is open to the public and the matter is a contentious one that has attracted media attention, it may be in the client's interest to make an opening statement so that the client's position is set out at the earliest possible opportunity, even if it is not the tribunal's practice to entertain one. In that case, counsel should acknowledge that it is not the tribunal's practice, but ask for permission to do so.

⁴² SPPA, *supra* note 2, ss. 11 and 14(1).

⁴³ See e.g. Canadian Bar Association, Code of Professional Conduct, c. IX, commentary 2(g) and (i), online: Canadian Bar Association <<http://www.cba.org/cba/activities/pdf/codeofconduct06.pdf>> [CBA].

This forestalls the inevitable response that it is not the tribunal's practice and signals to the tribunal that counsel has considered the tribunal's practice, but is asking the tribunal to make an exception.

IV. Advocacy at the Tribunal Hearing

The advocate must now present the case. He or she must build a persuasive case on the basis of relevant and admissible evidence. The advocate will have developed a theory of the case clearly tied to the statute under consideration, will have ensured that the remedy sought is within the statutory decision-maker's mandate, and be prepared to argue general principles of administrative law in the course of the hearing. Particular issues involved in advocacy are discussed below—for example, motions, opening and closing statements, and evidentiary issues. We begin, however, with the overarching theme of ethical advocacy, because, at every stage, the good advocate will consider ethics, professionalism, and civility in the conduct of his or her case.

A. Ethical Advocacy

The good advocate is civil and professional in his or her advocacy, which means engaging in ethical advocacy, in accordance with rules of professional conduct and canons of civility and professionalism. Canadian lawyers are regulated by the law societies of the provinces and territories, all of which have rules of professional conduct that address ethical advocacy issues, as well as commentaries on the rules that give more concrete guidance on specific issues.⁴⁴ The Canadian Bar Association's *Code of Professional Conduct* is also a good guide to ethical behaviour, although in a conflict between the Code and provincial law society rules, the latter prevail.⁴⁵

The rules of professional conduct govern the conduct of lawyers as advocates, situated within the general duties of lawyers. The Law Society of British Columbia, for example, has established canons of legal ethics, which state that “it is a lawyer's duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity.”⁴⁶ This statement captures the three main areas of focus for advocates: duties to the state and the tribunal or court, duties to the client, and duties to other lawyers. In all aspects of an administrative law case, the good advocate will ensure that he or she discharges these duties.

Law society rules specifically govern the conduct of lawyers as advocates. The B.C. Law Society Rules, for example, state:

⁴⁴ Web links to provincial and territorial Rules of Professional Conduct can be found online: Federation of Law Societies <<http://www.flsc.ca/en/law-society-codes-of-conduct>>.

⁴⁵ See CBA, *supra* note 43.

⁴⁶ Law Society of British Columbia, *Professional Conduct Handbook*, c. 1, online: Law Society of British Columbia <<http://www.lawsociety.bc.ca/page.cfm?cid=1027&t=Professional-Conduct-Handbook-Chapter-1-Canons-of-Legal-Ethics>>.

1. A lawyer must not:

- (a) abuse the process of a court or tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring another party,
- (b) knowingly assist the client to do anything or acquiesce in the client doing anything dishonest or dishonourable,
- (c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that may reasonably be perceived to affect the officer's impartiality,
- (d) attempt or acquiesce in anyone else attempting, directly or indirectly, to influence the decision or actions of a court or tribunal or any of its officials by any means except open persuasion as an advocate,
- (e) knowingly assert something for which there is no reasonable basis in evidence, or the admissibility of which must first be established,
- (e.1) make suggestions to a witness recklessly or that the lawyer knows to be false,
- (f) deliberately refrain from informing the court or tribunal of any pertinent authority directly on point that has not been mentioned by an opponent,
- (g) dissuade a material witness from giving evidence, or advise such a witness to be absent,
- (h) knowingly permit a party or a witness to be presented in a false way, or to impersonate another person, or
- (i) appear before a court or tribunal while impaired by alcohol or a drug.⁴⁷

B. Misleading the Tribunal on the Facts or the Law

Misleading the tribunal on the facts or the law is improper. It is also bad advocacy. A lawyer who misleads a tribunal will not be trusted again, on any matter, by the tribunal member who heard the case and likely by the tribunal as a whole. Tribunal members start from the proposition that advocates will conduct themselves ethically and professionally. Once an advocate engages in sharp practice, particularly by misleading a tribunal, his or her reputation will be compromised forever. Tribunal members and judges discuss the advocates who appear before them—and they remember those who skirt the ethical line.

It may be difficult for a client to appreciate that an advocate's duties to the tribunal and the administration of justice may seem to prevail over the client's individual interest in winning a case by any means necessary. However, it is important for an advocate to understand *how* the lawyer's duty to the tribunal or court supersedes what the client wants. As stated by Lord Reid in *Rondel v. Worsley*:

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to

⁴⁷ *Ibid.*, c. 8, online: Law Society of British Columbia <<http://www.lawsociety.bc.ca/page.cfm?cid=1037&t=Professional-Conduct-Handbook-Chapter-8-The-Lawyer-as-Advocate>> (footnote omitted).

the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with the client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce.⁴⁸

The good advocate recognizes ethical issues as they arise and deals with them squarely. This includes explaining to clients why, for example, you insist on producing a "smoking gun" document where the rules of disclosure so require. It is not the easiest path, but it is an essential one. Advocates should also understand the law society rules governing the duty to withdraw. Generally, if a client wishes to adopt a course that would involve a breach of the rules of professional conduct, the lawyer must withdraw or seek leave to withdraw.

C. Public Statements About Proceedings

As advocates we are frequently called on to comment publicly about cases in which we are involved; in fact, many advocates are attracted to administrative law because of the way in which administrative proceedings affect the lives of the most vulnerable. Advocates must be mindful of the ethical issues involved in making public statements about proceedings in which they are involved and be careful to avoid commenting improperly on such matters. While law society rules differ, a good example is rule 6.06 of the Rules of the Law Society of Upper Canada, which states: "Provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements."⁴⁹

The commentary provided under this rule follows:

Lawyers in their public appearances and public statements should conduct themselves in the same manner as with their clients, their fellow legal practitioners, and tribunals. Dealings with the media are simply an extension of the lawyer's conduct in a professional capacity. The mere fact that a lawyer's appearance is outside of a courtroom, a tribunal, or the lawyer's office does not excuse conduct that would otherwise be considered improper.

A lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer.

Public communications about a client's affairs should not be used for the purpose of publicizing the lawyer and should be free from any suggestion that the lawyer's real purpose is self-promotion or self-aggrandizement.⁵⁰

⁴⁸ [1967] 3 All E.R. 993 (H.L.) per Lord Reid at 998.

⁴⁹ Law Society of Upper Canada, *Rules of Professional Conduct*, rule 6.06(1), online: Law Society of Upper Canada <<http://www.lsuc.on.ca/with.aspx?id=671>>.

⁵⁰ *Ibid.*

Advocates must also be careful to avoid the *sub judice* rule, which also applies to tribunal proceedings, and to ensure that their comments are not calculated to influence the course of justice or prejudice a fair hearing. The Law Society of Alberta commentary on this issue, which is detailed, provides:

A lawyer having any contact with the media is subject to the *sub judice* rule and should be aware of it. Per David M. Brown, What Can Lawyers Say in Public?, *Canadian Bar Review*, Vol. 78, p. 283 at p. 316:

Designed to ensure the fairness of the trial process to the parties involved, the *sub judice* rule makes it a contempt of court to publish statement [*sic*] before or during a trial which may tend to prejudice a fair trial or influence the course of justice For contempt to be found, it is necessary for a court to be satisfied, beyond a reasonable doubt, that the words published were calculated to interfere with the course of justice in the sense of being apt, or having a tendency, to do so. The *mens rea* necessary for the offence is not an intention to commit a criminal contempt, but to knowingly and intentionally publish the material, irrespective of the absence of an intention or bad faith with respect to the question of criminal contempt itself.

It will be a question of fact in each case whether the words published “were calculated to interfere with the course of justice in the sense of being apt or having a tendency to do so,” but because the media frequently publishes lawyers’ comments, lawyers should be particularly careful when dealing with members of the media.⁵¹

D. An Advocate’s Duty to Opposing Counsel

Law society rules also address the advocates’ obligation to opposing counsel. The Law Society of Manitoba, for example, provides, in part:

6.02(1) A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.⁵²

The commentary to Manitoba rule 6.02(1) provides:

The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their functions properly.

Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward

⁵¹ Law Society of Alberta, *Code of Professional Conduct*, c. 5, rule 8, Commentary 8, online: Law Society of Alberta <<http://www.lawsociety.ab.ca/files/regulations/Code.pdf>>.

⁵² Law Society of Manitoba, *Code of Professional Conduct*, rule 6.02(1), online: Law Society of Manitoba <http://www.lawsociety.mb.ca/lawyer-regulation/code-of-professional-conduct/documents/english-version/code_of_conduct.pdf>.

each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system. ...

A lawyer should agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the client.⁵³

One of the most rewarding aspects of the practice of law is coming to know and respect lawyers who appear on the other side of a case. The good advocate remembers that he or she is appearing on behalf of a client, is discharging an important role in the administration of justice, and that professionalism in all relationships with counsel is of the utmost importance.

E. Dealing with Unrepresented Parties

Dealing with unrepresented parties can pose particular challenges for counsel. The rules of professional conduct address some aspects of dealing with unrepresented parties. The Law Society of Alberta Code, for example, provides that:

5. When negotiating with an opposing party who is not represented by counsel, a lawyer must:
 - (a) advise the party that the lawyer is acting only for the lawyer's client and is not representing that party; and
 - (b) advise the party to retain independent counsel.⁵⁴

More generally, as discussed by Lorne Sossin in Chapter 7, *Access to Administrative Justice and Other Worries*, an increasing number of litigants are unrepresented, and advocates and adjudicators both recognize that this affects the conduct of cases. For example, it may be more difficult for an unrepresented party to appreciate the importance of evidence that could be elicited on cross-examination. While we recommend that advocates maintain standards of professionalism and civility with all persons, it is essential to remember that an advocate's primary duty is to his or her client, a duty that cannot be sacrificed to assist another party. In other words, an advocate cannot assist the unrepresented party by suggesting a line of cross-examination. At the same time, as long as it does not compromise the administration of justice and the advocate's duty to his or her client, advocates should consider ways in which they can enhance accessibility to justice for unrepresented parties. Thus, for example, when seeking disclosure, rather than simply reciting the applicable rule, advocates can write a letter in plain English, identifying documents with reasonable specificity. Advocates contemplating bringing a motion to dismiss for a failure to comply with the tribunal's rules, could write a clear letter to the unrepresented party identifying the issue, the relevant rules, the possible consequences, and the deadline for compliance.

⁵³ *Ibid.*, commentary.

⁵⁴ Law Society of Alberta, *Code of Professional Conduct*, *supra* note 51, c. 11, rule 5.

F. Preliminary Motions at the Hearing

There are some types of serious preliminary motions that are generally argued at the commencement of a hearing. These include challenges to the jurisdiction of the tribunal, as well as challenges based on bias or tribunal independence.⁵⁵ There are two aspects of bias: impartiality and independence. Impartiality refers to the state of mind of the decision-maker. Independence refers to the relationship of the decision-maker to others. Both impartiality and independence may operate at either an individual or institutional level.⁵⁶ Objecting to a member of a tribunal on the ground of bias is a difficult judgment call even for an experienced advocate. The test is whether there is a reasonable apprehension of bias. What is “reasonable” varies greatly depending on the nature of the tribunal. For example, behaviour that would disqualify a member of an adjudicative tribunal may be perfectly acceptable in a member of a tribunal whose decisions are policy-based or whose functions approach the legislative end of the spectrum.⁵⁷ It is clear that an objection on the ground of bias must be made when it comes to the party’s attention, failing which it will be deemed to have been waived.⁵⁸ It is important to inform the hearing officer of these motions in advance, so that the tribunal is prepared to deal with such challenges.

A common mistake is the overuse of preliminary motions at the hearing itself. A good advocate thinks carefully about the usefulness and the timing of a contemplated motion. For example, tribunals generally prefer to deal with motions for production of documents before the hearing, to avoid adjournments. Even if a tribunal does not have rules governing pre-hearing disclosure of documents, a good advocate will contact counsel for the opposite party before the hearing, offer to share the documents on which he or she intends to rely, and ask for the same courtesy from opposing counsel. If there is a real issue and no opportunity for a pre-hearing motion or case conference, at a minimum counsel should advise the hearing officer well in advance of the hearing that a disclosure motion will be brought that may necessitate an adjournment.

G. Opening Statements

There are both similarities and differences between an opening statement before an administrative tribunal and an opening statement at a trial. As is the case in a trial, the purpose of an opening statement is not to make legal arguments. Rather, its chief purpose is to set out the theory of the case, to identify the issue from the perspective of the client, and to offer a simple solution. The opening statement is also an opportunity to “seize the moral high ground” of the case. A secondary purpose is to provide a road map for the tribunal as to

⁵⁵ Independence and impartiality are discussed by Laverne Jacobs in Chapter 8, Caught Between Judicial Paradigms and the Administrative State’s Pastiche: “Tribunal” Independence, Impartiality, and Bias.

⁵⁶ *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, [1995] S.C.J. No. 1 (QL), 122 D.L.R. (4th) 12.

⁵⁷ *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, [1992] S.C.J. No. 21 (QL), 89 D.L.R. (4th) 289.

⁵⁸ *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, [1990] S.C.J. No. 129 (QL), 75 D.L.R. (4th) 577.

how the case will unfold—that is, to identify the chief witnesses and the purposes for which they will be called. This aspect of the opening statement is generally briefer and less-detailed than at a trial, unless the tribunal has court-like procedures or is dealing with a number of complex issues. It is important that the opening statement be flexible enough to take into account the inevitable vagaries of the evidence. It is crucial that the advocate not promise anything in an opening statement that cannot be delivered. Even if the tribunal does not remind the advocate of the promise, opposing counsel will. Many tribunals make opening statements of their own, have a checklist of questions they are expected to ask, or otherwise start the proceeding. Some may even question witnesses themselves.

H. Evidence

As a general rule, tribunals are not bound by the strict rules of evidence. A good example is s. 15 of the SPPA, which states:

15(1) Subject to subsection (2) and (3), a tribunal may admit evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

- (a) any oral testimony; and
- (b) any document or thing,

relevant to the subject matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

(2) Nothing is admissible in evidence at a hearing,

- (a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or
- (b) that is inadmissible by the statute under which the proceeding arises or any other statute.⁵⁹

For each piece of evidence the advocate proposes to introduce, he or she should ask:

1. What facts will be established with this evidence?
2. How are the facts relevant to the issues in the hearing?

Is there any exclusionary rule that would prohibit calling the evidence—for example, privilege? General privileges in the law of evidence continue to apply in administrative proceedings.⁶⁰

Is there a better source? Although hearsay evidence is admissible, the common-law concern about hearsay was based on fairness. Highly adjudicative tribunals dealing with serious matters involving the livelihood of an individual or behaviour that would amount to criminal conduct often do not admit hearsay evidence.⁶¹ However, it is not an invariable rule that the more serious the subject matter of the proceeding, the less acceptable is hearsay evidence. For example, hearsay evidence is specifically permitted in child welfare proceedings in light

⁵⁹ SPPA, *supra* note 2, s. 15.

⁶⁰ *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809; SPPA, *supra* note 2, s. 15(2).

⁶¹ *Bernstein v. College of Physicians & Surgeons* (1977), 15 O.R. (2d) 477 (Div. Ct.).

of the need to have all available information before the decision-maker, and in social welfare cases in light of the need for expedition and informality. The lesson is: know the tribunal.

Are there any rules that govern the admissibility of the evidence—for example, are there notice requirements? Tribunal rules often require that expert reports be produced in advance.

If another party objects to the admissibility of the evidence, is there an answer to those objections? In particular, what response is there to arguments about weight?

Some of these issues are discussed below in more detail.

I. Relevance

Tribunals do not have the jurisdiction to hear evidence that is not relevant to the proceedings. The type of evidence that a tribunal can consider relates directly to natural justice concerns. The tribunal cannot take into account entirely irrelevant facts, or decide on the basis of facts for which there is no evidence. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the matter more probable or less probable than it would be without the evidence.⁶²

On the importance of presenting relevant evidence to support each component of a decision, see *Trinity Western University v. British Columbia College of Teachers*.⁶³ Trinity Western, a Christian university, was seeking accreditation to sponsor a teacher-training degree. The university's community-standards document prohibited "biblically condemned" practices. From this the College inferred that the outlook of graduates would have a detrimental effect on the learning environment in schools where they taught. The College of Teachers denied the University the ability to sponsor a teacher-training program. The Supreme Court held that the College of Teachers erred in considering the beliefs of the institution, but not the actual impact of their beliefs on the teaching environment. The Court specifically held:

For the BCCT to have properly denied accreditation to TWU, *it should have based its concerns on specific evidence*. It could have asked for reports on student teachers, or opinions of school principals and superintendents. It could have examined discipline files involving TWU graduates and other teachers affiliated with a Christian school of that nature. Any concerns should go to risk, not general perceptions.⁶⁴

J. Weight

In addition to deciding whether evidence is relevant, a decision-maker must also decide how much weight to give to the tendered evidence. For example, an unsigned, undated letter regarding a fact in question may be relevant, but afford little weight because its statements cannot be verified. The more reliable the evidence is, the more weight should be accorded to it. The rules of evidence were developed by courts to prevent unfairness. Before an administrative tribunal, be prepared to argue issues as to weight from first principles—that is,

⁶² *Canada (Attorney General) v. Gentles Inquest (Coroner of)* (1998), 116 O.A.C. 70 (Div. Ct.).

⁶³ 2001 SCC 31, [2001] 1 S.C.R. 772.

⁶⁴ *Ibid.* at para. 38 (emphasis added).

natural justice, procedural fairness, quality of administrative decision making, relevance given the purpose of the statute, and what is at stake for the individual.

K. Admissibility

Look to the tribunal's statutory provisions and to procedural codes like the SPPA to assist with admissibility issues. First, the statute may contain specific provisions on how evidence is to be dealt with. Second, the statute may describe the mandate of the tribunal and the scheme it administers in terms that suggest which considerations and priorities should weigh heavily on the tribunal in making decisions—for example, whether the tribunal should favour protection of the public or some other value. If there is some question about the admissibility of evidence, reference to the values and mandate of the tribunal may assist in resolving it.

L. Standard of Proof

There is a single standard of proof—that is, the balance of probabilities—for all civil cases, including administrative cases. The evidence must be “sufficiently clear, convincing and cogent” to meet the balance of probabilities test.⁶⁵ The advocate must recognize the differences among administrative tribunals in assessing the nature of evidence required. In order to meet this exacting standard, the advocate should make efforts to call the best evidence available.

M. Judicial Notice

Expert tribunals may take notice of generally recognized facts within their specialized knowledge. For example, discipline panels in medical cases may make certain findings of fact based on their own knowledge of human anatomy.⁶⁶ Section 16 of the SPPA provides that a tribunal may take notice of facts that may be judicially noticed, and take notice of any generally recognized scientific or technical facts, information or opinions within its scientific or specialized knowledge.

N. Examination-in-Chief

The usual rules of direct examination apply to most administrative hearings. However, a tribunal that is at the inquisitorial, as opposed to the adjudicative, end of the spectrum of administrative decision-makers may elect to question a party first.⁶⁷ The advocate must know what kind of tribunal is involved and what its practice is with respect to direct examination.

Perhaps surprisingly, examination-in-chief is a significantly more important skill than cross-examination. In case preparation, the focus should be on presenting a good case.

⁶⁵ *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 at para. 46.

⁶⁶ *Reddall v. College of Nurses* (1983), 149 D.L.R. (3d) 60 at 65 (Ont. C.A.); *Ringrose v. College of Physicians & Surgeons* (No. 2) (1978), 83 D.L.R. (3d) 680 at 695-96 (Alta. C.A.).

⁶⁷ *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385.

More cases are won on direct examination than on cross-examination, because the advocate can (more or less) control direct examination. The most important thing to remember about examination-in-chief is that counsel is trying to assist the witness to tell the story in his or her own words. Counsel's job is to make it seem that the evidence comes out effortlessly and persuasively. The advocate's work in structuring the questions will help the witness tell the story.

As discussed above, the strict civil and criminal rules of evidence do not apply. In practice, however, this may not make much of a difference, because the rules of evidence formally set out what is often a common-sense approach to developing evidence and also govern the expectations of most tribunals about the calling of evidence. For example, although, in theory, there may be more latitude to lead witnesses in an administrative tribunal, it is bad practice and bad advocacy to lead too much.

As also discussed above, the case should have a persuasive theme, consistent with the purpose of the statute, which is designed to take into account the normative policy choices reflected in the regulatory context. The evidence of each witness should advance the theme. What questions will do so? What facts should be highlighted?

Examinations-in-chief should be structured with headlines. Statements such as "The next group of questions is about your health after the operation" and "Turning to questions about your income before the accident ..." help both the witness and the tribunal understand where counsel is going—that is, they flag transitions in the evidence.

Any general advocacy textbook will summarize the rules of advocacy on direct examination. The most important rules include:

- Use open-ended questions—for example, who, what, where, when, why, how, describe, and what happened next?
- Elicit short bits of information through targeted questions—that is, avoid approaches such as "tell us about your complaint."
- Be prepared to introduce and use documents in the course of the examination-in-chief. Practice introducing exhibits and taking the witness through the documents in advance.

O. Cross-Examination

Cross-examination in administrative proceedings may differ substantially from those in court proceedings. Counsel should be aware that statutory procedural codes may limit cross-examination rights. The ATA requires cross-examination only where the party "will not have a fair opportunity" to contradict the allegations against him or her without it. The SPPA permits a tribunal to "reasonably limit cross-examination." What is reasonable is determined by reference to the common law. Refusal to permit cross-examination altogether does not always amount to a denial of fairness at common law. For example, in multi-party hearings involving policy issues, cross-examination may be refused.⁶⁸ Similarly, it may not

⁶⁸ *Unicity Taxi Ltd. v. Manitoba (Taxicab Board)*, [1992] M.J. No. 381 (QL), aff'd [1992] M.J. No. 608 (C.A.) (QL).

be appropriate to permit cross-examination in a hearing that is intended to be informal and expeditious.⁶⁹

The primary purpose of cross-examination is to test the credibility of the witness. If the proceeding does not involve matters of credibility, cross-examination may not be necessary or appropriate.

Most proceedings will not have any type of examination for discovery, so cross-examination in tribunal hearings is often more fun (with greater opportunity for surprises, both good and bad) than civil trials. That being said, in cross-examining a witness, the traditional techniques of advocacy apply:

- Control the witness.
- Avoid short questions—include only one fact per question.
- Avoid open-ended questions—for example, questions beginning with why or how.
- Impeachment on the basis of a prior inconsistent statement is an effective cross-examination tool. Make sure that the fact is material, helps the case, and that there is a genuine contradiction, before attempting impeachment.
- Have a reason behind every area of questioning—that is, know where the question will lead and think about how to get there with minimal damage. Bad answers count against the client's case.

P. Tribunal Precedents

It is important to understand the composition of the tribunal. Mature tribunals, like the Ontario Labour Relations Board or the Ontario Municipal Board, have well-established jurisprudence. Although tribunals are not bound to follow their previous decisions,⁷⁰ it is a bold step for an advocate to ask a tribunal to depart from established precedent. Occasionally, however, a precedent requires re-examination. In such a case, it is best to acknowledge the existence of and the policy reasons for the tribunal's line of authority and argue that a modification of the jurisprudence is necessary to give continuing effect to the policies identified by the tribunal. Many tribunals are concerned with ensuring the consistency of tribunal decisions, particularly busy tribunals with a number of decision-makers. Where an advocate raises a novel or significant issue, particularly where it represents a departure from existing jurisprudence, tribunal members may wish to consult with colleagues who are not on the hearing panel for the purpose of obtaining their advice, input, or expertise. In *Consolidated-Bathurst*, the Supreme Court of Canada confirmed that convening meetings of an entire tribunal is a practical means of consulting the experience and expertise of all tribunal members when making an important policy decision and obviates the possibility that different panels might inadvertently render inconsistent decisions.⁷¹

⁶⁹ *MacInnis v. Canada (Attorney General)*, [1996] F.C.J. No. 1117 (QL), 139 D.L.R. (4th) 72 (C.A.).

⁷⁰ *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756.

⁷¹ See *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 [*Consolidated-Bathurst*]; see also *Ellis-Don Limited v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 211.

Q. Closing Argument

Put bluntly, the purpose of a closing argument is to persuade the tribunal that the client should win. In the closing argument, make submissions on the facts and law that establish the client's case and cast doubt on any other interpretation. The closing argument is the opportunity to summarize the evidence in a persuasive manner; argue about the evidence, challenging the other side's case directly; persuade the tribunal to make findings of fact that favour the client's case; argue about the application of the law to the facts of the case; and persuade the tribunal that the client's case is just and in accordance with the facts and the law.

Where there are factual disputes, be prepared to argue issues such as:

- the conclusion or inferences;
- circumstantial evidence;
- analogies;
- credibility and motive;
- the weight of evidence;
- application of the law or justice;
- which witnesses can be trusted, or who should be believed, and why;
- the reasonableness of witness testimony, especially in light of other evidence in the case;
- the importance of documents; and
- which expert is to be preferred, and why.

Written submissions can be effective if it is the practice of the tribunal to reserve its decisions. Know the tribunal. If the case involves complex legal issues, it may also be helpful to the tribunal to have written submissions. However, if the case is one in which the tribunal is being asked to depart from or to expand on a line of authority, it may be preferable to have oral argument or at least a combination of oral and written argument to facilitate a full explanation of the issue and an opportunity for questions from the tribunal. If the opportunity for written submissions is offered to one party, it should be offered to all parties.⁷²

Sometimes it may be advisable to request an opportunity to divide up the submissions. For example, in a professional discipline case, it is more effective to make submissions on penalty only after there have been submissions on and a finding of misconduct.⁷³

R. Reasons, Reconsiderations, and Reviews

It is not uncommon for enabling statutes to require the decision-maker to provide reasons for decision. The procedural codes have varying provisions. The ATA requires reasons where

⁷² *Communications, Energy and Paperworkers Union, Powell River Local 76 v. British Columbia (Power Engineers and Boiler and Pressure Vessel Safety Appeal Board)*, [2001] B.C.J. No. 2764 (QL), 209 D.L.R. (4th) 208 (C.A.).

⁷³ *Brock-Berry v. Registered Nurses' Association*, [1995] B.C.J. No. 1876 (QL), 127 D.L.R. (4th) 674 (C.A.); *College of Physicians and Surgeons v. Petrie*, [1989] O.J. No. 187 (QL), 68 O.R. (2d) 100 (Div. Ct.).

the decision of the authority “adversely affects the rights of a party.”⁷⁴ Quebec’s procedural code requires that every decision of an adjudicative tribunal be accompanied by reasons. In contrast, the SPPA requires that written reasons be provided “if requested by a party.”⁷⁵ However, as noted above, the common law may require that reasons be provided even if the enabling legislation or the procedural code does not.⁷⁶

Unlike courts, many administrative tribunals have the power to reconsider or review their decisions, under either their enabling legislation or the applicable procedural code. The decision whether to request reconsideration must be made strategically. It may not result in the remedy sought by the client. Rather, it can have the unintended effect of permitting the tribunal to correct or explain a deficiency in the original decision that may have been a ground for appeal or judicial review.⁷⁷

V. Conclusion

It is worth repeating the cardinal rule of advocacy before administrative tribunals: know your tribunal. Advocacy is concerned with how certain disputes reach tribunals (or courts on appeals or applications for judicial review) and how administrative law is advanced in those settings. The different contexts in which administrative tribunals operate is the key to understanding many administrative law concepts. For most of the concepts discussed in this text, there is no more important context than advocacy. Without clients who are willing (and able) to challenge administrative decision making, and advocates arguing for new approaches to existing doctrines, or tribunal members and judges articulating their understanding of administrative law, the rest of this book would not be possible.

SUGGESTED ADDITIONAL READINGS

To prepare for objections at a hearing, bring a textbook or evidence summary with you. Having a textbook handy helps you frame objections you may have and respond to objections. If you have a lot of space, bring:

BOOKS AND ARTICLES

Bryant, Alan W., Sidney N. Lederman, & Michelle K. Fuerst, *Sopinka, Lederman & Bryant—The Law of Evidence in Canada*, 3d ed. (Markham, ON: LexisNexis Canada, 2009).

Paciocco, David M., & Lee Stuesser, *The Law of Evidence*, 6th ed. (Toronto: Irwin Law, 2011).

⁷⁴ ATA, *supra* note 3.

⁷⁵ SPPA, *supra* note 2.

⁷⁶ Baker, *supra*, note 20, at para. 43.

⁷⁷ See the Ontario Labour Relations Board’s reconsideration decision referred to in *Consolidated-Bathurst*, *supra*, note 71.

If space is limited, bring a slimmer, but useful, text:

Morton, James, *Ontario Litigator's Pocket Guide to Evidence*, 5th ed. (Markham, ON: LexisNexis Canada, 2010).

Another excellent source is the following short article, which requires some updating, but succinctly lists objections and exceptions:

Perrell, Paul, "An Evidence Cheat Sheet" (2007) 33 Adv. Q. 490.

Little is written about tribunal advocacy; however, traditional trial advocacy textbooks are useful for understanding the basics of advocacy. Two useful textbooks are:

Lubet, Steven, *Modern Trial Advocacy: Canadian Edition*, 3d ed., eds. Sheila Block & Cynthia Tape (Boulder, CO: National Institute for Trial Advocacy).

Mauet, Thomas A., Donald G. Casswell, & Gordon P. Macdonald, *Fundamentals of Trial Techniques*, 2nd Canadian ed. (Greenwood Village: Aspen Publishers, 1995).

Other sources include:

Adair, Geoffrey, *On Trial: Advocacy Skills Law and Practice*, 2d ed. (Markham, ON: LexisNexis Butterworths, 2004).

Bennett, D., & W. Cascaden, *Procedural Strategies for Litigators in British Columbia*, 2d ed. (Markham, ON: LexisNexis, 2010).

Cromwell, T., *Effective Written Advocacy* (Aurora, ON: Canada Law Book, 2008).

CASES

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.

IWA v. Consolidated-Bathurst Packaging Ltd., [1990] 1 S.C.R. 282.

Nova Scotia (Workers' Compensation Board) v. Martin, [2003] 2 S.C.R. 504.

R. v. Conway, 2010 SCC 22, [2010] 1 S.C.R. 765.

R. v. Stinchcombe, [1991] 3 S.C.R. 326.

STATUTES

Administrative Justice Act, R.S.Q., c. J-3. (Québec).

Administrative Procedures and Jurisdiction Act, R.S.A. 2000, c. A-3 (Alberta).

Administrative Tribunals Act, S.B.C. 2004, c. 45 (British Columbia).

Provincial and Territorial Rules of Professional Conduct, online: Federation of Law Societies of Canada <<http://www.flsc.ca/en/law-society-codes-of-conduct>>.

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22 (Ontario).