The Law Society of Manitoba

INCORPORATED 1877 | INCORPORÉ EN 1877

CIVIL PROCEDURE

Chapter 6

Advocacy Before Administrative Tribunals

March 2023

TABLE OF CONTENTS

A. INTRODUCTION

Independent administrative agencies have proliferated in recent years, as governments look for ways to administer their ever-increasing involvement in social and economic regulation. Lawyers are increasingly being relied upon to act as advocates before administrative authorities of every kind. The skills necessary to practice effectively before these various authorities are often quite specialized. Experience in civil litigation is most helpful. The purpose of this chapter is to consider some of the issues that are particularly applicable to administrative practice.

B. TYPES OF ADMINISTRATIVE AUTHORITIES

Administrative authorities may be classified as permanent or *ad hoc*.

1. Permanent Authorities

> A permanent authority is usually created by a specific statute or regulation and its members are generally appointed by an order-in-council or elected by a process set out in the enabling legislation. The authority is usually responsible for the administration of a legislative scheme over which it has exclusive jurisdiction.

Typically, such administrative authorities come into existence when legislators wish to refer resolution of sensitive issues to non-partisan tribunals, or specialized tribunals are considered necessary to manage more complex matters, or the sheer volume of decisions makes it necessary to create a new administrative structure.

There are many examples of permanent tribunals under both the federal and provincial jurisdiction. See the *list* of all Manitoba tribunals.

Without in any way attempting to be exhaustive, the following is a list of provincial tribunals that many lawyers will come into contact with at some point in their careers:

- *Automobile Injury Compensation Appeal Commission*
- *Clean Environment Commission*
- *Manitoba Labour Board*
- *The Manitoba Securities Commission*
- *Mental Health Review Board*
- *Appeal Commission* (This is the official name of the Workers Compensation Board Appeal Commission, as named in the enacting legislation.)

Some examples of federal tribunals are as follows:

- *Canada Industrial Relations Board*
- *Canadian Human Rights Commission*
- *Immigration and Refugee Board (Immigration Appeal Division)*
- *Immigration and Refugee Board (Refugee Protection Division)*
- *Canada's Energy Regulator*
- *Parole Board of Canada*

a) Types of Permanent Tribunals

Tribunals may be divided into three sub-categories, depending on the type of function they perform - regulatory, adjudicative, or hybrid.

i. Regulatory Tribunals

Regulatory tribunals usually perform a licensing function. Some regulatory bodies also have the power to regulate a particular industry. Examples are Canada's Energy Regulator and the Manitoba Securities Commission. The governing bodies of professional associations, which have statutory authority to license and to supervise the professional conduct of their members, closely resemble these regulatory tribunals.

Regulatory tribunals may also have enforcement functions, incidental to their licensing function, which require them to act like adjudicative tribunals. Some regulatory tribunals may also have a policy-making function as an advisor to the government.

ii. Adjudicative Tribunals

Adjudicative tribunals are usually established for the purpose of reviewing the actions of the bureaucracy or ruling on applications for benefits. Typically, adjudicative tribunals do not have an ongoing relationship with the parties affected by their decisions and do not regulate the industries in which they are engaged. Examples of purely adjudicative tribunals are the Immigration and Refugee Board (Refugee Appeal Division), the Automobile Injury Compensation Appeal Commission and the *Land Value Appraisal Commission*.

iii. Hybrid Tribunals

Some tribunals exercise both a regulatory and an adjudicative function. For example, the *Manitoba Farm Products Marketing Council* has authority to supervise the operation of producer boards and marketing commissions in the province and to advise the Minister of Agriculture thereon. It also hears appeals from decisions made by any producer board or marketing commission.

2. *Ad Hoc* Authorities

Ad hoc authorities are usually appointed for a fixed period of time to deal with particular issues. An *ad hoc* authority generally ceases to exist when its job is done.

a) Commissions and Inquiries

The most common type of *ad hoc* authority is a royal commission or public inquiry (which are in effect the same thing). *Ad hoc* authorities are usually called upon to investigate and make a report.

The federal government and the provincial government both have general legislation empowering the creation of public inquiries to investigate and report on matters within their jurisdiction. The federal law is contained in the *Inquiries Act*. The Manitoba legislation is contained in the Part V of *The Manitoba Evidence Act*.

The jurisdiction of a public inquiry or royal commission is established by the terms of reference contained in the order-in-council creating the inquiry. The terms of reference can only be altered by another order-in-council. Once the inquiry has reported, as required by the terms of reference, the inquiry ceases to exist.

There are also numerous statutory provisions for the creation of inquiries for specified purposes. For example, section115 of *The Workers Compensation Act* provides that the Lieutenant Governor in Council may appoint an advisory committee in relation to workers' compensation.

An inquiry is not a court although it may proceed in a judicial manner. An inquiry or commission is in effect an agency of the executive branch of government. It will usually have no decision-making authority but will be assigned to investigate a particular matter and to make recommendations. The inquiry usually sets its own procedure, unless otherwise directed by order-in-council. Generally, there are no restrictions on the type of evidence that can be considered by an inquiry.

Usually, an inquiry will appoint an independent lawyer who will assume conduct of the proceedings. In many cases that lawyer will also provide advice to the commissioner before and after the formal proceedings. Accordingly, it is essential that lawyers representing parties with an interest in the proceedings establish early contact with the lawyer for the inquiry to discuss procedural and evidentiary matters. Depending on the nature of the subject of the inquiry, the inquiry may also have its own research staff.

b) Arbitration Panels

A number of statutes provide for the creation of *ad hoc* adjudicative bodies to dispose of disputes between a citizen and government or between a citizen and a private interest. These *ad hoc* bodies frequently resemble arbitration panels because each party is given an opportunity to appoint their own nominee to the tribunal.

For example, disputes as to the nature and extent of repairs or as to the amount of insurance monies payable in respect to property damage to an automobile must be referred to an appraisal panel under section 70 of the *Automobile Insurance Coverage Regulation* (a regulation made under *The Manitoba Public Insurance Corporation Act*). There are similar provisions in *The Insurance Act* dealing with property insurance and hail insurance.

These arbitration panels are quick, inexpensive and informal. Nominees generally require no special experience or training. The panels normally establish their own informal procedure, and the panel ceases to exist once it has rendered a decision.

These arbitration panels are under-utilized and frequently overlooked by lawyers even though in many cases access to the courts is prohibited where the statute provides for dispute resolution by means of an arbitration panel.

C. COMPARISON TO COURTS

There are significant differences between the courts and most administrative agencies.

The most fundamental difference is that virtually every administrative agency views itself as having an obligation to protect the public interest. For example, the *Workers Compensation Board* may deny a claim for benefits even in circumstances where the worker and the employer agree that the claim should be paid. Tribunals usually have to satisfy themselves that the prerequisites of their *Act* have been met and that the authority has jurisdiction to grant a licence or to award benefits regardless of the position taken by the parties themselves.

Issues of public policy will be considered by almost every board and tribunal. Agencies in effect create public policy with every decision. Agencies often adjudicate, administrate and legislate all at the same time. Courts only adjudicate.

Agencies such as the Manitoba Securities Commission, the Clean Environment Commission and the Human Rights Commission often monitor the decisions that they render. Courts do not follow up on their own decisions.

> Procedure before administrative tribunals also differs significantly from court procedure.

Tribunals will ordinarily:

- consider evidence that would be inadmissible in court;
- review their own record of proceedings leading up to the inquiry in question;
- commission their own experts and advisors to prepare reports with respect to the matters at issue;
- rely on their own knowledge and experience;
- generally, proceed in a more flexible manner.

In some cases, tribunals may also be able to reconsider their own decisions whereas a court would be *functus officio*.

D. PREPARING FOR A HEARING

1. Introduction

Effective administrative advocacy is really no different from effective advocacy in any other civil proceeding. As Mauet says in his preface to *Fundamentals of Trial Techniques* (Thomas A. Mauet, Donald G. Caswell & Gordon P. Macdonald, Canadian ed. (Toronto: Little, Brown & Co., 1984) at ix:

> *(Effective advocates) always seem to have two complementary abilities. First, they have developed a methodology that thoroughly analyzes and prepares each case for trial. Second, they have acquired the technical skills necessary to present their side of a case persuasively in court. It is the synthesis of both qualities – preparations and execution – that produces effective trial advocacy.*

Administrative advocacy differs from trial advocacy, not in the professional skills employed, but rather in the technical knowledge brought to bear in the course of prosecuting a case.

A trial lawyer must be familiar with the rules of court; an administrative lawyer must be familiar with whatever rules of practice that have been adopted by a particular tribunal. The trial lawyer must be able to cite technical rules of evidence by chapter and verse; the administrative lawyer needs only knowledge of the evidentiary fundamentals – relevancy, reliability, credibility and the like. The trial lawyer structures a case in accordance with the expectations of the court or the judge who is hearing the case; the administrative lawyer learns to adapt, knowing that each administrative tribunal operates as a specialized forum with its own special set of policies and procedures.

The fact that tribunal practices are so varied and flexible – unlike those of a court – offers both challenge and opportunity. As observed by E.A. Goodman, K.C.:

> *There is much greater scope for counsel's ingenuity and imagination in an administrative hearing than in appearances before a court.*
>
> *. . .*
>
> *I believe that in administrative tribunals, imagination is as important as any other quality.*
>
> *(E.A. Goodman, K.C., "Advocacy Before Administrative Tribunals", in Administrative Advocacy: The Lawyer and Government, Department of Continuing Education, Law Society of Upper Canada, Toronto, January 28, 1978 at p.B-1.)*

The practice of administrative advocacy requires strategic planning and recognition of public policy issues. No lawyer in practice today can avoid dealing with administrative authorities for long. Whether you choose a career as barrister or pursue the solicitor's path, you will regularly encounter situations in which your client requires assistance in dealing with some official whose job is to administer the law.

2. Initial Client Contact

Begin by getting the facts as the client understands them. Included here will be the legal difficulty the client is facing. Sometimes clients involved with an administrative agency or tribunal are quite sophisticated. In such cases, the client will likely be able to brief the lawyer on the facts, the problem, the objective and the preferred plan of action. Often, however, this is not the case.

The client may be completely in the dark about what has taken place. Other than having received a notice, demand or order from an administrative agency, the client may be unaware of the intricacies of the administrative system involved. Sometimes the client has a little knowledge about the agency in question, but a little knowledge can be a dangerous thing. The client may frame the problem and the issues in a way which is inaccurate or strategically erroneous.

Your job is to provide the best possible advice and counsel that you can. Listen to the client but be skeptical of what you hear about the board and the manner in which the client expects to be impacted. You must check out every aspect of the case and, if necessary, educate yourself fully on the agency and its operation. Client information may or may not put you on the right track.

For example, the client may say: "I'm not going to worry about this licensing notice. I've heard that no company loses its licence the first time. It will probably just be a warning." That may be correct. On the other hand, there may be new legislation, or new government policy, or a new board chairperson. Perhaps there are competitors, or inspectors, or public interest groups who will see this apparently minor administrative violation as a case to pursue as an example to others. The client could be in jeopardy and not even know it.

To give sound advice, you need more information. If you are already experienced in the area, or have recently been through the same situation with another client, your task will be easier. In any event, before giving any advice some preliminary steps are required.

3. Immediate Steps

First, it is essential to determine with accuracy the status of your client's case. You could be at the beginning, middle or end of an administrative process.

Find out whether any notices have been served and published. Are there deadlines for responses by your client or other parties? Are extensions available? What are the consequences of late filing or response?

Obtain copies (or examine the board's originals) of any documentation already existing, such as applications, notices, orders, directions and any written materials that have been filed with the board by a party to the proceeding. Read carefully and critically. Has something been missed? Has your client been afforded procedural fairness?

The status of the proceedings should be discussed and confirmed with a responsible board official. Use your judgment, but be wary of accepting the word of a junior official in the agency office. It is best wherever possible to contact the Board secretary or registrar. Take notes at the time or confirm any significant advice or information received by sending a confirming letter.

4. Learning about the Board

a) The Legal Framework

The first step in preparing for an administrative hearing is to review all applicable governing legislation for the Board with which you are dealing. It is there that you will find the Board's jurisdiction, its composition, what constitutes a quorum, any right of appeal, the powers of the Board to hear evidence and summon witnesses, etc.

Usually, the statute is enabling, rather than exhaustive of the agency's duties and powers. Regulations may provide more details of the administrative scheme. Often the most useful source of information is the Board's policy and procedure manual which may provide you with the guidelines that the Board itself uses in interpreting its own legislation as well as its procedures and practices.

Visit the Board's website (or the government's website) to get some of these details, especially on the Board's own policies/procedures.

Check for any court decisions interpreting the jurisdiction of the Board and the legislative provisions that may be applicable to your client's case. Some of the more established tribunals may have published decisions of the Board on previous cases. These cases may be available directly through the Board's website or through online legal research databases.

It is usually useful to consider the history leading to the establishment of the Board. Why was it set up and what concerns was it intended to address? This will help you understand how the Board sees its role and what it is trying to achieve.

All tribunals are required to comply with the rules of natural justice, which include procedural fairness. At its core, procedural fairness in the administrative law context is concerned with ensuring that a party who may be impacted by a decision has the opportunity to know the case that it must meet and has a full opportunity to have its position heard.

What is required by procedural fairness in any given case, however, will depend upon the particular statute involved and the rights affected.

When deciding what procedural protections must be provided, the courts will consider, among other things, the following factors:

- the nature of the decision made and the procedures followed in making it (i.e., the closeness of the administrative process to the judicial process);
- the role of the particular decision within the statutory scheme;
- the importance of the decision to the individual affected;
- the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and
- the choice of procedure made by the agency itself.

See *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 SCR 3.

b) Learning from the Board Itself

Once you have a good understanding of the Board's jurisdiction and function, you should begin the process of acquainting yourself personally with the Board and its staff.

> Most Boards have a secretary and/or a registrar who will be able to meet with you to review your case. Some Boards have their own staff lawyer who can also be an invaluable source of information. It is important to establish a good relationship with tribunal staff as they can be of tremendous assistance if you approach them with courtesy and respect.

Most Boards and tribunals would prefer that counsel appearing before them are familiar with their policies and procedures. This is in the interest of the tribunal as it prevents needless delay and frustration dealing with counsel who are ill-prepared to address the real issues arising in a particular case.

Most tribunals are interested in ensuring a fair process and do not wish to participate in a hearing in which issues are not being adequately considered because of counsel's lack of familiarity with the tribunal's policies or procedures. Accordingly, most

tribunals will instruct their staff to assist lawyers who will be appearing before the Board.

Perhaps the first time you approach tribunal staff they may provide you with a great deal of unpublished and previously unavailable policies and rules of procedure. It would be advisable to review this information before wasting the time of tribunal staff asking questions that are answered in their published guidelines.

Answers to many of the questions set out below may be contained in the tribunal's governing legislation, policy statements, or rules of procedure.

To be well-prepared, you want to have answers to the following questions:

- Does the Board have published guidelines, standards or policy statements?
- Is the Board's internal file available to you?
- Is the Board's internal file available to other parties?
- Does the Board have copies of past decisions which are available to the public?
- Does the Board consider itself bound by past decisions?
- Can you view other Board files dealing with other applications?
- Does the Board have a library where you can find its decisions or other relevant publications?
- Are there published rules of procedure?
- What will be the format of the hearing?
- Will there be witnesses called or will the hearing be limited to a review of the record?
- Will the Board accept an expert's report and if so, will it be necessary to call that expert to allow cross-examination?
- Will the argument be oral or written?
- Are there time limits?
- If oral submissions are required will the Board also be prepared to receive a written argument?
- Does the Board swear in witnesses?
- How do panel members prefer to be addressed?
- Will the hearing be in camera?
- Will there be a transcript of proceedings?
- Will there be any intervenors or other interested parties allowed to appear at the hearing?

You should not abuse the cooperation of tribunal staff by asking them questions of this kind until you have reviewed the readily available sources of information and are satisfied you cannot find answers to those questions.

c) Published Guidelines, Policies and Standards

Some tribunals have statutory authority to establish policies or practices which, once adopted, are deemed to have the force of law. These policy statements are sometimes difficult to locate, resulting in criticism that tribunals are governed by secret law to which only the board and certain insiders or experts are privy or even aware.

To the extent boards and tribunals have formalized their policies or practice guidelines, most are prepared to release them upon request or they may already be posted on their website. Some boards and tribunals may be reluctant to release their policy guidelines because they are not in a form which is suitable for public circulation. In those circumstances you may have no alternative but to attempt to make do with the best available information in the form of written summaries or verbal discussions with tribunal staff.

5. Retaining Experts and Advisors

In advance of the hearing, it is important to ascertain the tribunal's attitude to experts. Some tribunals are accustomed to hearings in which a large number of experts are called as witnesses. Others are suspicious of expert evidence based on previous experience.

The choice of expert at an administrative hearing may be more important than the choice of expert in an ordinary civil proceeding. In a court case, it is unlikely that the judge will be familiar with all of the experts in a particular field and have formed an opinion as to the expert's reliability before a hearing. However, in appearing before a specialized tribunal, the members of the panel may well have heard from all of the knowledgeable experts in the regulated area on numerous occasions in the past and have thereby formed their own conclusions as to the competence and candor of the particular expert you intend to call.

Obviously, if you are choosing an expert to appear before a specialized tribunal, you will want to ensure that your expert has a good track record before the tribunal in question and that the expert's opinions are generally considered credible and worthy of careful consideration. You may be able to learn how certain experts have fared in the past by reviewing past board decisions. Alternatively, you may be able to learn the names of the experts that appear regularly before the tribunal from tribunal staff. Discreet inquiries of counsel who regularly appear before the tribunal will usually reveal how the various experts have been received in the past.

As in any civil case, you will want to obtain an expert who is, in all circumstances, able to give the best evidence. However, it is equally important that the expert be able to express an opinion clearly and simply. It is of the utmost importance that your expert not appear to be arrogant and does not patronize the members of the panel.

You should retain your expert early and give instructions to prepare the report well in advance of the hearing. It is necessary that your client review your expert's report carefully to ensure the expert has correctly described your client's situation.

> As with any expert witness in a civil proceeding, you must ensure that all of the assumptions contained in your expert's report will be proved in evidence, either through documents that are acceptable to the tribunal or through *viva voce* evidence called at the hearing.

Many tribunals do not have rules of procedure which require an exchange of expert reports prior to the hearing. Generally, it is desirable to agree with opposing counsel that expert reports will be exchanged in advance in order to permit both sides to adequately prepare for the hearing. It is in everyone's interest generally to disclose to opposing counsel that expert testimony will be called and an expert report will be filed.

If expert reports are not exchanged in advance, and a party is presented with a report at the hearing, an adjournment will likely be requested, resulting in delays to both parties. Most tribunals are reluctant to require a hearing to proceed if one of the parties requests an adjournment based on a previously undisclosed expert report.

In presenting expert testimony to the tribunal it may not be necessary to qualify the witness as an expert in the way counsel must in court proceedings because the tribunal may be familiar with various experts in the field and be ready to accept the witness as an expert without formally walking through the witness' qualifications. However, unless you are certain that the panel is familiar with your particular expert it is generally useful to qualify the witness in order to illustrate to the panel the extent of the witness's qualifications and experience.

If the witness is qualified in the same general area as members of the tribunal, it may be important to establish that your witness has a particular specialty within the field that will somehow set the opinion apart from that of other experts in the field or the tribunal members themselves.

In establishing your witness's qualifications, it is generally useful to file a curriculum vitae and to bring out the relevant qualifications by leading the witness. When it relates to the expert's particular area of specialization that is relevant to the proceedings, it is best that this type of explanation come from the expert and not through leading questions by counsel.

You should not overlook the possibility of having an expert assist in the preparation of your presentation even if you are not able to call the expert as a witness. In dealing with any tribunal, and in particular a specialized tribunal, an expert can be invaluable in assisting you with your presentation whether oral or in writing. In some cases, you will find that there are experts who specialize in dealing with a particular tribunal and advising parties on all matters related to jurisdiction, regulation and procedure before that tribunal.

6. The Pre-Hearing Conference

Once the tribunal's practices and procedures are fully understood, counsel should consider whether there are any pre-hearing procedures which will be of assistance. Permanently established tribunals tend to proceed by established rules. Sometimes there is an opportunity for a pre-hearing conference at which any outstanding issues with respect to the proceeding in question may be considered.

If the tribunal you are appearing before does not routinely have pre-hearing conferences, you should consider nonetheless whether you wish to ask for one. In general, if you can convince the tribunal's registrar or chairperson that there are procedural issues to be resolved, the tribunal may accommodate a request for a pre-hearing conference in order to avoid the expense and delay of adjournments during the hearing to deal with procedural questions.

You should attend a pre-hearing conference with a clear view of what you want to achieve. For example, you may wish to agree to an exchange of expert reports or to discuss the necessity to subpoena certain witnesses. You may wish to have certain tribunal staff appear for the purposes of cross-examination on their reports. You should proceed to a pre-hearing conference with a list of issues to be resolved in order to facilitate an orderly adjudication of your client's application before the tribunal.

The hearing in question may be taking place in a highly charged political environment. Depending upon your client and the interest you are representing, you may wish to attempt to limit interventions that are merely repetitive of each other. You may wish to attempt to have the tribunal organize particular interest groups into classes with instructions that parties with a common interest can only retain one lead counsel to prevent repetitive and damaging cross-examination.

There are limitless numbers of procedural issues that can be resolved at a pre-hearing conference. Some of these issues may be impossible to resolve if they are left to the date of the hearing.

Advocacy is extremely important at a pre-hearing conference, as the process by which certain applications are heard often affects the outcome. For example, if environmental issues are important to an application, you may wish to suggest that hearings are necessary in specific communities that will be particularly impacted by the application in question. Obviously, it can significantly affect a tribunal's decision if large numbers of the public attend the hearings and make emotional submissions either for or against an application. Accordingly, it is of critical importance that you consider the effect and implications of the processes and procedures which you are advocating the tribunal adopt in the hearing of any particular application.

With respect to the more technical aspects of the hearing you may wish to request a limited discovery process involving disclosure of documents in order to permit your client to prepare for the hearing. While tribunals may have limited authority to order pre-hearing disclosure of documents, litigants may be reluctant to refuse to disclose such information for fear that the tribunal will conclude they are being uncooperative and secretive, thus causing unnecessary delays and creating general suspicion as to the reliability of their evidence.

Conversely, if your client is in possession of information which may be harmful, you may wish to minimize the opportunity to compel production. Once again, the position you take at any pre-hearing conference will depend upon the circumstances of your case, the position of your client, and the advantages and disadvantages of disclosing documents. Examinations for discovery are virtually unheard of in administrative proceedings so that disclosure of documents is frequently the next best thing.

As an example of the kind of pre-hearing disclosure that might be possible to obtain, there was, a pre-hearing conference before the Manitoba Securities Commission in May of 1999 with respect to a hearing to review the licensing of a salesman under *The Securities Act*. The Manitoba Securities Commission concluded that its general jurisdiction to compel the attendance of witnesses and to compel production of documents included the right to compel pre-hearing disclosure and ordered, *inter alia*:

1. that the respondent produce for inspection all documents in his power or control upon which he intended to rely at the hearing;
2. that the respondent produce the names and addresses of all witnesses to be called at the hearing;
3. that if expert witnesses are to be called at the hearing by either party, a copy of a report signed by the expert setting out the substance of the proposed testimony be provided at least one month before the hearing.

The pre-hearing conference is also an opportunity to consider whether the hearings in question can be phased or scheduled according to subject matter. If your client is interested in only part of the issue being considered by the tribunal, is there a way in which the tribunal can agree to segregate that matter? For example, an inquiry into an aviation disaster might have many months of hearings but the manufacturer of the aircraft may only be interested in a few days of testimony relating to the condition of the aircraft at the time of the accident. You should consider whether it is possible to have all of the witnesses dealing with the

condition of the aircraft called at one time so as to eliminate the need for your client to sit through the entire hearing.

In a complex hearing with political overtones there are usually a number of courses the hearing can follow. Each course will tend to emphasize different issues and will affect public perception as well as the tribunal's decision. Because procedures tend to be flexible it is particularly important that you be involved in the pre-hearing procedures so as to establish a course of proceedings that will best facilitate your client's needs.

7. Constitutional Issues

Certain administrative agencies have the jurisdiction to make constitutional decisions including questions involving the division of powers, the *Canadian Charter of Rights and Freedoms* and Aboriginal/Treaty rights. This may include the jurisdiction to consider the constitutionality of provisions in the tribunal's enabling statute. See *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 (CanLII), [2003] 2 SCR 585*; Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54.

Traditionally, at common law, whether a tribunal was competent to consider constitutional questions depended on whether the empowering legislation expressly or impliedly granted jurisdiction to the tribunal to interpret or decide general questions of law. As a general rule, tribunals had the jurisdiction to consider constitutional matters unless their enabling statute expressly removed this jurisdiction.

On January 1, 2022, however, *The Administrative Tribunal Jurisdiction Act* (the "*ATJA*") came into force in Manitoba and expressly removed the jurisdiction of all administrative tribunals to consider constitutional questions, except for those tribunals set out in the accompanying Regulation. As of 2023, the list of tribunals which retained jurisdiction to consider such questions under the Regulation was limited to:

- the Automobile Injury Compensation Appeal Commission established under *The Manitoba Public Insurance Corporation Act*;
- the complaints investigation committee established under *The Legal Profession Act*;
- the discipline committee established under *The Legal Profession Act*;
- the Manitoba Human Rights Commission;
- the Manitoba Labour Board;
- the Manitoba Securities Commission;
- the Public Utilities Board;
- the Residential Tenancies Commission.

The *ATJA* defines a constitutional question as a "challenge to the constitutional validity or constitutional applicability of a law" or a "determination of any right under the Constitution of Canada". As of early 2023, the *ATJA* had not yet been interpreted or applied by a court in Manitoba.

When preparing for a hearing, therefore, counsel must determine whether to argue any constitutional issues and whether the jurisdiction of the tribunal in question has been limited by the *ATJA*.

If a *Charter* issue may be engaged by a tribunal's decision, you may consider whether there are *Charter* "values", as described by the Supreme Court of Canada in *Doré v. Québec (Tribunal des professions)*, 2012 SCC 12, that are applicable and may be relied upon. While the *ATJA* expressly precludes certain tribunals from making a determination regarding any rights under the Constitution, it does not preclude tribunals from considering *Charter* values. See also, *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, for a discussion of *Charter* protections and how they encompass both *Charter* rights and values.

If you intend to raise a constitutional question within the meaning of the *ATJA* before any of the tribunals that have retained jurisdiction under the Regulation, notice must be given to the Attorney General of Manitoba, the Attorney General of Canada, all parties to the proceeding and the tribunal under section 3 of the *ATJA*. Where the question involves the invalidity or inapplicability of a legislative provision or a request for a remedy is made, reference should also be made to the notice requirements of section 7 of *The Constitutional Questions Act*.

Finally, it should be emphasized that a tribunal does not have the jurisdiction to make a general declaration of invalidity. Each case must be decided on its merits.

E. RULES OF EVIDENCE BEFORE ADMINISTRATIVE TRIBUNALS

1. Applicability of Rules of Evidence

The civil court rules of evidence do not generally apply to administrative tribunals. However, that principle is subject to two important qualifications.

The first qualification is that the tribunal's statute might specifically provide that certain rules of evidence do apply. Where such a statutory provision exists, it must be strictly complied with as the tribunal will lose jurisdiction if it fails to do so.

The second qualification is that, even though a tribunal may not be bound by rules of evidence, the tribunal is still bound by the rules of natural justice and must apply procedural fairness. For example, even though a tribunal is not generally required to allow cross-examination of witnesses, there may be situations where procedural fairness requires that a tribunal allow cross-examination in order to permit a fair hearing.

In other words, when you are before administrative tribunals that are not bound by civil court rules of evidence you will be facing

- flexibility (rules of evidence do not apply); and
- fairness (rules of natural justice or fairness do apply).

Even though rules of evidence have limited application to administrative decision making, there are a number of very good reasons for focusing on them. If a tribunal is faced with evidence that would not admissible according to the rules of evidence, that should be a warning to you that the evidence might be unreliable to some degree. It is possible that such evidence could prove to be so unreliable as to constitute a breach of the rules of natural justice. If the tribunal bases a decision on such evidence, that decision may be open to judicial review.

It should also be kept in mind that the extent to which a tribunal will apply the strict rules of evidence will generally depend upon the type of function being exercised by a particular tribunal. Thus, for example, a disciplinary hearing into professional misconduct involving a physician would follow much stricter evidentiary rules than would a regulatory tribunal hearing evidence on the potential environmental or social impact of a particular project. Indeed, the strictness of application of rules of evidence might vary within the same hearing.

For example, the *Aboriginal Justice Inquiry* proceeded very informally in hearing testimony from individuals dealing with general justice issues, but in the *J.J. Harper Inquiry* where potential misconduct of individuals was in issue, stricter rules were applied.

Many statutes establishing administrative tribunals contain a provision dealing with the kind of evidence which may be received by the board. In most cases, the legislature has decreed that the formal or court rules of evidence need not be applied. Sometimes the statute or the regulations or rules of procedure go on to provide an alternative, more flexible, standard for admissibility of evidence.

For example, tribunals under *The Regulated Health Professions Act* provides:

> ***117(2) Rules of evidence do not apply***
> *A panel is not bound by the rules of evidence that apply to judicial proceedings.*

2. The Nature of Evidence

The rules of evidence impose certain conditions upon the introduction of evidence for use in court. These rules are based on the suspicion that certain kinds of evidence may be unreliable.

In effective administrative advocacy one must distinguish between the rule that is established in law and the rationale for that rule. For example, there is a general rule that hearsay evidence is not admissible. The rationale is that the evidence is likely to be unreliable, since it was not given under oath and since the other side will have no opportunity to cross-examine on it. Before the courts, it is generally sufficient to object to the evidence and cite the rule in order to prevent the introduction of hearsay evidence. Before administrative tribunals, it is the rationale that will usually be more important.

For example, in a hearing before the *Land Value Appraisal Commission* a witness may give evidence as to what someone else told the witness regarding the purchase price for a particular property. If you simply object to the testimony and cite the hearsay rule, you will inevitably be met with the response that the tribunal does not follow the strict rules of evidence.

However, you may have more success if you point out that this evidence may not be reliable because the other party is not before the tribunal and you are limited to cross-examining the witness as to the witness's recollection of what was said as opposed to testing the reliability of the evidence itself. Generally, it would also be useful to point out that there may have been other factors associated with the other purchase which may not have been disclosed. Was the land subject to encroachment agreements? Was it a cash sale or were there special payment arrangements? Was the sale non-arm's length? By pointing out the unreliability of this type of evidence the tribunal may be persuaded that the testimony has no probative value.

Thus, in cases where a tribunal overrules your objections and admits evidence that you consider to be inherently unreliable, it will usually give very little weight to that evidence if you have given persuasive argument that the evidence is, by its very nature, unreliable.

3. Evidentiary Objections

Where objections are made on the basis that the rules of evidence specifically made applicable by a statute are being contravened, those objections must be dealt with in the same manner as in an ordinary court. In those situations, the tribunal should deal with the objection and make a ruling with respect to admissibility or the procedure to be followed. Thus, if a claim to privilege is asserted and the claim falls within the evidentiary rules excluding such evidence, the evidence should be excluded.

> However, in all other situations, the tribunal should not determine merely whether or not an evidentiary rule has been breached. The tribunal should inquire further as to whether, even though there may have been a breach of an evidentiary rule, the evidence should nevertheless be permitted into evidence at the hearing. At this point the inquiry is not into whether a rule of evidence is being contravened, but whether the evidence is helpful in coming to a determination and whether it would be fair to the other side for such evidence to be received at the hearing.

In such circumstances, the tribunal might determine that even though the evidence should be admitted, consideration should be given to the objection when assessing the weight to be given to it. Thus, for example, if a witness cannot be found but the witness had written a relevant letter, the tribunal might admit the letter but take into account, when assessing it, that it is hearsay and that the other side had no opportunity to cross-examine the writer. It may not be given much weight by the tribunal for that reason.

In ruling on such objections, it is often valuable for the tribunal to state, for the record, the basis on which the objection to admissibility is denied. For example, a typical tribunal ruling on evidence would be the following:

> *We have given careful consideration to the nature of the evidence in question and the objections of counsel to the admissibility of that evidence. Taking into account:*
>
> *(I) the potential relevance of the evidence,*
>
> *(ii) the potential unreliability suggested by counsel's objections; and*
>
> *(iii) balancing these considerations in relation to fairness to the parties,*
>
> *we have decided to admit the evidence before this board but to give further consideration to counsel's objections in deciding ultimately what, if any, weight should be given to it.*

Of course, if the evidence is extremely unreliable and the other side may be seriously prejudiced, it should not be admitted at all.

4. Tactics in Dealing with Evidentiary Issues

In general, one must recognize that very little evidence will be kept out of a broad administrative proceeding. Further, little distinction will be made between fact, lay opinion and expert opinion. Lay witnesses may well give opinions with respect to issues outside their expertise and will also express opinions on policy issues which are incapable of factual determination. You should consider carefully whether you wish to attempt to cross-examine on these sorts of issues which will inevitably result in a debate in which you are simply giving the witness an opportunity to reinforce the witness's stated opinions.

When faced with a lay witness giving purely opinion evidence, you may wish to limit your cross-examination to establishing that the witness has no expertise or substantive knowledge enabling them to express an opinion. Where appropriate, you may attempt to cast doubt on the *bona fides* of the witness by demonstrating that the witness has a special interest in the issue on which the witness is expressing an opinion. Debating the merit of the opinions rarely furthers your client's interest.

On the other hand, in proceedings where there are many parties who will be cross-examining, you can anticipate that someone else will ask the questions which you do not ask. Thus, if you are particularly concerned about the response to a question, you are better off to deal with the issue yourself so that when the adverse evidence comes out, you will at least have an opportunity to ask further questions in the area.

F. ADVOCACY BEFORE ADMINISTRATIVE TRIBUNALS

1. General

> Your attitude towards the Board and its staff is of utmost importance in dealing with an administrative tribunal. Where there are no rules of procedure, you will need to rely on your skills of persuasion to get the tribunal to proceed in the manner you are advocating. It is, therefore, important that you do not have or project a condescending attitude to the Board or its staff.

Most administrative tribunals are not comprised of lawyers. Many do not like legal processes or legal jargon. Most administrative tribunals view themselves as protecting the public interest and will have little time for aggressive or abusive lawyers.

Effective advocacy before an administrative tribunal will require that you temper any adversarial posturing or position in light of the Board's function to protect the public interest and its desire to permit a hearing of the issues without undue technicalities.

Often tribunals have a difficult time dealing with individual rights where they perceive their primary function as the protection of the public interest. It is important that you recognize and respect the Board's desire to protect the public interest and show them a process whereby it can protect the public interest while at the same time recognize your client's individual rights.

Tactics may be particularly important if you are representing a client in a regulated industry. Remember that in a regulated industry your client usually has an ongoing relationship with the Board or tribunal with which you are dealing, and if you offend the tribunal, you may not only lose the case at hand, but you may irreparably harm your client's business interest in the future. Therefore, you must take extra care to show respect to the tribunal and to establish and preserve both your credibility and your client's credibility with the Board.

2. Opening Statements

Opening statements are particularly important in cases dealing with broad issues of policy. Many tribunals do not distinguish between argument and evidence and therefore counsel must be particularly careful in their opening statements to clearly lay out the position of the client.

In a regulatory proceeding, the opening statement is an opportunity for counsel to attempt to focus the tribunal on what the client views to be the determinative issues. The opening statement may also be an opportunity to anticipate the other side's case and to defuse issues

before any evidence is called. Remember that in regulatory proceedings participation of intervenors may significantly affect the process. A careful and well-focused opening statement may enlist the support of certain intervenors. An ill-considered opening statement may antagonize intervenors into needlessly opposing your client's application.

Counsel should be careful not to be perceived as abusing their right to an opening statement. If your client is able to present their own position effectively, then sometimes you may choose not to make an opening statement only to have your client repeat the same information later in testimony. In each case the use of an opening statement must be carefully considered in view of the nature of the inquiry, the composition of the tribunal, the other interested parties and the public profile of the hearing.

3. Confidential Information

Some tribunals permit parties to file certain evidence in confidence. For example, in licensing applications financial statements may be filed to show that the applicant has the resources to engage in the regulated industry. An objector to such an application may wish to cross-examine on that material to show that the applicant is in fact financially insecure and a risk to the public interest. In this circumstance you may be able to convince the board to release the information to counsel on the undertaking that it will not be disclosed, even to your client, and will be used for the purposes of cross-examination only, with no copies of the documentation being kept after cross-examination is complete.

Even where the tribunal refuses to release confidential information you may wish to ask for it and state your request on the record together with your rationale for the request. This may well give rise to an issue of denial of natural justice which can be the basis for judicial review if the tribunal hands down reasons which are not acceptable to your client based on information which you have not been permitted to examine.

4. Presenting Final Argument

It is difficult to make generalizations relating to final argument because there is such a variety of administrative and quasi-judicial tribunals. For example, a disciplinary proceeding before a professional association will usually limit itself to a strict determination based on the evidence heard in the formal proceeding. In a licensing hearing, on the other hand, you can expect the other parties to make reference to material which is outside the record of proceedings. Accordingly, the final argument must be tailored to reflect the wide differences in approach that will be adopted by the various types of tribunals.

It must be kept in mind that tribunal members are often appointed because of their expertise or prior knowledge in a particular area. In such circumstances the tribunal can be expected to give consideration to things not on the formal record. Accordingly, advocates must recognize this reality and deal with it in their closing argument.

Lengthy hearings may result in fundamental issues becoming lost in an avalanche of evidence. The closing argument is your last opportunity to bring the tribunal back to the fundamental issues which you consider necessary to establish your case. Final arguments should be in a form which clearly identifies the issues that the tribunal must determine and

the decision you want in respect of each issue. If you have been successful in controlling the process, you may find that your closing argument amounts to an expanded version of your opening statement.

> Generally, you will wish to summarize for the tribunal the issues you have identified and focus on how the evidence during the hearing relates to the issues you have identified. It is not generally useful to reiterate the evidence at length. A concise point form summary may be the best method of ensuring the tribunal understands the position you are advancing on behalf of your client.

Make sure you remember who is receiving your argument. If the panel will be assisted by staff in reaching its decision, you will wish to address your argument to those individuals as well.

Generally, it is unwise to emphasize that you are a lawyer or to advance technical legal arguments. If there are legal issues to be addressed, express them in a manner that is appropriate to the type of panel you are dealing with. For example, it may get you nowhere to argue that a particular result is *ultra vires* the jurisdiction of the board. However, if you argue respectfully that a particular result would be, in your opinion, outside of the authority conferred on the panel by their governing legislation, this may cause the tribunal to consider your argument more carefully and perhaps seek its own legal advice which may be sufficient to achieve the result your client desires.

G. REVIEW OF ADMINISTRATIVE DECISIONS AND ACTIONS

1. Introduction

If your client has received a negative decision from a tribunal, you will likely need to consider the possibility of some form of review. There may be several available alternatives to review the tribunal's decision. In each case you will have to decide which avenue of review is most appropriate for your client. Available avenues of review can generally be classified into the following four headings:

- review or appeal before administrative bodies;
- judicial review and statutory appeals to courts;
- ombudsman review;
- political review.

2. Review or Appeal before Administrative Bodies

> In every situation you must first determine whether there is an available statutory right of appeal or other ability to seek a review of the decision before another administrative body. Most other types of review are considered premature until all existing rights of review at the administrative level have been exhausted.

These forms of review are commonly referred to as "internal" reviews. Statutory appeals to courts are a distinct issue and are dealt with in Section 3 below.

Many statutes provide for appeals to one or more administrative review bodies. These may be appeals to higher level officials within the department (i.e., from the Director of Employment Standards to the Manitoba Labour Board under *The Employment Standards Code*); appeals to a statutory appeal tribunal (i.e., *The Automobile Injury Compensation Appeal Commission*); or appeals to cabinet (i.e., decisions of the *Canadian Radio-television and Telecommunications Commission*).

Before advising your client with respect to such an appeal, you should consider the following:

- What is the jurisdiction of the appeal body?
- Will the review be a hearing *de novo* or is the review limited to errors of fact or law?
- Is there a leave requirement?

- Is there a time limit for filing an appeal?
- What is the procedure on appeal?
- Will there be a *viva voce* hearing or merely a paper review?
- Does the authority provide you with alternatives?
- What remedies can the appeal body grant? Can it merely order reconsideration or does it have the jurisdiction to substitute its own decision?
- What criteria does the appeal body apply? Are these set out in the statute, regulation or policy guidelines of the tribunal?

Once you have decided to proceed with an appeal you must adjust your advocacy technique to suit the tribunal to which you are appealing. Some tribunals will not hold an oral hearing but will conduct a file review and receive written submissions only. In such cases it may be wise to consult other counsel experienced in dealing with that tribunal, or to consult the tribunal staff, to find out what the tribunal likes to see in a written submission.

Additionally, many departments and agencies have internal review mechanisms which are not provided for by statute. These review procedures may be set out in written policy or may be more informal, based on principles of sub-delegation. In many cases the statute confers a discretion on the Minister who in turn delegates the matter to senior staff. Accordingly, you must look to the governing statute to determine who has final authority.

If your client's request has only been considered by a lower-level official, you may wish to approach a supervisor or the supervisor's supervisor. You may eventually end up approaching the Minister responsible for the administration of the legislation.

In some situations, there may be a special internal review committee with a specific mandate set out in formal policy with fixed procedures. Obviously, if such internal procedures have been formally established, you must pursue the available appeals using the same approach as noted previously.

Some tribunals may have specific statutory authority to reconsider their own decisions. For example, under section 60.10 of the *Act* the Chief Appeal Commissioner of the Workers Compensation Board has limited jurisdiction to order a reconsideration of any matter on which there is substantial new evidence that was not available at the time of the previous hearing.

The Supreme Court of Canada has made it clear that, in the absence of constitutional constraints, the principles of natural justice (including the requirement of structural independence) can be ousted by the legislature. Constitutional guarantees of structural independence for the courts do not apply to administrative agencies, even if they are exercising quasi-judicial functions.

The degree of independence required of a particular tribunal is determined by its enabling statute. If the legislation is silent on the point, the courts will generally require the tribunal to comply with the principles of natural justice. See *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 (CanLII), [2001] 2 SCR 781.

> In the absence of specific statutory authorization, there may be an implied power to reconsider depending on the nature of the tribunal in question. In some cases, the tribunal will have a policy on reconsideration. The policy will be more or less restrictive depending upon the nature of the subject matter dealt with by the tribunal. In general, the more the tribunal's process resembles that of a court, the more difficult it will be to persuade the tribunal to reconsider the matter.

If the error committed by the departmental official or tribunal is so obvious as to be beyond debate, it is usually correctable by some informal process. If there is a time limit on filing an appeal, you may wish to proceed to file your appeal and then attempt to persuade the staff of the tribunal to correct the error without the need of a formal rehearing.

3. Judicial Review and Statutory Appeals to Courts

Once all internal appeal and review mechanisms have been exhausted, you may wish to pursue a statutory appeal and/or judicial review of the administrative action to a court.

Beginning with statutory appeals, some provincial statutes in Manitoba provide a party to an administrative decision with the right to appeal the decision to the Court of King's Bench or the Court of Appeal. These appeal clauses are often narrow. They may, for example, be limited only to errors of law. You will need to identify any errors you believe were made in the decision below and determine whether they fall within the scope of the appeal clause.

Recently, however, the Manitoba Court of Appeal determined that the mere existence of a narrow statutory right of appeal does not preclude an individual from simultaneously seeking judicial review of the merits of a decision: *Smith v. The Appeal Commission*, 2023 MBCA 23. In the Federal Courts, this issue currently appears to be somewhat more divisive, see, for example, *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161.

It should also be noted that procedural issues may arise where a statutory appeal and a judicial review are to proceed before different courts. Where a statutory appeal clause grants a right of appeal to the Manitoba Court of Appeal, but a judicial review ought to proceed before the Court of King's Bench, you will need to consider whether you can pursue both avenues simultaneously. See *Smith* for a preliminary discussion on this point.

Judicial review of administrative action is a matter of substantive law that is beyond the scope of this chapter. Accordingly, what follows is an outline of the considerations that counsel will have to address in deciding whether judicial review is an appropriate course of action.

a) Standard of Review on the Merits of a Decision

***Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65**

The standard of review has been the subject of consistent scrutiny by the Supreme Court. As of 2023, the leading decision remains *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653. In essence, courts will presumptively review the merits of a tribunal's decision on a reasonableness standard.

To date, the Supreme Court has recognized six exceptions to that presumption:

- Where a statutory appeal to a court exists, the court will apply appellate standards of review, meaning that questions of law will be reviewable for correctness, while questions of fact and mixed fact and law will be reviewable for palpable and overriding error;
- Where the legislature has expressly set out the standard of review in statute, that standard will be applied; and
- Where the rule of law requires the standard of correctness, which will apply to:
    - Certain constitutional questions;
    - General questions of law of central importance to the legal system as a whole;
    - Questions regarding the jurisdictional boundaries between two or more administrative bodies; and
    - Legal issues over which courts and administrative bodies have concurrent first instance jurisdiction under statute. See *SOCAN v. Entertainment Software Association*, 2022 SCC 30.

Generally, a decision will be considered reasonable where it exhibits the hallmarks of reasonableness – justification, transparency and intelligibility – and where it is justified in relation to the relevant factual and legal constraints that bear upon the decision.

b) Procedural Fairness Issues

Where procedural fairness issues are raised on judicial review, the standard of review is commonly described as one of "correctness", insomuch as the reviewing court must find that the tribunal either met the applicable requirements of procedural fairness or it did not. See *SGI v. Marostica*, 2022 MBQB 35.

Where a statutory appeal clause grants a right of appeal regarding questions of procedural fairness, however, appellate standards of review apply. See *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29.

c) The Appropriate Forum for Judicial Review

There are essentially two avenues for judicial review of an administrative authority depending upon whether the tribunal is federal or provincial.

Federal Tribunals

Generally, applications with respect to federal tribunals are made to the *Federal Court* or the *Federal Court of Appeal* in accordance with the *Federal Courts Act* and *Rules*. Some federal tribunals will indicate that judicial reviews/statutory appeals are to go to the Superior Court in the Province as opposed to the Federal Court. For example, under the *Indian Act*, decisions of the Indian Registrar on a person's entitlement to Indian Status can be appealed only to the provincial Superior Court (in our case, the Manitoba Court of King's Bench. See *section 14.3*)

Most applications are made in the Federal Court (see *ss. 18 and 18.1*) but the Federal Court of Appeal has exclusive jurisdiction to hear judicial review applications from any of the tribunals listed in *section 28*.

> See Chapter 4 of these Civil Procedure materials for more information on Federal Court proceedings.

If you are dealing with a federal tribunal and are considering a judicial review, **you must act quickly**. The time limit to file a judicial review is 30 days from a decision. Your client may come to you quite late in the day. As such, it is crucial to identify your limitation period as soon as you meet with your client.

Provincial Tribunals

Applications for judicial review with respect to provincial tribunals are made to the Court of King's Bench. Rule 68 of the King's Bench Rules provides that if the relief sought is an order of mandamus, prohibition, certiorari, or *quo warranto*, the proceedings are to be commenced by notice of application. Where the only relief sought is an injunction or a declaration, Rule 14.05(3) provides that the proceedings shall be commenced by action. If the declaration or injunction is being sought ancillary to other relief, the proceedings may be commenced by application.

The notice of application should be served on the administrative tribunal in question as well as any other parties to the hearing before the tribunal or any party with a legal interest in the outcome of the case. Where in doubt, it is preferable to serve parties who may have a legal interest in the outcome of the case, as Rule 68.02 provides that the court may require notice to be given to any person who in the opinion of the court may be affected by the order sought.

If the proceeding in question may affect the consolidated fund of the Province of Manitoba, then the Minister of Justice should also be served. (See *Re Castel and Criminal Injuries Compensation Board*, 1978 CanLII 2105 (MB CA), 89 D.L.R. (3d) 67 (Man.C.A.)).

d) The Role of the Tribunal on Judicial Review

On judicial review the tribunal in question may engage counsel to defend the tribunal's jurisdiction before the courts. The tribunal should not argue that its decision was correct. The tribunal will be permitted to make submissions explaining the record before the court and to show that the tribunal had jurisdiction to embark upon the inquiry and that it has not lost jurisdiction through a patently unreasonable interpretation of its powers: See *CAIMAW v. Paccar of Canada Ltd*., 1989 CanLII 49 (SCC), [1989] 2 SCR 983 (1989), 62 D.L.R. (4th) 437 (S.C.C.) at 461-463.

4. Ombudsman Review

The provincial ombudsman has jurisdiction to investigate all actions of the executive branch of the provincial government and most crown corporations. Generally, the ombudsman will not consider a matter unless all statutory rights of appeal have been exhausted.

A complaint to the ombudsman has some advantages over judicial review. Costs are a significant factor as the ombudsman has its own budget and staff to investigate complaints. The ombudsman is not limited in the nature of the remedy that they can recommend. As well, the ombudsman has access to file information and is not restricted by a privative clause.

The limitations on ombudsman review are the fact that the ombudsman can only make recommendations and not an enforceable order. In practice, however, governments are extremely reluctant to ignore a recommendation from the *Office of the Ombudsman*.

5. Political Review

In some cases, political review may be the only appropriate option available to your client. Political review should be an avenue of last resort because ministers will be reluctant to interfere with the decision of a quasi-judicial tribunal for fear of enormous political consequences.

However, in some cases you may be able to demonstrate that particular government policies or agency practices have caused a real hardship to your client. In these circumstances' ministers may be prepared to initiate changes at least with respect to future applications.