Workshop #6
How Far Can You Go?

Moderator: Lawrence Blackman, Financial Services Commission of Ontario
Speakers: Honourable Justice David Corbett, Ontario Superior Court of Justice
Nini Jones, Paliare Roland Rosenberg Rothstein LLP
Michael Melling, Davies Howe Partners

This workshop examined the balance between fairness and efficiency in decision-making. Michael Melling spoke about the duty of fairness and how it is equally important both to be fair and to be seen to be fair. The duty of fairness extends to all, although the duty of fairness is not the same from one tribunal to the next. In *Brown v Evans*, the court talked about the duty of fairness and how difficult this duty is. The duty depends on the nature of the decision, the nature of the statutory scheme, the importance of the decision being made on the person's life, the legitimate expectations of the parties, and the nature of deference involved. In order to be fair and appear to be fair it was suggested that adjudicators keep these points in mind:

- listen and look like you are listening
- use active listening techniques
- be patient, especially with unrepresented parties – people are very sensitive to signs of impatience in the adjudicator
- be polite and respectful – everyone knows the adjudicator is the most powerful person in the room, there is no need to 'throw one's weight around'
- the decision does not need to be made immediately – if you are wrestling with doubt, take extra time
- don't favour one side over the other, unless it is appropriate to do so eg,. with a represented party versus an unrepresented party
- don't change the rules in the middle of the game
- try to get the parties to solve the problem themselves
- procedure is a means, not an end in itself

Justice David Corbett advised that adjudicators should not be worried about what will happen with a judicial review of their decisions. It is important not to be paralyzed by what the appellate level will do in review. If you get something really wrong, someone above you can fix it, and it is helpful to view appellate review this way. Review exists to liberate you to move on and to make decisions in an efficient fashion. In procedural rulings, it is important to get them right in terms of fairness. Start with your own rules and what they provide. As each issue comes up, look at them under 4 headings:

- notice – is there reasonable notice to both sides and to you
- disclosure – whatever the rules are of the tribunal in this regard, assess whether there has been proper disclosure
- participation – every tribunal will have different rules about what is allowed – have both sides been allowed to fully participate
- complementarity – have both sides had equal opportunity to participate – eg. it may be that it is unequal with respect to who will have to produce documents, has there been a reasonable opportunity to meet the disclosure requirements. If one side is represented and the other is not, it is not fair to expect the same from each. Complementarity is about accommodation to ensure the participation of both sides.

Applying these four principles will make it easier to make fair procedural decisions.

Justice Corbett also spoke about efficiency and the importance of recognizing that you, as the decision-maker, are a custodian of a scarce resource. The tribunal's time and resources are reserved and paid for by the public and adjudicators are custodians of those resources. Although decisions should not be made based on efficiency alone, this custodial duty is what makes it reasonable to deny someone's adjournment request.

Nini Jones spoke further about fairness and said that there are no easy answers. Everyone's approach to fairness is different. Administrative bodies were created to move the decision machine away from formalities and into more efficient processes. Ms. Jones talked about David Mullan's observation that getting bogged down in due process can prevent creative solutions being found. Again a balance is the goal. It is important to remember that you, as the adjudicator, are the boss, controlling the process and moving it forward. In a recent judicial review of an OLRB decision, the divisional court recognized that there was a difference between Board and court procedures, and that these differences were essential in achieving a balance between fairness and efficiency. The court noted the importance of tribunals controlling their own processes and that natural justice does not require cross examination and oral evidence in every case. Ms. Jones suggested some practical tips for adjudicators including; be in charge; exercise adjudicative common sense; ask the right questions; focus the parties; require them to narrow the issues, to agree to a statement of facts wherever possible without tipping their hand.

Mr. Melling spoke about adjournments and when they should be granted. He said that it is helpful to look at expectations, assess why the parties think they should get an adjournment. If the parties have the impression from you as the adjudicator that they will be granted an adjournment, then one must be provided. It is rare that an adjournment should be granted without terms, and terms should further order the process.

Justice Corbett spoke about adjournments as well and said that the reason for the adjournment influences the decision about granting one. It is important to keep in mind what the consequences will be of granting or denying the adjournment. If the party has fired their lawyer, then it will probably be necessary to grant the adjournment. If a party repeatedly asks for an adjournment, it becomes even more important for them to provide reasons. For harsh procedural calls, you must give reasons, not just the conclusions. Give substantive reasons for procedural decisions and if they are reasonable, the decisions will be upheld.

Justice Corbett talked further about procedural decision-making. It is important to ask why disclosure is being made when it is, is the delay in the proceeding worth getting the new evidence in, is the person who wants the delay the person disclosing new documents. It is not good enough to say simply 'that is the rule' to justify procedural decisions. Rules are intended to be the embodiment of principles. So if you are relying on a rule, tie it back to the principle.

Other ways to expedite the hearing process include:

- making sure the pre-hearing conference accomplishes something, beyond just the hearing start time
- agreed statement of facts
- joint submissions
- be aware of too much process, of process over substance
- written arguments
- assign steps – make sure they are documented – defining how the process will proceed, either on consent or by ruling
- at the hearing itself limit witnesses and evidence
- adjudicators can spend time discussing with counsel what will happen, this is a good opportunity to focus the process