Active Adjudication

Improving access to justice

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Fitting the forum to the fuss

- Tribunals can provide a variety of options for dispute resolution
- ADR may now be understood to be Appropriate Dispute Resolution utilizing the right mix of forms of mediation and different forms of adjudication.

The “problem” of the self-represented litigant

- The crux of the problem created when one party is not represented by counsel is that there are competing duties and responsibilities on the tribunal member, which duties and responsibilities may not be terribly compatible one with the other. The member has the duty to ensure that the parties before him or her receive a fair hearing. At the same time, the member has an obligation to remain impartial. The tribunal member must not, by virtue of the assistance offered to a party appearing without counsel, either become, or be seen to have become, an advocate for that individual.

Justice Anne L. Mactavish, Federal Court of Canada, Canadian Council of Administrative Tribunals, June 21, 2005 (From a paper by Athanasios D. Hadjis Legal Counsel Public Service Staffing Tribunal)

The problem of the under-represented litigant

- A paralegal or lawyer who is not competent in the subject area or who has not properly prepared may provide under-representation.
- An under-represented litigant may be worse off than a self-represented litigant.
- Greater concern about seeming to inappropriately “help” a represented litigant even if the representative is not competent.

- Active adjudication techniques can help to provide a fair hearing process for the various combinations of represented and self-represented parties who appear.

Rules

Human Rights Code

Tribunal may adopt rules that:

43. 3(a) provide for and require the use of hearings or of practices and procedures that are provided for under the *Statutory Powers Procedure Act* or that are alternatives to traditional adjudicative or adversarial procedures;

(b) authorize the Tribunal to,

(i) define or narrow the issues required to dispose of an application and limit the evidence and submissions of the parties on such issues, and

(ii) determine the order in which the issues and evidence in a proceeding will be presented;

(c) authorize the Tribunal to conduct examinations in chief or cross-examinations of a witness;

Consent is always good

- Even with support from Tribunal rules and statute, preferable to proceed with the consent of the parties.
- Without Rules, consent is essential
- Can be provisional consent – let's try this approach and see what you think.

Checking In

- Helpful to check in periodically with everybody to see if there are any concerns or objections about the process.
- Encourage parties to raise concerns
- Parties can still object to questions even when they are asked by the adjudicator.

Lord Denning and the adjudicator's role

"If a judge should himself, conduct the examination of witnesses 'he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict'"

- Lord Denning in *Jones v. National Coal Board*

Lord Denning and the adjudicator's role

"The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition, to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies."

Jones v. National Coal Board

- Doing the things Denning prescribes can result in very active adjudication.
- The reason that Denning is so critical of the adjudicator entering the fray is that he is talking of is a formal adversarial hearing where the parties are in complete control of their respective cases.

Opening statements

- May be of limited value with full pre-hearing disclosure and pleadings
- Can be helpful to clarify hopes and expectations.
- Can help to clarify issues that are and are not in dispute and have some discussion about the nature of the case and the interests of the parties.
- Can be a time to clarify why witnesses are being called

Preliminary issues

- Consider deferring to when you can actually assess relevance of a contested document or proposed witness.
- Later, no one may care

Changing the order of witnesses options

- Hearing from applicant and then respondent before other witnesses.
- Hearing from the respondent first. Perhaps all of the respondent's evidence but maybe only an aspect. For example a general overview.

Deferring cross examination

- Consider deferring cross examination until after other witnesses have been heard.
- Can reduce or even eliminate need for cross.
- Helps with the Rule in Browne and Dunn. When the witness is cross-examined questions can be put about actual, not anticipated evidence.

Active listening

- From mediation tool kit
- Listening to understand
- Stating back and summarizing what you have heard helps the parties know what you have heard and understood.
- Helps counsel know you understand their point (although not necessarily that you accept the point).
- Can be particularly helpful during cross-examination

Cross examination and active adjudication

- If witness seems unable or unwilling to answer even straightforward questions, consider asking them yourself.
- With caution, consider re-phrasing the question.
- Consider asking adjudicator questions after examination in chief and before cross examination.

Taking the lead in questioning

- Consent is necessary and checking in is a good idea.
- Essentially a conversation with the witness
- Will include examination in chief type questions and also cross examination type questions
- Do not actually cross examine: e.g. I put it to you that you are lying! But – “respondent might say…”
- By the end the representatives may have only a few or no remaining questions.

Immigration and Refugee Board

- Rule 7
  - "In a claim for refugee protection, the standard practice will be for the Refugee Protection Officer [the adjudicator] to start questioning the claimant."
  - Upheld by Federal Court of Appeal in Thamotharen v. Minister of Citizenship and IRB. Leave to SCC refused.

Fact finding and establishing things that are not in dispute

- Can hear from more than one witness at a time to establish the chronology and what is not in dispute.

- Can make decision writing much easier

Changing the hearing dynamic

- Parties are engaged in a collaborative effort to help the adjudicator understand the essential chronology.
- Doesn’t mean that the issues in dispute are no longer in dispute or that the parties are not still adversaries.
- May mean that issues that should not actually be in dispute remain that way.

Conclusions
Active adjudication techniques

- Improved access to justice.
- Tailors the process to the participants
- Can lead to understanding of the underlying issues and conflicts, enhancing understanding of the evidence and the meaning of the dispute.
- Can result in shorter hearing processes.
- Can facilitate decision writing.