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"BEST PRACTISES IN ADMINISTRATIVE TRIBUNALS"

DOCUMENTING BEST PRACTISES

BY

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I am pleased to be with you today to discuss some of the initiatives the Canadian International Trade Tribunal (Tribunal) has undertaken, and will undertake, to help us do our work. Let me first tell you who we are, and what we do.

International trade has become more and more a part of our national consciousness. Already, trade is responsible for generating more than thirty percent of Canada's gross domestic product. More than one billion dollars in trade takes place daily between Canada and the United States alone, a figure expected to double within the next several years. The need for mechanisms to ensure a fair rules-based trading environment has never been greater. On the global stage, the World Trade Organisation has assumed the pre-eminent role as trade monitor and adjudicator, while in Canada, the Tribunal is the foremost trade dispute authority, responsible for overseeing a diverse trade-related mandate.

The Tribunal currently has seven full-time members. Due to health problems over the last two years, we have been left with even fewer members to hear cases. This has forced us to work even more efficiently and effectively with our limited resources. The Tribunal has a staff of almost eighty five highly professional economists, lawyers, statisticians, clerks, registry staff, and computer experts. Through the combined efforts of members and staff, the Tribunal has developed an excellent reputation within the tribunal community, and been accorded considerable respect by Courts and international panels reviewing our decisions.

The Tribunal hears and decides cases involving the dumping or subsidising of goods imported into Canada. The magnitude and complexity of these cases can be staggering. The Canadian industry involved may have a value exceeding one billion dollars. The outcome of our deliberations can impact the lives of tens of thousands of people both within Canada and beyond our borders. Conversely, the domestic industry may be comprised of a small family enterprise, employing less than ten people. Larger cases produce thousands of pages of documents and thousands of pages of transcripts. Our challenge to work efficiently and effectively is critical given that we must conduct our inquiry and hearing (which may last up to 10 days and have as many as 25 counsel) in order to render a decision within 120 days. Because cases involve small, as well as large corporate interests, our practises and procedures must be responsive to the needs of all parties.

The Tribunal is also Canada's bid dispute body for federal government procurement complaints. Potential suppliers of goods and services who feel a government tendering process was conducted unfairly may, by virtue of the *North American Free Trade Agreement* (NAFTA), *World Trade Organisation* (WTO) or *Agreement on Internal Trade* (AIT), look to us for recourse. Like

dumping and subsidy matters procurement cases must be investigated and decided quickly: in this case 90 days. Unlike the dumping and subsidy cases however, we normally do not conduct hearings. Rather, we collect information from the parties through the exchange of written documents. Parties coming before us may be corporate giants complaining about the loss of a multi-million dollar software contract, or a sole proprietor complaining about the loss of a small, yet still important, translation contract. During the course of a year we may review well over a half of a billion dollars worth of government contracting.

We also deal with appeals under the Customs Act involving disputes over tariff classification or valuation of imported goods. Similarly we hear appeals under the Excise Tax Act, although with the implementation of the GST, this responsibility is diminishing. These cases are more what the lawyers would call, a *lis inter pares*, a dispute between parties. As a consequence they tend to be more quasi-judicial in nature. Once again, these cases can have a substantial dollar value. For example, they may involve goods used for generating and distributing electricity throughout Canada, or they may involve a single importation of a cordless telephone, worth less than one hundred dollars.

In addition to those activities, the Minister of Finance asked us to review requests from Canadian manufacturers seeking a reduction or elimination of the duty paid on imported textiles used by them to make goods such as men's suits, women's swim wear, material for tents, to name just a few. Like procurement cases, information is gathered almost exclusively through the exchange of written documentation.

Finally, if all of that isn't enough to keep us occupied, from time to time the Governor-in-Council will ask us to conduct economic inquiries into an aspect of Canadian trade or commerce. Last year for example, we were asked to investigate and report on the impact of certain sugar-dairy blend imports on the Canadian dairy industry. These inquiries, which are often politically sensitive, consume enormous resources are also conducted within very short time-frames.

As you can see, some of our mandates are administrative in nature while others are more quasi-judicial. In view of this diversity, we do not have "one-size-fits-all" procedures. We have crafted different procedures for each mandate, although to the greatest extent possible, we try to ensure symmetry and overlap. They must be as user friendly for the small party as they are (hopefully) for the larger ones.

We have come to accept that such diversity requires continual refinement to our procedures. We therefore try to anticipate issues and work towards a solution before circumstances force change upon us.

To help the Tribunal find out what our stakeholders are thinking, we meet them regularly during the year in what we call the Bench and Bar Committee. These meetings, which bring together lawyers from the private bar and government, along with non-legal consultants, are a useful forum in which we can hear their concerns and observations as well as receive feedback on Tribunal initiatives. This Committee acts as a conduit through which counsel and parties who appear before us can channel their comments on draft Practise Notices and Guidelines. Be prepared these sessions can be lively and the news is not always good, but in my experience it is all worth hearing.

We have made effective use of Practise Notices to alert counsel and parties about procedural concerns which need change or clarification. For example, after enduring scheduling chaos caused by repeated postponements and adjournments, we issued a Practise Notice saying that, in future, these would only be granted when the reasons for the request were compelling and well-substantiated. This Notice introduced a much needed discipline into pre-hearing case management. We have also used Notices to remind counsel about their responsibilities with respect to the handling of confidential information and set out consequences if they did not respect those obligations.

In order to inform the public about procedures to be followed in our proceedings, we have issued Guidelines. The Guidelines indicate milestone events, content of submissions and the manner in which representations are to be made to the Tribunal. We are currently consulting with our stakeholders on draft Guidelines dealing with a preferred approach the Tribunal will use when deciding the amount of compensation to be paid for lost profit and lost opportunity in procurement cases. These calculations have proven to be remarkably complex and we wanted to establish some benchmarks to help us get it right. Even though this topic is more substantive than procedural, we feel that getting feedback on the approach and factors we will generally take into account, will result in a better and more transparent tool to assist the Tribunal and parties.

As I have mentioned, we are often faced with daunting time-limitations. In order for us to conduct shorter, more focused hearings, we have taken steps to ensure parties exchange and file all relevant documents before a hearing begins. Nothing gets a hearing off to a worse start than a series of motions from counsel asking for production of documents from opposing parties. Not only do these motions poison the atmosphere, the documents produced at this late time cannot be considered by parties or the Tribunal in any meaningful way. We have therefore informed parties that, except in exceptional cases, we will not accept the filing of previously undisclosed documents once the hearing begins. This has generated some spirited debates but we have tried to hold firm in order to avoid the unfairness to the Tribunal and opposing parties which is created when documents are produced at the last minute.

Some new approaches take some time to de-bug. For example, in order to facilitate the orderly exchange of information and documentation before a hearing, we developed a process that permits parties to pose questions to, and request information from, opposing parties. This was done to avoid a lot of tension at the beginning of the hearings as counsel tried to obtain information from opposing counsel. This has been an iterative process. Initially we encouraged the parties to circulate these requests amongst themselves well before the hearing, and to come to the Tribunal only if there was a problem. Human nature being what it is, this process became a strategic instrument well-suited to distracting the other side from the preparation of their case. We ended up with counsel making dozens if not hundreds of requests to opposing parties. This abuse caused system melt-down, and sent us back to the drawing board. Now all the requests come to us first so we can determine whether they are irrelevant, repetitive or unduly onerous. Disputes over whether a request or response are proper are settled before the hearing. All of this is time-consuming but improvement to the quality and smooth-functioning of hearings has been obvious.

With hearings as long and complex as ours sometimes are, we have tried to limit time for examination-in-chief and cross-examination by counsel. A fair, well-constructed hearing schedule which establishes these time-frames is the first step towards an orderly hearing. However, the presiding member must be vigilant in keeping to the schedule as much as possible, keeping in mind the considerations of fairness. I'm not saying that we are a slave to these time-frames, but they must be kept in the forefront of everyone's mind. If they are not, the Tribunal risks losing its ability to direct the direction and pace of the hearing. Hearing-room management is much easier said than done but, you either control the process or you don't. And, the latter is quite simply, not an option.

To achieve a higher level of control in the hearing room has not been easy. Like the civil justice system, it was necessary to change the culture in order for us to recover control of the proceedings. At times we were perhaps overly zealous with our attention to the clock and refusal to accept documents filed at the last minute. We soon learned, however, that effective case and hearing-room management needs flexibility, in addition to a firm hand, in order to preserve fairness. While we continue to refine these procedures, we can see the culture shifting, and generally speaking, our stakeholders and the Tribunal are pleased with the result.

Our Tribunal has developed a regular schedule of professional development for members to promote continuous learning and skill development. Like many tribunals, new members at our Tribunal attend the very popular training program sponsored by the Canadian Centre for Management Development in Ottawa. New members also receive mandate specific training

designed to inform them of relevant legislation, practises and policies. Every new member is also assigned a “mentor”, a seasoned member, who ensures they are included in case meetings and hearings as an observer. Although we do not have the resources some larger tribunals have for ongoing professional development, our staff regularly meet with members to discuss substantive and procedural issues. This puts a heavy strain on our staff but we all know that a better-informed member is a better-performing member, one who carries his or her share of the load.

Our approach to case management demands that each team, consisting of members and staff assigned to a case, function smoothly and collegially. Each team member knows what is expected of them. The presiding member has ultimate responsibility for ensuring a case is conducted fairly and efficiently, but he or she can only do this with the close co-operation of our research, registry and legal staff. And so, from the time staff and members are assigned to a case until the reasons are issued, every team member must have their oar in the water. Well, that’s the theory at least! The reality is that good teamwork is sometimes difficult to achieve and there is a need to reinforce this concept on a periodic basis to make sure that all the players remember their role and the role played by other team members. You can never overstate the importance of team work, or the need to respect and value the contribution made by all other members and staff.

The Tribunal makes extensive use of technology. We have an excellent website on which you can find all Tribunal decisions dating back some ten years. We also have descriptive guides explaining our different mandates in a clear non-technical manner. Our website uses Adobe Acrobat software which allows concordance between the original and electronic versions of Tribunal decisions. This facilitates the work of counsel and parties who can rely on the website to locate and download Tribunal decisions whenever they want them.

The Tribunal’s website is in both official languages and has powerful search engine that allows research in both official languages.

We have also made use of push technology. Our e-mail service we use also permits us to advise interested stakeholders whenever new Tribunal documents i.e. Notices, Decisions, Statements of Reasons, Guidelines, Practice Notices, etc. have been posted on the website.

All our staff and most of our members are not only computer literate, they are computer dependant. Working as we do in teams, information is often moved to each other electronically. Like other Tribunals, our staff, after receiving the panel’s instructions, often help draft the statement of reasons. These drafts are then sent to the members who revise the text. Different colours can be assigned to each member so everyone will know which proposed revisions come

from which member. Before the revisions are accepted, members will review them all and decide which ones to incorporate.

Tribunal hearings are recorded by court reporters. In order to facilitate for members and staff searching through thousands of pages of a transcript, they are loaded onto the network within the Tribunal in a program called Folio Views, a text retrieval software package. This software allows members and staff to search key words or topics with the press of a button. It has reduced substantially the time spent by staff and members to search these transcripts.

The Tribunal is researching the feasibility of automating its administrative record through the use of imaging and scanning technologies which, with the aid of a search engine, would allow someone to search of the full administrative record. Longer term, we plan to use of the electronic administrative record in the hearing room. This would require computers for all parties and a local network developed for that hearing room so everyone is inter-connected. The Tribunal will conduct a few pilot projects in the early part of year 2000.

Because we deal with so much commercially sensitive information appropriate firewalls and encryption technology will be a primary consideration when developing this, and other information technology solutions. I have personally made use of encryption technology to receive confidential information forwarded to me while I was on holiday. Given our tight time-frames, this technology provides the members with a bit more freedom and it allows me more flexibility in the assignment of members. I am satisfied that the safeguards provided will protect the important information entrusted to us by parties.

Our hearings take place in Ottawa, although occasionally in the past, we travelled to different regions. Because our budget has been cut over time, we have all but eliminated those visits, even though many cases are still generated outside the national capital region. To compensate, we have made extensive use of video conference hearings for cases of a regional nature. Some of the irritating problems such as sound delay and clipped visual movement have largely been eliminated by advances in technology. It’s not the same as being there, but it provides a very economical and effective alternative. Some counsel initially felt that video conferencing should not, or could not, work when the credibility of a witness was in dispute. Our experience tells us differently. Counsel who were initially reluctant to participate because of that concern have now largely been convinced that video-conference hearings do not impair the search for the truth.

There are some obvious disadvantages with video-conference hearings. It is awkward to accept filings on the day of the hearing, although, in cases where its appropriate to accept them, documents can be faxed to the other location during the hearing. We are fortunate to have access to the cross Canada video

conference facilities of Human Resources Development, a facility that may be available to other federal entities.

All of the above initiatives have made a positive contribution to the way we have discharged our mandate. The changes will continue, as we strive to improve the way and the manner in which we do our business. It is important that you lead the process of change as much as possible. To do so you must be attentive to practises and procedures which need alteration. Be proactive. Don't wait for problems to arise before you embark on changes. Change is unsettling for everyone, particularly when it involves a cultural shift, but we have found the results of these changes most gratifying. Thank you.