ORAL HEARING VERSUS PAPER HEARING

The question has been posed as to whether hearings in the appeal process should be by way of an oral hearing or if a hearing through written submissions would be sufficient. There needs to be some clarity around terms in order to properly answer this question. Currently, the parties make oral submissions supported by a written record when they appear before the Federal Court of Appeal (FCA). In the decision-making process within the Charities Direction, the decision is based largely on a paper record (this may be supplemented by telephone conversations or meetings with the applicant).

Usually, when we talk about a "paper hearing" we are talking about a process where the parties make submissions in writing only, and have no opportunity to make oral submissions. For example, this is how the Canadian Human Rights Commission screens complaints. It makes a decision on whether a complaint should go to a tribunal solely based on written submissions. This has been viewed by the courts as appropriate for an administrative function[1]. Certainly, a "paper hearing" would be appropriate for an internal reconsideration process. Oral hearings for such internal appeal processes are rare.

As for the appeal to an external body, whether a hearing would be conducted with oral testimony or based on a written record (as is currently done before the FCA) will depend to a certain extent on the rules of the external body, and the views of the court on whether an oral hearing is required.

If the matter in dispute is solely a question of law – in other words, if there are no facts in dispute between the applicant and the regulator – there would be no benefit in having oral evidence. Rather, in such cases the court could rely on a written record along with oral submissions on the law from the parties (as is currently done before the FCA).

There are a number of options open to the parties if the matter in dispute is solely a question of law. The Court can make a determination solely on a matter of law, or can rule on a "stated case" where the parties agree on the facts and issues. It is important to note that the Court is always able to refuse to hear a case solely on a question of law or stated case, at its discretion (see Tax Court Rules below, for example).

For example, under the Tax Court Rules (General Procedure):

Question of law

58. (1) A party may apply to the Court,

> (*a*) for the determination, before hearing, of a question of law raised by a pleading in a proceeding where the determination of the question may dispose of all or part of the proceeding, substantially shorten the hearing or result in a substantial saving of costs, or

[1] *Bell v. Canada* (CHRC); *Cooper* v. *Canada* (CHRC) [1996] 3 S.C.R. 854

(*b*) to strike out a pleading because it discloses no reasonable grounds for appeal or for opposing the appeal, and the Court may grant judgment accordingly.

(2) No evidence is admissible on an application,

(*a*) under paragraph (1)(*a*), except with leave of the Court or on consent of the parties, or

(*b*) under paragraph (1)(*b*).

Special Case

59. (1) Where the parties to an appeal concur in stating a question of law in the form of a special case for the opinion of the Court, any party may apply to the Court to have the special case determined.

(2) Where the Court is satisfied that the determination of the question may dispose of all or part of the appeal, substantially shorten the hearing or result in a substantial saving of costs, the judge may hear and determine the special case.

60. A special case shall,

(*a*) set out concisely the material facts, as agreed to by the parties, that are necessary to enable the Court to determine the question stated,

(*b*) refer to and include a copy of any documents that are necessary to determine the question, and

(*c*) set out the relief sought, as agreed on by the parties, on the determination of the question of law.

61. (1) On the hearing of a special case the Court may draw any reasonable inference from the facts agreed on by the parties and documents referred to in the special case.

(2) On the determination of the question of law the Court may grant judgment accordingly.

62. On a hearing of the question of law under sections 58 and 59, each party shall serve on every other party to the hearing a factum consisting of a concise statement, without argument, of the facts and law relied on by the party, and file it, with proof of service, in the Registry not later than seven days before the hearing.

If there are facts in dispute, there still may not be a need for oral evidence – depending on the nature of the facts in dispute. An alternative to oral evidence often used in applications before courts is the use of the affidavit. In all cases, affidavits are subject to cross-examination by the other party.

However, if credibility is at issue, or if personal information not obtainable through documentary evidence is required to determine the appeal, then an oral hearing may be necessary. Whether an oral hearing is required will therefore be very case specific. One could argue that in most cases, where the facts are uncontroversial and there exists a documentary record, an oral hearing is not necessary.