GREY AREAS

Steinecke Maciura LeBlanc
October 2012
No. 170

A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

The Efficiency Experts

Discipline hearings are getting lengthier. And despite the efficiency innovations contained in the 1990's amendments to the Ontario *Statutory Powers Procedure Act*, the significant changes to the civil court procedures over the past decade have not left their mark on discipline hearings. So said lawyer Brian Gover as he introduced the panel for the Federation of Health Regulatory Colleges of Ontario session entitled "Balancing Fairness and Efficiency: Being Less Formal But Every Bit as Fair" earlier this month.

The Honourable Patrick LeSage advocated for a "flexible formality" approach. He emphasized that planning the hearing in advance is the key to efficient hearings. For example, getting counsel to make and commit to time estimates is essential. He favours allowing single panel members to make binding rulings in advance of the hearing (which is permitted in Ontario if the proper rules of procedure are made by the Committee). For example, parties could be required to deliver written opening statements that identify the issues in advance of the hearing, thereby saving precious hearing time.

Lawyer Freya Kristjanson suggested that part of the difficulty for hearing panels is the challenge of listening to the oral evidence of witnesses without yet understanding the context for that evidence. Hearings would not only be faster, but the quality of decisions would be enhanced by ensuring that the hearing panel had the context before the hearing began. For example, providing documents to the panel members in advance of the hearing, including statements of anticipated evidence, a list of issues and a full documents brief would facilitate clarity and comprehension for the panel when witnesses testified.

Lawyer Paula Trattner does privileges hearings at hospitals before hospital Boards whose members have severe time constraints. She has experienced hearings where a limited amount of time was set aside for the entire hearing which the two parties had to divide evenly between them. Independent legal counsel recorded the time taken by each party and provided a running total as the hearing progressed. This approach forced counsel to carefully think through their approach to the hearing.

Often evidence in chief was lead by way of an affidavit, possibly with a light go-through the witness' evidence before they were cross-

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examined. In her experience, while the hearing panel often received a comprehensive joint documents brief in advance, the affidavits of the witnesses were usually only provided to the panel at the time the witness testified.

The panel discussed the existence of "chess-clock" hearings where time was carefully calculated between the parties (who each had equal time). One variation involved deducting the entire time taken on a motion or objection from the losing party's allocation. Retired Justice LeSage pointed out the need for careful use of language; "chess-clock hearings" made the process sound like a game.

Perhaps the most discussion was spent on the topic of expert witnesses. Two models were discussed. The first, is where two or more experts with similar expertise, are testifying on similar issues. A practice is developing where such experts, once their reports have been delivered, are required to meet in the absence of counsel to discuss their views. The experts would be required to prepare a common report identifying their areas of agreement and disagreement. Not only does this approach narrow the issues, it can identify misconceptions (e.g., often when experts disagree it is because they are operating on different assumptions; not because their professional opinions actually differ).

A second approach is taken when experts do not have similar expertise, are from different disciplines or are testifying about a sequence of events. Having such experts testify sequentially, while the other experts are present, can be helpful and efficient. The process reduces the adversarial nature of the expert evidence process. Areas of agreement and disagreement can be easily clarified. An expert can be immediately recalled to address a specific point. Efficiency is also enhanced because the hypothetical questions do not have to be repeated and the experts can refer directly to each other's testimony.

Some of the presenters even had experience with panels of fact witnesses testifying in the presence of each other, one immediately after the other. This is particularly helpful where the fact witnesses observed the same events or participated in a sequence of events. Safeguards are necessary here, though. For example, affidavits of each witness' evidence in-chief must be delivered in advance to prevent witnesses from tailoring their evidence to what previous witnesses had said. Care must be taken to prevent fact witnesses from ganging up on each other particularly where one supervises or directs other fact witnesses. Cross-examinations of the fact witnesses are often done individually (often in the absence of the other witnesses).

The presenters also indicated that perhaps the time for mandatory reciprocal disclosure in discipline cases had arrived. When first proposed twenty years ago, the concept was met with significant opposition, particularly from defence counsel. However, the atmosphere may have changed since then.

Discipline procedures may be in for rapid reform over the next few years.

For an example of a court case applying some of these efficiency principles, see: *Wood v. Arius3D Corp.*, 2012 ONSC 5596 (CanLII).