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Justification, Transparency and Intelligibility: From Beginning to End

November 8, 2017

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Recent case law has stressed the importance of regulatory tribunals ensuring that their processes be transparent and intelligible, from beginning to end: from the establishment of clear allegations in discipline proceedings to the writing cogent reasons for decisions.

This can be frustrating for tribunals: the writing of clear allegations or the drafting of cogent reasons can be very time consuming, and sometimes very costly. Nevertheless, this is something that must be done to ensure that the regulatory process is seen as reasonable, and is able to withstand scrutiny on appeal or judicial review.

This article considers two recent cases and suggests some of the things a regulatory tribunal can do to make sure that it is meeting the standards set by the courts.

In *Bulletproof Enterprises, et al. v. Ontario Racing Commission, et al*., 2017, ONCA 833 (released, November 1, 2017) the Ontario Court of Appeal had to consider the adequacy of allegations, and whether they constituted sufficient "notice" to the appellants of the case they had to meet. On their application for judicial review, the appellants alleged (among other things) that the lack of particularity in the allegations was a breach of the duty of fairness that prevented them from mounting a full defence.

The Court of Appeal rejected this argument. It supported the decision of the Divisional Court, which had held:

"Given this, I find that the necessary threshold for the provision of particulars was met. The Applicants had reasonable information of the allegations against them and had "a full and satisfactory understanding of the issues in the proceeding". The wrongdoing alleged in the Notice of Proposed Order to Suspend Licences was directly connected to the eventual findings of the tribunal at the merits hearing. The Applicants were able to appreciate the issues to be heard and decided."

In *Harrison v. Association of Professional Engineers of Ontario*, 2017 ONSC 2559 (released May, 2017), the Ontario Divisional Court had to consider a judicial review application of a refusal by a Complaints Committee to refer a complaint to the Discipline Committee. The former's refusal was based on its simple conclusion that there was "no evidence of professional misconduct of a significant nature".

The applicant brought an application for judicial review, arguing that his complaints were dismissed without addressing any of his allegations or providing any reasons as to why his allegations did not constitute professional misconduct. He alleged that the failure to give reasons constituted a breach of procedural fairness and an error of law.

The Complaints Committee was required to make a decision in writing, which it did by way of a letter, that the Registrar forwarded to the complainant. The Court concluded this letter met the requirement to provide a decision in writing (the first "test"). It then turned to consider whether the decision was reasonable (the second "test"); the Court said:

“Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible acceptable outcomes which are defensible on the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47.”

The Court agreed that the decision of the Complaints Committee was defective, because it stated its central conclusion without explaining how that conclusion was reached. However, it went on to say that the “adequacy of reasons is not a stand-alone basis for quashing the decision”. By examining the record, the Court was able to develop reasons that “could be offered” in support of the decision. Notwithstanding the defective nature of the reasons, therefore, it refused to grant the application for judicial review.

It did so, however, with a warning to the Committee, which other regulators should pay heed to. The Court cautioned that while it can look to the materials that were before the Committee to see if they explain the reasons, the Committee “…should not assume that the material before it will always satisfactorily explain its written reasons”. It also noted that the court could not “…uphold a decision by writing reasons and substituting them for defective reasons”.

In both decisions, the applications for judicial review were dismissed. However, both decisions pay homage to the now well established principles of justification, transparency and intelligibility that must permeate the regulatory process from beginning (the allegations) to end (the reasons). While the courts will show deference to regulatory tribunals, it would be risky for any such tribunal to assume or rely on this curative approach.

What are some of the things a regulatory tribunal can do to make sure that it is meeting these standards? Here are some suggestions:

- understand that the writing of allegations or reasons is a skill that can be learned; have orientation sessions (especially for new members) to instill these skills and deal with standard issues that will emerge in almost every hearing, such as the jurisdiction of the tribunal, burdens of proof, etc.
- create orientation binders to serve as a more permanent resource for members (and preserve corporate memory);
- develop appropriate “templates” that allow a decision to be structured appropriately, while giving the tribunal the ability to respond to specific cases, facts and circumstances;
  have readily available access to past decisions (the jurisprudence of the tribunal);
- have staff and counsel *appropriately* assist with the drafting of allegations, through their work before and during hearing, and in the wordsmithing of the tribunal’s reasons, always making sure that the responsibility of authorship rests with it.

In short, tribunals should invest the time, effort and, if need be, money, to do things right. Courts have held that this will likely assist the working of the tribunal and increase the public’s confidence in the process. This alone likely justifies the investment of time and money needed. The avoidance of, or ability to withstand, judicial challenges is another benefit.

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