EXPERT EVIDENCE BEFORE ADMINISTRATIVE TRIBUNALS

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Rule of Law

The great German scholar on bureaucracy, Max Weber, documented the historical transition in the West from a system of "Kadi Justice," which he described as the personalized dispensing of justice by wise leaders or elders, to the codified, rationalized, and impersonal justice of the modern world. He traced the development of political authority from kings endowed with hereditary charisma to cool heads of state, ruling within the strict limits of legal prescriptions and rationally enacted law.

Administrative law is concerned with the application of law by administrative tribunals and the ultimate review of their decisions by the Courts. The law applied by and to tribunals varies with the purpose and make up of the tribunals. Some tribunals like Boards of Variance function today as Kadi=s, unfettered by the chains of relevance, fact, law, consistency or logic. Others, like Expropriation Compensation Boards, function more like courts.

There are some big differences between administrative tribunals and courts of law. It is well established that the formal rules of evidence that apply in courts generally do not apply to administrative tribunals. If a tribunal admits evidence that a court would have excluded, a Court will not necessarily set aside the decision. However, members of such tribunals, whether the Expropriation Compensation Board, a quasi judicial body, or a Board of Variance ought to have some idea of what the rules of evidence are all about. So should professionals whether they are architects or appraisers. This is because the purpose of the rules of evidence is to ensure that decisions that are rendered are just and opinions that are provided are truthful.

If you are a board member, a general knowledge of the rules will assist in deciding what weight to give to evidence. If you are an appraiser, you will want to be cautious in the interest of preserving your professional reputation. And if you are a party to a matter or an advocate for one position or another a knowledge of rules of evidence will help you challenge your opponent=s argument. For even if the rules of evidence do not strictly apply, the logic beyond the rules is always applicable.

This paper is a very superficial survey of a few of the rules of evidence with particular regard to expert evidence. First I will review the rules as applied by courts and then review how tribunals deal with some of the same matters. Although I will refer to a few specific decisions from time to time, I generally will not burden you with references to case citations. I also want to

say at this point that I have relied heavily on the following indispensable texts: *Expert Evidence in British Columbia Civil Proceedings*, C.L.E. of B.C.; *Todd, The Law of Expropriation and Compensation in Canada*, Carswell 2nd ed., and *Macaulay & Sprague, Hearings before Administrative Tribunals*, Carswell 2nd ed.

Evidence and The Rule of Law

1. Questions of Law vs. Questions of fact.

There are certain threshold questions which a tribunal must answer correctly or the courts will reverse the tribunal=s decision. These are said to be questions of law and include:

1.1 What is the jurisdiction of the person whose decision is being reviewed?

1.2 What is the jurisdiction of the tribunal?

1.3 What does the statute mean that it is asked to apply?

1.4 What discretion do the decision maker and tribunal have?

After a court or an administrative tribunal has determined that the matter before it is within its jurisdiction, it must then decide the matter. To do so it must hear evidence. Judges are constrained not merely by questions of law but also by technical rules regarding the admissibility of evidence. The purpose of the Rules of Evidence is to (1) establish a factual basis for decisions; (2)ensure a proper balance between risks inherent in accepting evidence and the value of the evidence, and (3) maintain a fair and effective process.

Even though there may be no obligation on an administrative tribunal to apply the formal Rules of Evidence, whenever an agency has to decide whether to admit or reject evidence it ought to ask itself the same questions addressed by the Rules:

1.5 Is the evidence capable of creating a factual basis for the decision and how far can it logically go?

1.6 Even if it is capable should it still be rejected?

1.7 Is there something wrong or unfair about admitting the evidence?

Much of my experience is before the Vancouver Board of Variance. If the Expropriation Compensation Board exemplifies a quasi judicial system, the Board of Variance exemplifies Kadi justice. The following story provides an example of why rules of evidence and procedure are so important. The Board of Variance recently rendered a

decision relating to the application of a zoning bylaw. The applicant wanted to demolish a house on her lot and replace it with a new house. The zoning bylaw allowed either new construction or renovation and set out guidelines as to how either shall be accomplished. The thrust of these guidelines was that the end result should fit in architecturally to the surrounding neighborhood.

The Planners refused to allow new construction and insisted on renovation of the old house, a tear down, because they said they had an inflexible rule that if a house had been built before 1930 then, regardless of its architectural merit, it had to be renovated. Moreover, they said that the building should be preserved because it was an example of early depression architecture. The applicant argued that the building had no architectural merit, that the insistence on renovation was unreasonable and evaded the compensation requirements of the heritage preservation legislation, and that it made no sense in that every other building in the block was of relatively recent origin. The Board denied the appeal and upheld the decision of the Planner.

This decision involved a series of complex components that should have been addressed or considered by the Board of Variance. These included:

1.8 What powers did the City have to enact a bylaw of this nature? To answer this question one had to refer to the Vancouver Charter.
1.9 What powers of discretion did the bylaw confer to the Planner?
1.10 Did the City have the power to hand over this discretion to the Planner?
1.11 If it did, did he exercise his discretion according to the law?
1.12 Was the fact that the building represented depression architecture relevant to anything?
1.13 Were the opinions of neighbours who supported the application entitled to any weight and if so, how much?
1.14 What were the facts relied on by the Board leading to the decision?
1.15 Were other decisions on the same issues relevant?
1.16 Applying the facts to the law, was the decision correct?

The Board of Variance is not required to give detailed reasons for its decision. In this case there were no reasons. There was instead only one comment made by one member of the Board which was to the effect that in her view the bylaw did not really authorize the Planner to do what he had done, but, since what he did was really a good thing, it was necessary and desirable to ignore the law and make what she felt was the right decision. As to all of the other issues her view was really that the law did not matter nor did the rights of the property owner. The Kadi had spoken.

The formal Rules of Evidence are not binding on administrative agencies. Some legislation specifically says so. Others, including the **Expropriation Act,** make no mention

of rules of evidence but it is generally acknowledged that there is no legal obligation to apply the rules imposed on the various tribunals created under them. This is consistent with the common law. The degree of exclusion of evidentiary rules reflects the nature of the case and the fact that the rules of evidence are somewhat more relaxed today. Standards vary with purpose and seriousness. Occasionally, a court will overturn a tribunal=s decision where the rules of evidence have been grossly ignored on the basis that the decision has breached the rules of natural justice or has been unfair.

hile an administrative tribunal is not bound by the strict evidentiary and procedural rules that are applicable to civil or criminal proceedings, it nonetheless has a duty to ensure that it acts fairly. In the context of expert testimony, this means that adequate notice should be provided. To ensure that the requirements of natural justice are being adhered to, most tribunals will look at s.11 of the B.C. *Evidence Act* as a persuasive guideline to the notice requirement of such testimony before it may be admitted.

Curial Deference and Privative clauses.

A *privative clause* is a provision in a statute that bars the courts from reviewing the decisions of an administrative tribunal. Where there is a privative clause the courts will only review a decision if it is outside the jurisdiction of the tribunal or, alternatively, if the decision was patently unreasonable.

Curial Deference refers to the tendency of Courts, even where there is no privative clause, to defer to the judgement of certain administrative tribunals. The extent of such deference is a function of the nature of the tribunal and the nature of the subject matter. Where the tribunal possesses a high level of expertise, it is more likely to receive curial deference. If the legislation is highly technical such as the building code, there will also be deference.

Appeals from decisions of tribunals

The *Expropriation Act* [RSBC 1996] ch. 125 s. 28 provides that an appeal lies to the Court of Appeal from a determination or order of the board with leave of a justice of the Court of Appeal. On an appeal, the court may either refer the matter back to the board, or make any determination or order that the board has the power to make.

Under statutes where there is no privative clause and no specific statutory right of appeal there is an appeal to the Supreme Court under the *Judicial Review Procedure Act.* Under certain circumstances a right of appeal under the *Judicial Review Procedure* Act may exist concurrently with the statutory right of appeal to the Court of Appeal, depending on the nature of the appeal.

Appeals to the Courts from decisions of an expropriation compensation board may be either errors of fact and errors of law. Courts will generally not interfere with an error of fact unless it was extremely serious and affected the Board=s assessment of the situation. If there is some evidentiary basis for the facts the Courts will not interfere.

On the other hand courts will usually intervene to correct errors of law. If an issue goes to its jurisdiction a the Board must be correct in its determination and will be reversed if it is wrong. Where there is an evaluation error courts will set decisions aside. Where wrong principles are applied by arbitrators such as where they applied the test of value to the taker, or market value, instead of value to the owner, or valued unsubdivided lands as if they had been subdivided or failed to award compensation for disturbance, or severance damage, or allowed values which did not attach to the subject property, or incorrectly included the value of the land on revesting after abandonment, or arrived at a value by averaging the sale prices and acreage of comparable properties, they will be reversed.

wards will not be set aside merely because some evidence has been improperly admitted. It has to be shown that the wrongly admitted evidence affected the award. Moreover if relevant evidence is admitted but ignored the decision can be set aside. The Court however, will normally not disturb an award unless it is very clearly in error and there is no evidence to support it. Even if the court would have awarded a different amount and, on reading the transcript, would have not accepted the evidence, it will generally not set decisions aside.

The Rules of Evidence in a Nutshell

The rules of evidence are formidable and complex. Although the basics may be intuitive, their application in specific circumstances is not. The leading text, *Wigmore on Evidence*, is many volumes and thousands of pages long. The number of rules is exceeded only by the number of exceptions. The complexity of the rules is at the heart of the reason that tribunals are not required to rigorously apply them. Nonetheless, it is important to understand the basics.

Relevance

The primary rule of evidence is that all relevant evidence is admissible. A court will exclude evidence if it is irrelevant. That is to say if the thing that the evidence tends to prove should not affect the final outcome, then it should be excluded for several reasons: It may be highly prejudicial. For example, evidence about the life and hard times of the

party seeking compensation may greatly influence the decision of the tribunal. Secondly, it may take a lot of time to introduce the evidence and thus divert the trial from things that are relevant. Tribunals are supposed to decide issues based on certain principles defined in the statute. If irrelevant evidence is produced, it increases the chances that the decision will be based on matters that are not allowed to be taken into account.

There are two major exceptions to the general rule that all relevant evidence is admissible. The first exception is that *hearsay* evidence, though relevant, is generally excluded. The second is that *opinion* evidence, though relevant, is generally excluded.

Hearsay is statement made out of court by someone which is introduced for the purpose of proving its truth. The main reason that it is excluded as evidence is that it is not reliable. The author of the statement should be made to testify under oath and should be subject to cross examination. The trouble with hearsay of course is that there may be substantial doubt whether the speaker ever really made the statement, and if he did make the statement, whether it is true. If the speaker must appear in court he can be placed under oath and cross examined. There are a great number of exceptions to the rule excluding hearsay evidence many of which are based on practicality. Sometimes it is impossible to have the speaker attend in court and in other instances the hearsay because of its nature may be reliable.

An appraisal report invariably contains hearsay. It relies upon data provided by others who are not called into court and who cannot be cross examined. However, as we will see appraisers= reports are admissible although the extent of hearsay may be a grounds for attacking their credibility.

A second kind of evidence that is excluded is *opinion* evidence. Witnesses in court are not allowed to give their opinions. They are supposed to state facts and attest to what they saw or heard but not as to their opinion as to what they saw or heard. One meaning of the word *opinion* is *belief, conjecture, speculation or guess*. In this sense opinion means a deduction or conclusion without any basis in personal knowledge. In another sense, opinion means an inference or conclusion based on personal knowledge. The opinion evidence rule prohibits witnesses from abstracting based on the observed facts to conclusions. In this sense witnesses should not draw inferences or conclusions from observed facts. The role of the witness is to attest to the facts observed. It is the judge=s role to draw conclusions.

Exceptions to the rule excluding Opinion Evidence.

A non expert can give an opinion if it is the kind of opinion that laymen can generally make. Statements such as, *He looked to be about 35 years old* or *she seemed*

healthy or *he was stone drunk* or *she was hysterical* or *the car was worth about $500*" are the kind of simple opinions that are generally admissible.

However, an opinion that *a building was worth two million dollars* by a lay person would not be admissible. A layman could state facts that give rise to the opinion but not state the opinion himself. To introduce this type of opinion, a person must be qualified as an expert. To qualify for admissibility the expert evidence must meet a four part test: (1) relevance (2) necessity in assisting the trier of fact; (3) the absence of any other exclusionary rule and (4) given by a properly qualified witness.

There are many exceptions to the exception admitting expert evidence. Expert evidence may be excluded if it is highly prejudicial, despite being relevant. The courts have noted that there is a danger that expert evidence will be misused and will distort the fact-finding process. Jazzed up in incomprehensible gibberish and submitted through a witness of impressive credentials, this evidence is apt to be accepted as virtually infallible and as having more weight even when the emperor as expert has no clothes.

Expert evidence may also be excluded if the judge feels it won=t help him. If it is possible to apply ordinary human knowledge to a situation - for example that a noisy land use next to a house will decrease its value - an expert may not be necessary to prove that fact. The expert would be admitted only if he could answer the question, A How much?@.

Another danger of expert opinion is that experts may rely on academic literature and out of court interviews that are unsworn and not available. Thus opinions may be a way of introducing hearsay that would otherwise be excluded as unreliable. I had a case recently in which the issue was the extent to which the destruction of trees affected the value of land. A related issue was whether the Plaintiff could have saved the trees. The appraiser, after giving his opinion on the impact of the loss of the trees on land value, opined that he could easily have saved the trees if he used the latest hi tech equipment that was available. To prove this point, he appended to his report a further opinion from someone who said that the equipment worked well in these circumstances. However, that person was not qualified as an expert. The appraiser had tried to turn the sow=s ear of hearsay by a non expert into the silk purse of qualified expert opinion.

Here is a list some of the instances when expert evidence may be excluded even though the expert is qualified and the evidence is relevant:

1.17 Expert evidence will be excluded if it is outside the expert=s expertise.

1.18 It will be excluded if it is not established that the subject matter is truly a field of expertise.

1.19 It provides an opinion on the ultimate issue, especially the application of a legal standard such as negligence or intent , to the facts.

1.20 It provides an opinion on the credibility of witnesses or the weight of the evidence, or

1.21 The opinion makes findings of fact.

A court will not simply allow a reference to a text book or learned treatise by a lawyer or a lay witness. It must be introduced by an expert who must first say that the work is considered authoritative in the field. Once the fact that it is authoritative is established, then the treatise may be introduced as opinion evidence.

Judges are wary of expert evidence. Even if it is admitted, a court may choose to give it little weight. If the expert seems to be a paid advocate for a client, then a court may tend to ignore it. Experts must give opinion evidence on their genuinely held objective opinions and must not adopt the role of the lawyer or advocate. Experts who always appear in court on the same side of an issue in successive cases may find that judges discount their opinions.

Courts may require that the facts upon which an expert opinion is based be fully disclosed. This may involve the disclosure of all notes and prior drafts of his written report to the court and the expert may be cross examined on this material.

Experts Appearing Before Administrative Tribunals

There are several types of administrative tribunals: The first are compensatory or regulatory boards established by statute. These would include expropriation/ compensation boards, assessment tribunals, boards of variance and workers compensation boards. These may in turn vary according to the degree of expertise of their members. Secondly there are disciplinary or quasi judicial tribunals established by statute which can limit rights and freedoms or impose fines.

Cases dealing with evidentiary rules must be read with caution because the rules may vary with the type of tribunal and its purpose. Where issues of liberty are concerned courts may apply a different or higher standard. Although the legislation creating a tribunal may be silent on rules of evidence, many tribunals can enact their own procedural bylaws respecting conduct of hearings and rules of evidence.

Courts will defer to a tribunal to decide whether a particular person or group of persons are experts and will not interfere with the decision even if the court might have reached a different result.

With increasing frequency Courts apply more formal rules of evidence to disciplinary tribunals such as the College of Dental Surgeons and the Law Society. It may well be therefore that courts will extend evidentiary requirements to other tribunals depending on the circumstances.

Expert evidence must be disclosed in advance under the **Evidence Act** *[RSBC 1996] CHAPTER 124*. That Act applies to quasi judicial or administrative tribunals and requires that experts provide a report in writing setting out their opnion and credentials thirty days before the hearing.

11 (1) A person must not give, within the scope of that person=s expertise, evidence of his or her opinion in a proceeding unless a written statement of that opinion and the facts on which that opinion is formed has been furnished, at least 30 days before the expert testifies, to every party that is adverse in interest to the party tendering the evidence of the expert.

This section is incorporated in the **Expropriation Act Expropriation Compensation Board Practice And Procedure Regulation**:

13 *In complying with sections 10 and 11 of the Evidence Act, R.S.B.C. 1996, c. 124, a party intending to call an expert shall also furnish to the board a copy of each report or statement in writing setting out the opinion of the expert at least 30 days before the report or statement is given in evidence.*

In some instances the legislation expressly states that the rules of evidence do not apply. An example secton 45 (2) of the Assessment Act states:

(2) For a hearing, the board or the panel or member conducting the hearing is not bound by the legal or technical rules of evidence, and the board, panel or member may, at the discretion of the board, panel or member, accept and act on evidence by affidavit or by written statement or by the report of any officer appointed by the board, panel or member, or obtained in any manner the board, panel or member thinks suitable.

One case involving a compensation board shows that where a Board is comprised of experts it may rely on its own expertise, but like a court should give adequate reasons for judgement.

*[**15] The Board may rely not only on the evidence at the is hearing,' but also on its own expertise and its own experience of the multitude of hearings it holds. The Board may have adopted a kind of shorthand to describe some of the factors that it considers in making its awards, and it might be preferable for the Board to use language that is more precise so that there will be no misunderstanding about its reasoning and its conclusions, but there is no error of law that can [*12] be attributed to the Board on this ground.* Re **Dome Petroleum Ltd. and Juell]** (1982) 143 D.L.R. (3d) 360 (BCSC)

Inquiry Boards may be directed by courts to address their minds to specific factual issues. For example in

> *RE KARN et al. AND ONTARIO HYDRO et al. 79 D.L.R. (3d) 256; 1977 I agree with that view. The duty of an inquiry officer is to consider whether the taking of lands is "fair, sound and reasonably [**11] necessary in the achievement of the objectives of the expropriating authority". It is difficult to invest that language with any real meaning if he does not inquire whether alternative sites (or routes) were considered, or, whether they were or were not, should be. It appears to me that if an inquiry officer concludes that alternatives were not considered by the applicant, or not adequately considered, or, whether they were or not, a preferable alternative exists that could reasonably achieve the objectives of the expropriating authority, this should be reflected in the opinion he must ultimately give. How this issue should be handled will depend on the circumstances of each case. Some cases may require lengthy investigation, in others the questions of fairness, soundness, and reasonable necessity might be answered with only little effort. How much or how little inquiry is necessary is, in the first instance, for an inquiry officer to decide. It is a matter of discretion.*

In another case, the decision of an inquiry officer, although not bound by the rules of evidence, was reversed because he *relied* on expert evidence which in turn relied on evidence that was irrelevant and should have been excluded:

> ***Pawson v. The City of Sudbury**. COURT OF APPEAL [1953] O.R. 988; 1953 Ont. Rep. LEXIS 45 In this **Court in Re Gibson and City of Toronto** (1913), 28 O.L.R. 20 at 29, 11 D.L.R. 529, [**15] Hodgins J.A. stated the proposition thus: "The rule which excludes evidence of the rise in value [of the expropriated lands] caused by the particular [*995] scheme under which the compulsory powers are exercised, ought equally to prevent evidence of the loss of value caused by the same scheme." It is clear from the learned arbitrator's written reasons, portions of which I shall later quote, that there was present to his mind the necessity, as he put it, for excluding from his consideration "all advantages or disadvantages resulting from the expropriation proceedings". However, by accepting Neal's evidence as to values, he did not exclude them, because, as I have already made manifest, Neal did not exclude them. The learned arbitrator thereby, unwittingly, made the very error which he stated he should avoid.*

A panel has the ability to prefer its own expertise to that of experts brought before it. And a court will defer to the judgement of such a panel.

Another issue of relevance relates to the admissibility of *Ex Post Facto* Evidence. To what extent if at all should evidence of facts which occurred after the date of expropriation be considered in the assessment of compensation. It was originally felt that such evidence should be excluded because it was irrelevant. That is no longer the case. Sales data of properties comparable

to the subject in order to establish its market value as of same date prior to those sales has been held as admissible and their timing merely goes to the weight to be given to them by the tribunal.

Appraisers and Hearsay. As noted earlier, a witness is generally not allowed to give hearsay evidence, i.e. information acquired from others who have not been called upon to testify. However, experts may use the evidence of others in forming an opinion. Hearsay may be used by an expert. He may rely on his learning , his continuing education, he may refer to texts, periodicals, discussions with others in his field. He is not restricted to opinions based solely on his own personal experiences and observations. Accordingly, the opinion of an appraiser as to market value is not inadmissible simply because it is based on data such as comparable sales acquired from others. What is behind the rule is that part of the expert=s function is to satisfy himself as to the reliability of hearsay evidence. Also, if it were necessary to bring in the supporting evidence, the costs and time involved would be prohibitive.

However, recently in **Ferguson v. Ranger Oil Ltd.** File No. 15868 Alberta Court of Appeal 1995 A.C.W.S.J. LEXIS 51066; 1995 A.C.W.S.J. 636477; 57 A.C.W.S. (3d) 51 the Court granted leave to appeal where an appraiser=s report apparently went well over the line respecting reliance on hearsay.

Appeals

Three separate rights of appeal exist under the **Expropriation Act**. Section 28 allows an appeal directly to the Court of Appeal from a determination or order of the board. However, leave of a justice of the Court of Appeal is first required. The Court may either refer the matter back to the board, or make any determination or order that the board has the power to make. Under section 45, appeals respecting legal and appraisal costs go to a judge of the Supreme Court from a determination of the chair respecting costs. Finally under section **51** (1) Legal proceedings to challenge the validity of an expropriation must be brought under the *Judicial Review Procedure Act* within 30 days after the order or determination subject to review is made.

Conclusion

An understanding of the basic rules of evidence is necessary so that administrative tribunals do not slide into a system of Kadi justice in which decisions are made based on insufficient or irrelevant prejudicial evidence. Although the law does not require Tribunals to apply rules of evidence in a formal sense, every practitioner before a tribunal and every member of a tribunal should review the evidence presented in order to ensure that the ultimate goal of justice is served.

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