Swifter Regulation

Lawyers applying to tribunals will find themselves at the mercy of onerous procedural demands. There's an effort, however, to streamline things.

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ADMINISTRATIVE TRIBUNALS, ideally, are worthy alternatives to the courts because of the subject expertise and procedural efficiency they provide. Increasingly, however, tribunals have themselves become bogged down in a torrent of documents and motions. Some have recently launched initiatives intended to streamline their processes. Below, we examine two provincial securities commissions and a federal IP tribunal.

SECURITIES COMMISSIONS

In January 2015, the Ontario Securities Commission (OSC) issued case management timelines for enforcement proceedings in order to move cases forward more quickly. The practice guideline sets out what is supposed to happen at various dates in the process.

The first appearance, for example, is to occur within four weeks of the Notice of Hearing and Statement of Allegations. At that first appearance, timelines are to be set for disclosure of documents, witness lists and summaries. The second appearance is to follow within 120 days of the first appearance, and the third appearance within the following 60 days.

This practice guideline is a response to a trend that Melissa MacKewn, a partner at Crawley MacKewn Brush LLP in Toronto, called "the proceduralization of [OSC] proceedings." She attributes this increased length and complexity in enforcement proceedings to the size of monetary penalties the regulator has lately imposed for *Securities Act* transgressions and to the one-way cost regime, which gives OSC staff no incentive to limit their requests for discovery.

The statutory maximums the OSC is able to impose have not been raised lately, but in recent insider-trading cases, for example, the penalties imposed have been much steeper than in earlier cases. "When the OSC fines $1 million, $2 million for an individual, is it really to send a deterrent message to the market — or is it to punish that person?" asks MacKewn. (A constitutional challenge of the OSC's authority to order payments of up to $1 million per breach of the *Securities Act* failed in 2012 when the Ontario Court of Appeal unanimously upheld the OSC's administrative penalties of more than $1.2 million against Roger Rowan, Watt Carmichael Inc. and Harry Carmichael in the Biovail insider trading case.)

As MacKewn explains it, "Because the monetary stakes can be so high — they can effectively put individuals out of business — respondents' counsel are bringing more and more motions. And because disclosure obligations are extremely high and documentary disclosure so voluminous, you end up with hundreds of thousands of documents in some cases.

"It's almost as if you're in civil court in terms of the quality of materials that have to be presented and the documents you have to review," she says. "[But] I do think the commission has made significant efforts to try to address those trends."

Another measure designed to encourage efficiency in enforcement proceedings was the OSC's introduction in March 2014 of no-contest settlements in certain circumstances. Respondents often used to refuse to settle a case if they had to admit wrongdoing because they faced the threat of being sued in civil court and having that admission being used against them. "They would drag it out, bring motions, insist on disclosure and go through a lengthy hearing — or at least drag out the discussions until they settled the civil case," says MacKewn. "Now, with no-contest settlements, you don't have to admit

wrongdoing. It's a way to bring the regulatory proceeding to a quicker conclusion."

Negotiating with OSC staff in the enforcement branch presents another set of problems. Because most regulatory proceedings settle, rather than progress to a contested hearing, negotiating with regulatory staff has become a key component of the enforcement process. However, it is ordinarily not possible to have meaningful off-the-record discussions with Commission staff because they usually won't agree to it.

"When you know you are on the record, and there is a room full of staff taking notes, everyone on the issuer or respondent side of the meeting watches their words very carefully," says John Fabello, a partner at Torys LLP in Toronto. "This can inhibit a free exchange of ideas.

"Our experience with Commission staff is somewhat in contrast with self-regulating organizations such as IIROC [Investment Industry Regulatory Organization of Canada] and MFDA [Mutual Fund Dealers Association of Canada] staff, who are usually much more willing to have 'without prejudice' discussions."

In March 2016, an Ontario Securities Commission panel denied Catalyst Capital Group legal standing when it applied for a postponement of Corus Entertainment Inc.'s acquisition of Shaw Media. In issuing their reasons, the OSC Commissioners provided guidance on the role of OSC staff in third-party applications regarding transactions, such as mergers and acquisitions, within the Commission's jurisdiction.

The typical case might involve (as in Catalyst's application) a third party seeking to slow down an acquisition or a rival bidder seeking to have the opportunity to place its own offer before the target company's shareholders or to have the target company's poison pill cease-traded. The Commission said that their staff are not to be "gatekeepers" with respect to third-party decisions on whether to seek standing before the tribunal. "The kinds of relief that a court can order, and the costs of obtaining that relief, make going to the Commission, if you can get in front of a panel, a more attractive option," says Fabello. "Then the question becomes, how does a third-party complainant get that issue before a panel of Commissioners?"

Despite the OSC's guidance in the Catalyst ruling, he says, "it's still uncertain as to when a third party can go directly to a tribunal and when it is beholden to staff for that. When you're beholden to staff, you can't force staff to do it. Staff in the OSC's mergers and acquisitions office don't always see these issues in the same way that a third-party bidder will."

The Alberta Securities Commission (ASC) is also trying to deal with procedural complexity in its enforcement hearings. "In insider-trading cases and financial disclosure cases, there can be a massive number of electronic and paper records that ASC staff collects as well as transcripts of interviews they've done in the course of their investigation," said Dan McDonald, a partner at Burnet, Duckworth & Palmer LLP, in Calgary.

Commission staff are currently obligated to meet the disclosure standard of turning over "all relevant information." In a recent attempt to lessen the volume of documents having to be disclosed by staff and reviewed by respondents' counsel, the ASC developed a proposal whereby the onus would fall on defence counsel to identify the documents they wanted produced. Consultations held with the defence Bar, however, did not gain support for the proposal.

"We were of the view that the desire to streamline the process can't trump the right to full disclosure and the ability of the respondents to properly defend a case," says McDonald.

"We don't know what's in staff's possession, and they do, so it would be hard for us to identify specific documents. It wouldn't be fair to impose on us an obligation to take the initiative and identify what our defence is and request documents relevant to that."

McDonald praised the ASC for consulting fully with the defence Bar on its streamlining proposal, but said it's unclear whether the proposal has been shelved.

TRADEMARKS OPPOSITION BOARD

The federal Trademarks Opposition Board (TMOB) rules on third-party oppositions to applications for trademark registrations. In addition to these so-called "opposition proceedings," it also conducts proceedings under s. 45 of the *Trademarks Act*, which allows for a third party to seek to have a trademark expunged three years following registration, if the owner cannot prove its use in the marketplace.

"Section 45 procedure hasn't changed in any significant way over the years," says Steven Garland, a partner at Smart & Biggar/Fetherstonhaugh in Ottawa. "It's a very summary-type procedure." The registrant must submit an affidavit demonstrating use or explain any special circumstances justifying lack of use. The third-party challenger does not submit evidence. Both parties exchange written arguments, but there are no cross-examinations.

Opposition proceedings, however, are much more complex. Both the applicant and the opponent can each submit evidence. There are opportunities for cross-examinations and written arguments. There are also extensions of time that can be obtained for each of these steps. "The Board has tried to make the trademark opposition process more streamlined," says Garland. "There are fewer opportunities to gain extensions in the various steps, but it still takes two to three years from the time an opposition is started to having an actual decision rendered."

In tandem with Bill C-31 amendments to the *Trademarks Act*, the Trademarks Opposition Board is considering further changes to the trademarks opposition process by 2018 to shorten or remove some of the delays.

Under the proposed new rules, cross-examinations would occur after the submission of all of the evidence (as in court proceedings). Now, when the opponent submits its evidence, there is an opportunity for cross-examination. Then the applicant submits its evidence, followed by an opportunity for cross-examination. And then there is reply. Under the new format, says Garland, "all the cross-examinations would be done at the same time, once all of the evidence is in. That would lead to a reduction in delays."

The TMOB is also weighing the exchange of written arguments in sequence. "Right now," says Garland, "they're exchanged at the same time, and as a result, sometimes you don't see the crystallization of the issues as you would in a court proceeding. That sequential process wouldn't save any time, but it would make it easier for the parties and the Opposition Board to understand the critical issues at play."

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