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August 27, 2014

Ms. Murielle Brazeau, Chair
Social Security Tribunal
PO Box 9812
Station T CSC
Ottawa, ON K1G 6S3

Dear Ms. Brazeau:

Re: Hearings at the Social Security Tribunal

I am writing on behalf of the National Administrative Law Section of the Canadian Bar Association (the CBA Section), to express concern about how the mode of hearing is selected by members of the Social Security Tribunal. As it stands, the process for making these decisions lacks transparency, due to a lack of both published criteria and reported decisions with reasons for the choice of hearing.

The CBA is a national association representing over 37,500 jurists, including lawyers, Québec notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice. The CBA Section comprises lawyers from across Canada who practice administrative law and address practice issues relating to administrative tribunals.

While we appreciate the imperative in the legislation for Tribunal members to select the most efficient means of determining cases, the mode of hearing must comply with the rules of natural justice and also be seen to comply. We recommend that the Tribunal change its existing practices so the public can know the process and criteria for selecting the mode of hearing, and assess the reasons for the selection in individual cases. These changes would better ensure balance between efficiency and transparency, adherence to natural justice, and ultimately, public confidence in the integrity of the Tribunal's decisions.

Existing Procedures, Transparency and Natural Justice

In cases other than leave-to-appeal applications (which must be in writing), the Tribunal can choose the type of hearing on its own motion.[1] As with other statutory powers, the Tribunal's choice is not unfettered. For example, it may not use the power in a manner

[1] Section 21 of the *Social Security Tribunal Regulations* SOR/2013-60 ["Regulations"].

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inconsistent with the purposes of the legislation or incompatible with the principles of natural justice.

Consolidating four tribunals into the Social Security Tribunal has brought considerable administrative streamlining. The *Department of Employment and Social Development Act* was enacted with efficiency in mind. As Senator Marjory LeBreton stated at the time:

> The new social security tribunal will provide a fair, fast and accessible appeals process for Canadians while eliminating duplication and overlap in the administrative process.
>
> This has been the problem. There has been so much overlap between the various groups that the government felt combining the efforts of all of them would eliminate duplication, streamline the process, fix what was obviously not a good situation and make it fairer, faster and more accessible. [2]

The Regulations also place efficiency front and centre of the Tribunal's proceedings. Section 2 says they "must be interpreted so as to secure the just, most expeditious and least expensive determination of appeals and applications" and s. 3(1)(a) requires the Tribunal to "conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit." To further illustrate:

- The phrase "without delay" appears 13 times in the Regulations;
- Hearings (even appeals) are conducted by a single Tribunal member, not a panel of three;
- There are four possible types of hearing: in-person; videoconference; teleconference; and written;
- There is only one unrestricted adjournment (Regulations s. 11(2));
- There are mechanisms for a pre-hearing conference, dispute resolution or settlement (Regulations s. 15-17); and
- The General Division performs a gatekeeping function, through its power to summarily dismiss an application.
- The Appeal Division also has a gatekeeping function. In all appeals of General Division decisions except summary dismissals, appellants must make a written leave to appeal application (Regulations ss. 39 and 40).

The CBA Section lauds efforts at streamlining and recognizes that efficiency is an important aspect of access to justice, particularly in light of the large backlog facing the Tribunal. However, these concerns must be balanced with natural justice, as the Regulatory Impact Analysis Statement accompanying the Regulations recognized.[3]

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2 *Debates of the Senate*, 41st Parl, 1st Sess, No 148 (Dec. 12, 2012).

3 (2013) C Gaz II 866 ("Principles of natural justice are paramount and upheld by the regulations.").

Among these principles are that parties must receive adequate reasons for decisions, and that "justice is not only done but be seen to be done." Parties before the Tribunal must know the reasons why it chose the particular mode of hearing for their case and these decisions must be publicly accessible.

At present, the Tribunal's reasons for its hearing choices are not readily available. Few Tribunal decisions are reported on public databases.[4] In the published decisions addressing type of hearing, it is impossible to identify the rationale for the Tribunal's choice. Typically the decision states that the type of hearing was chosen "for the reasons mentioned" in the notice of hearing, which might be available to a reviewing court in the record but not to the public. The RIAS states that, "How a hearing is conducted is decided by members based on a combination of factors as defined by SST policy," but this policy does not appear to be publicly accessible.

In this vacuum, the media have expressed concerns about how Tribunal members make these selections.[5]

Recommendations

The type of hearing is often a critical aspect of the right to present a meaningful case under the rules of natural justice. Further, efficiency is enhanced where participants know about the process, as it allows them to streamline presentation of their case and avoids unnecessary appeals and reviews.[6] While the law does not always require a particular type of hearing, a decision to select a particular type of hearing in a particular case should be supported by publicly accessible reasons, made in accordance with publicly available criteria. Without knowable, standard criteria governing the Tribunal's choice of procedures, it will be impossible for the parties, the public or the courts to verify whether the Tribunal is considering the right criteria and is consistent in its approach. This erodes confidence in the process.

The CBA Section recommends the following changes to the Tribunal's practice:

1. Give appellants the opportunity to indicate their preference on the type of hearing and their reasons for same.
2. Publish prominently on the Tribunal website the policy governing selection of the hearing mode.
3. Include reasons for selecting the mode of hearing in final decisions, particularly if the selection did not follow the appellant's preference or was otherwise

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4 As of July 28, 2014, there were 39 decisions reported on CanLII, whereas the Globe and Mail article cited above indicates that there have been 405 decisions in the first 13 months of the Tribunal's operation.

5 For example, "Tribunal can deny in-person appeals in disability benefits cases," *Globe and Mail* (6 July 2014), online: www.theglobeandmail.com/news/politics/ottawa-guts-already-overloaded-tribunal/article19485258

6 The RIAS states:
These regulations are required to provide all those who work in the appeal system, appellants and their representatives, tribunal administrators, and decision makers, with an understanding of the rules and procedures of the SST so that they can effectively work in this system.

contentious. We would also encourage the Tribunal to publish more of its decisions to permit a "critical mass" of jurisprudence on the selection process to develop.

4. Provide guidelines to Tribunal members that if their reasons refer to the notice of hearing, relevant excerpts should be contained in the decision.

We agree generally that the choice of hearing should be left to the decision maker, who will determine the type of hearing necessary to ensure fair process and to produce the best decision. We recommend the Tribunal's policy on hearing selection recognize the following:

- The importance of the decisions to the individuals involved;[7]
- That in disputes of fact or where credibility assessments are otherwise necessary, an in-person hearing is ordinarily required;[8] and
- That an in-person hearing is required where it is necessary to enable the person concerned to participate effectively in the process.[9]

We hope that our recommendations are helpful, and would be pleased to provide any further comments or clarifications you require. The CBA Section would be happy to discuss other issues of mutual interest with the SST. For example, we have expertise in delivering legal education training on Charter litigation before administrative tribunals.

Yours truly,

(original signed by Kerri Froc for Lorna Pawluk)

Lorna Pawluk
Chair, Administrative Law Section

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7 See *Campbell v Workers' Compensation Board,* 2012 SKCA 56 at paras 77-79.

8 See *Khan v University of Ottawa*, [1997] OJ No 2650 (CA) at paras 21-22. See *also Conboy v. Minister of Social Development* (20 June 2005), Appeal No. CP17501 (PAB) (regarding "the fundamental importance of the personal appearance of the claimant" before the Board and stating that, "It is the role and duty of the trier to assess that credibility by observing the demeanour of the witness during his or her testimony. A trier cannot properly assess the demeanour of a witness by listening to the witness over the telephone").

9 Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto : Canvasback Publishing, 1998, loose-leaf updated to December 2013) at 10-5-10-6. The 2004 report of Ron Ellis, "Videoconferencing in Refugee Hearings" and the subsequent "Immigration and Refugee Board Response to the Report on Videoconferencing in Refugee Hearings," are instructive regarding what must be done to ensure the effective participation of the person concerned in that context (online: (www.irb-cisr.gc.ca/Eng/transp/ReviewEval/Pages/Video.aspx; and www.irb-cisr.gc.ca/Eng/transp/ReviewEval/Pages/VideoRespRep.aspx).