

For information

LegCo Panel on Administration of Justice and Legal Services

Procedural Matters of Appeal Boards

Purpose

This paper is provided pursuant to the request set out in item 11 of the AJLS Panel's list of outstanding items for discussion as at 19 May 2011 (LC Paper No. CD(2)1803/10-11(02)). This paper addresses the following issues:

- (a) the criteria for determining whether procedural matters relating to appeal boards should be set out in the principal ordinance or in subsidiary legislation as authorized in the principal ordinance or should be left to the appeal boards to decide if the procedure is not provided in the statute; and
- (b) the absence of uniform definition for "costs of appeal proceedings".

The Background

2. During the scrutiny work of the Bills Committee on the Buildings Energy Efficiency Bill, Members have raised a number of issues relating to the treatment of appeal board procedures. Members have noted that there is no universal treatment across the board regarding procedural matters of appeal boards. At present, the procedures are either provided in the principal ordinance, in subsidiary legislation as authorized in the principal ordinance, or are left to the appeal boards to decide if the procedures are not provided in the statute. The Bills Committee has also noted that there is no uniform definition for "costs of appeal proceedings". These issues have been referred to the Panel for follow up.

Appeal Board Procedures Set Out in Primary/Subsidiary Legislation

3. There is no universal treatment regarding whether procedural matters relating to appeal boards are set out in the principal ordinance or in

subsidiary legislation as authorized in the principal ordinance. Some enabling ordinances contain provisions empowering an authority or person to make rules on appeal board procedures by means of subsidiary legislation. For example, s. 43(1)(u) of the Air Pollution Control Ordinance, Cap. 311 (“APCO”) empowers the Secretary for the Environment to make regulations providing for the procedures to be followed for the purposes of the Air Pollution Control Appeal Board (“APCAB”) after consultation with the Advisory Council on the Environment. Whilst ss. 32 to 34 of the APCO are provisions governing the exercise of the APCAB’s jurisdiction, the Air Pollution Control (Appeal Board) Regulations, Cap. 311D contains the procedures for regulating appeals to the APCAB, such as date, time and place of hearing, witness summons and record of the appeal proceedings.

4. In contrast, there are cases where the procedural matters relating to an appeal board are set out in the principal ordinance only. For example ss. 17 to 26 of the Gas Safety Ordinance, Cap. 51 (“GSO”) set out the procedural matters of the Appeal Board, including the determination of appeal, conduct of hearing, summons of witnesses, legal representation, evidence and effect of determination. No rules or regulations were enacted by means of subsidiary legislation to govern the procedural matters of the Appeal Board.

5. In this connection, we wish to refer to the Report on “*Powers and Procedures for Administrative Tribunals in Alberta*” published by Alberta Law Reform Institute (Report No. 79, December 1999)¹. Whilst the Institute suggested that a Model Code of powers and procedures of administrative tribunals (“the Code”) should provide guidance to all tribunals, it is also suggested that under the terms of the newly proposed ‘opt-in’ legislation², tribunals may apply for a ministerial order to make the provisions that they have selected as part of their own procedural rules. The following observations of the Institute on the need to accommodate diverse functions and resources of the tribunals are of particular relevance:

¹ The Report has not been implemented. In September 2008, the Alberta Law Reform Institute published a consultation paper on “Powers and Procedures of Administrative Tribunals” which updated, reorganized and streamlined the suggested provisions in the Report. No final report has been published following the consultation.

² The Institute recommended legislation of the Code in the form of an ‘opt-in’ statute. Under this proposal, every tribunal would compare its existing procedures to the Code and would choose those powers and procedures from the Code that it needs to help make its decisions fairly and enable it to be as effective and efficient as possible. [at para. 31]

“We recognize that not all tribunals will need all of the Code’s rules. Some tribunals deal with matters that don’t require some of the powers or procedures at all. Some tribunals already have well-developed rules, suited to their own functions, for all or most of the topics covered by our proposals. *The consultants to our project told us, almost uniformly, that the functions and resources of administrative tribunals are too diverse to try to impose uniform rules.*” [at para. 26] (original emphasis)

6. As pointed out in paragraph 3 above, there is no universal treatment regarding whether procedural matters relating to appeal boards should be set out in the principal ordinance or in subsidiary legislation as authorized in the principal ordinance. There are generally many reasons why it is necessary to delegate legislative power for rules to be made by way of subsidiary legislation. *Bennion on Statutory Interpretation* (5th Ed., 2008) gives some of the reasons as follows:

- “(a) Modern legislation requires far more detail than Parliament itself has time or inclination for. For example detailed forms may be needed.
- (b) To bring a complex legislative scheme into full working operation, consultation with affected interests is required. This can best be done after Parliament has passed the outline legislation, since it is then known that the new law is indeed to take effect and what its main features are.
- (c) Some details of the overall legislative scheme may need to be tentative or experimental. Delegated legislation affords an easy means of adjusting the scheme without the need for further recourse to Parliament.
- (d) Within the field of a regulatory Act new developments will from time to time arise. By the use of delegated legislation the scheme can be easily altered to allow for these.”³

³ On pages 242-3

7. There is no hard and fast rule for determining whether the procedures of appeal boards should be provided in the principal ordinance or in subsidiary legislation, and each case should be considered on its own. If the procedures in question are highly detailed and technical in nature, it may be appropriate for such procedures to be dealt with by subsidiary legislation⁴. The statutory framework may, depending on the justified needs for delegation, provide for the procedural matters regarding appeal board in the subsidiary legislation.

Appeal Board's Power to Regulate its Procedure

8. We observe that whether or not procedural matters relating to appeal boards are set out in the principal ordinance or in subsidiary legislation as authorized in the principal ordinance, some enabling ordinances reserve a residual power for the individual appeal board to prescribe its own practices and procedures to govern an aspect in respect of which no provision is made in the legislation. For example s. 33(8) of the APCO provides that: "The Chairman may determine any form or matter of practice or procedure in so far as no provision is made therefore by or under this Ordinance." Similarly, s. 20(1) of the GSO provides that "subject to [Part VI of this Ordinance], the procedure of any hearing shall be determined by the appeal board."

9. In this connection, we wish to refer to the Law Commission of New Zealand's ("LCNZ") report on "*Tribunal Reform*" (October 2008). LCNZ has looked into the tribunal system in New Zealand and made the following comments on the power of an appeal board to regulate its procedure:

"It is common for the constituting legislation to confer on a tribunal the power to determine or regulate its own procedure. Within the confines of legislative provisions governing procedure, and any rules of procedure that might be set to apply across the unified tribunal structure, or within a division of it, *individual tribunals should have the power to regulate their own procedure in order to effectively deal with any matter before them*. Although the courts have not substantially considered the extent of a tribunal's statutory ability to

⁴ See for example the standard forms for Notice of Appeal, Notice of Time and Place Fixed for Hearing of an Appeal and Summons to Witness in the Schedule of the Air Pollution Control (Appeal Board) Regulations, Cap. 311D.

control its own processes, *such a power clearly allows tribunal members the flexibility to adjust the procedure to the requirements of the case before it.*” [at para. 7.50, emphasis added]

10. The Administration agrees with the above observation of LCNZ. We take the view that the flexibility and effectiveness of an appeal board would be enhanced if it is given a residual power to control its own process subject to the relevant provisions in the legislation.

Definition of “Costs in Appeal Proceedings”

11. Members have raised the concern that there is no uniform definition for “costs of appeal proceedings” in the legislation. Although there is no universal definition for “costs of appeal proceedings”, some enabling ordinances governing appeal boards contain provisions empowering them to make awards for costs of appeal proceedings. For example, s. 33(6) of the APCO allows the APCAB to make an award for the costs involved in the appeal that is just and equitable in all the circumstances of the case. Another example is s. 57(4) of the Construction Workers Registration Ordinance, Cap. 583 (“CWRO”), which empowers the Appeal Board formed under the CWRO to make any order it thinks fit with regard to the payment of the costs of the parties to an appeal in the appeal.

12. Therefore, it can be seen that the appeal boards are often given very broad discretion to award costs of the appeal by the enabling legislation. As an illustration of the coverage of costs of appeal proceedings, reference may be made to the following passage of Brian Harris in *Disciplinary and Regulatory Proceedings* (5th ed., 2009):

“An order for costs may, subject to the rules of the tribunal in question, comprise:

- the legal expenses of the successful party;
- the reasonable expenses of the party’s witnesses in attending the hearing, including his own;
- the costs of the investigation including the fees and expenses of any expert witness such as accountants; and
- the costs of the tribunal.”⁵

⁵ Para. 14.55, on pages 257-8.

13. We note that an order for costs made by the tribunal is not limited to legal costs but in general may cover all costs and expenses incurred for an appeal. O 62 r 1 of the Rules of the High Courts (Cap. 4A) provides that: “costs include fees, charges, disbursements, expenses and remunerations.” Although this non-exhaustive statutory definition of costs applies only to legal proceedings, it lends support to the above view that an order for “costs of appeal proceedings” may include legal costs and all other costs and expenses incurred for an appeal (subject to rules of the tribunal in question).

14. Given that the appeal boards will have to deal with very disparate types of decision-making, the types and amount of costs of the appeal proceedings that are incurred would also be very different. The Alberta Law Reform Institute in its Report on “*Powers and Procedures for Administrative Tribunals in Alberta*” came to the following conclusion:

“With regard to both costs and hearing expenses, but particularly the latter, there are some types of tribunals for which making such awards would be completely inappropriate. For this reason, and because *it is not possible to craft a general costs provision that is suitable to the function of tribunals generally, the costs provision is included in the list of provisions for tribunals to consider for amendment to their enabling legislation on a tribunal-by-tribunal basis.*” (emphasis added) (page 167)

15. In the light of the above, the Administration is of the view that it would not be practicable or appropriate to apply a uniform definition for “costs of appeal proceedings” in all legislation across the board.

**Department of Justice
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