Cross-Examination in Tribunal Hearings

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CROSS-EXAMINATION

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Introduction

This article considers some cross-examination issues that arise in tribunal hearings.

Issues arise because cross-examination in tribunal hearings is used by more participants, and for more purposes, than in a traditional courtroom setting – but the rules and practices that govern the use of cross-examination were not developed in anticipation of those additional users or uses.

In a courtroom, counsel may cross-examine a witness of a party adverse in interest, and do so for the purpose of either discrediting the previous testimony of the witness, or to elicit testimony that is favourable to her clients' case. By contrast, in many administrative proceedings it is not uncommon to find numerous cross-examining parties with a multiplicity of interests that may or may not be adverse, and other actively cross-examining participants not normally found in a courtroom, such as tribunal counsel, and an inquisitorial tribunal. Such additional participants commonly cross-examine witnesses for purposes beyond those observed in a courtroom setting. Such purposes include the creation of a full and complete record (referred to as a "fishing expedition" in a courtroom but a common basis for cross-examination by tribunal counsel); the elicitation of evidence to assist the cross-examining party to form a view on matters in issue; and the elicitation of evidence by tribunal members to help them fulfil their statutory duties,[1] particularly where a poly-centric approach to the matters at issue is required.

There are a myriad of courtroom rules and practices regarding cross-examination. To take just a few examples: rules regulate the order of cross-examination; prescribe the scope of cross-examination; restrict communications between counsel and witnesses under cross-examination; and restrict the use of leading questions. Practices include the use of tone and word choice as an advocacy tool. For convenience, this article only considers the use of leading questions, and the use of tone and word choice as a persuasive tactic, from the perspective of parties who may not be adverse to the party whose witness is being cross-examined and from the perspective of tribunal members.

The thesis of this article is that care must be taken in applying courtroom rules and practices regarding cross-examination in a tribunal hearing, and that in most cases the reason for the rule or practice needs to be considered in light of the nature or interest of the particular cross-examiner. The focus in this article on leading questions and the style of cross-examination is illustrative of issues that generally arise when the distinctions between courtrooms and tribunal hearing rooms are not given sufficient consideration. Some suggestions are made with respect to the manner in which tribunal members conduct their cross-examinations.

Definitions

It seems helpful to state at the outset what is meant by "cross-examination." Unfortunately, this is not as easy as perhaps it should be. Two of the leading Canadian textbooks on trial practice simply do not define it, instead moving directly into an exposition of rules and practices.[2] For example, *Conduct of an Action* states that "a party may cross-examine any party adverse in interest or his witnesses,"[3] from which one might infer that cross-

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[1] Robert Macauley and James Sprague, *Practice and Procedure Before Administrative Tribunals*, vol. 2, looseleaf (Toronto: Carswell, 2004) at 12-18.17 to 12-18.21 ("*Practice and Procedure*").

[2] W.B. Williston and R.J. Rolls, *The Conduct of an Action* (Toronto: Butterworths, 1982) ("*Conduct of an Action*"); and Thomas A. Mauet, Donald G. Casswell and Gordon P. MacDonald, *Fundamentals of Trial Techniques*, 2nd ed. (Boston: Little, Brown & Company, 1995).

[3] Ibid. at 100.

examination means the range of permissible questions one may employ in the examination of a witness called by an adverse party. Unfortunately, such a definition would apparently preclude the cross-examination of a witness by a tribunal panel member who, by reason of the requirement for impartiality, may not generally be adverse in interest to a witness,[4] and would thus be inconsistent with the generally accepted notion that tribunal panel members may, and in some cases may be obliged to, have a more inquisitorial role than a judge in a courtroom, to the point of conducting "probing examinations" of witnesses.[5] Further, such a definition would be unhelpful, as it does not provide any clues to the answer the question begs, namely: "What types of questions are permissible in a cross-examination?"

In the experience of the writer, it is common to refer to all examinations of witnesses by participants to a tribunal hearing, except the examination and re-examination by counsel that called the witness, as "cross-examination." While that usage may not be theoretically sound, it avoids what likely would amount to no more than a semantic debate, and allows for a more principled consideration of the appropriateness of practices that are commonly understood to be part of a cross-examination.[6]

Leading Questions

The authors of *Fundamentals of Trial Techniques* state that in the context of a courtroom, "a leading question suggests the desired answer to the witness .... Under certain circumstances, such as ... questioning hostile or adverse witnesses, the leading form is permissible."[7] Leading questions asked of a witness whose views are thought to be favourable to the examining party is referred to as "friendly" or "sweetheart" cross-examination and is generally not permitted in a courtroom.

The basis of the rule is that leading questions asked of a witness sympathetic to the cause of the examining lawyer are unreliable by virtue of the presumed willingness of a witness to agree to the propositions put to him or her by "friendly" counsel. What the trier of fact hears from such a witness is not the witnesses' views, or recollection, but that of the examining lawyer.[8]

In an administrative tribunal hearing, the prohibition against friendly cross-examination raises no issues, that is, when counsel is cross-examining a witness favourable to the examining lawyer's cause. In administrative proceedings, it is not uncommon for numerous parties – intervenors – to be active participants, and it is rare that parties will have plead their position or otherwise have been required to state their final position on matters in issue prior to final argument. In these circumstances, it can be difficult to discern whether the witness and cross-examining party are aligned on an issue, and indeed neither may actually know. In these circumstances, a more flexible practice that recognizes both the reality of the situation in a hearing

[4] The requirement for impartiality in tribunal members is a fundamental element of procedural fairness, although subject to the particular legal regime in which the tribunal member operates: *Practice and Procedure*, supra note 1 at 9-20.19 to 9-20.20, and at 39-3 to 39-4.

[5] *Practice and Procedure*, supra note 1, cites numerous examples of decisions allowing for a more inquisitional role for tribunal members relative to judges in a courtroom, at 12-18.17 to 12-18.21. The endorsement of "probing" examinations is made in *Thamotharem v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 16, rev'd 2007 FCA 198, leave to appeal ref'd [2007] S.C.C.A. No. 394 (13 December 2007), although the higher court similarly endorsed the use of "probing" examinations by tribunal members.

[6] The authors of *Conduct of an Action*, supra note 2 at 146, state that: "It is generally accepted that it is improper for counsel to cross-examine a witness favourable to his cause by putting the very words into the mouth of the witness which he is expected to echo back." Note that the stated rule allows for "cross-examination" of a "witness favourable to his cause," despite the rule prescribed earlier in the book, and quoted above, which limits cross-examination to "a party adverse in interest or his witnesses." While the two statements are not strictly inconsistent – nothing precludes an adverse party from calling a witness favourable to the other party's cause – the effort required to reconcile the statements illustrates why it is preferable to avoid focusing on a precise definition. The use of leading questions in a tribunal context is the subject of the next section of this article.

[7] Supra note 2 at 324, citing *McCormick on Evidence*, 3rd ed. at 11; and *Maves v. Grand Trunk Pacific Railway* (1913), 14 D.L.R. 70 (Alta. S.C.).

[8] See *R. v. Deacon*, [1947] 1 W.W.R. 545 (Man. C.A.), reversed [1947] S.C.R. 531, without comment on the discussion in the lower court regarding "friendly" cross-examination.

room and the purpose of the rule is appropriate.

The National Energy Board ("NEB") has usefully addressed the issue in this way:

> The Board is aware of the rules of evidence applicable in the Courts of law but it is of the view that such rules do not apply "*stricto jure*" ["strict law"] to its proceedings. The Board will, however, be guided by such rules in establishing its procedures, with due regard to fairness and natural justice.
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> The Board is of the view that cross-examination at its hearings should not only serve to test or discredit evidence adduced by an adverse party but also to elicit any information or facts relevant to the issues before the Board. As a rule, a counsel appearing before the Board presents as witnesses, officers, representatives or employees of the party he represents and does not treat as his "own witnesses", to be examined in-chief, witnesses of other parties whose evidence may support his client's position. It is through the cross-examination of all witnesses present at a hearing, whether they are adverse in interest or not, that a party may fully establish all the facts and evidence upon which its position is based. The Board must also recognize that, at many of its hearings there is no dispute or action at law *per se* and that its proceedings do not always resemble the adversary system. It would be difficult, in such instances, to clearly identify those parties adverse in interest and those sharing a similar position on some of the issues.
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> The Board is concerned with "friendly" cross-examination that serves only to prop up a position already on the record or that results in repetitious evidence. However, restraints that may reasonably be imposed on cross-examination will depend on the nature of the Hearing, the interests of the parties involved, and the procedures adopted in the best interest of fair and just proceedings and should be imposed in light of the circumstances of each hearing.
>
> In the case at hand, the Board is of the opinion, however, that cross-examination of a party not adverse in interest should be limited to eliciting new facts or information relevant to the issues before the Board and useful to the resolution of those issues.[9]

The NEB's approach is to be commended for its flexibility and responsiveness to the particular circumstances of the tribunal hearing in which the issue arises. Further, it opens the door to an approach to "friendly" cross-examination by counsel in a tribunal hearing that responds to the underlying basis of the rule, namely giving the elicited evidence more or less weight commensurate with the degree to which it can be relied on as the witness' testimony.[10]

Different considerations arise when it is not counsel but tribunal panel members themselves that pose leading questions to witnesses.[11]

Firstly, it can be assumed that a party-witness with an interest in the outcome of the proceeding will be reluctant to unnecessarily disagree with the ultimate decision-maker, and be less zealous than she otherwise might be in putting her testimony in her own words. Thus, just as with friendly counsel, but for different reasons, the testimony elicited by leading questions from tribunal members can be unreliable.

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[9] Originally made on January 13, 1987 during the TCPL RH-3-86 hearing, and re-issued May 15, 2003 in Hearing Order EH-1-2000, footnotes omitted. The Board's pronouncement on friendly cross-examination has been the subject of some criticism: see C.K. Yates, "Whither the Woodshed? Counsel/Witness Relations in Regulatory Proceedings" (1987) 1 *C.J.A.L.P.* 183.

[10] In a recent proceeding before the British Columbia Utilities Commission ("BCUC"), participant funding was denied to an intervenor on the basis, in part, of inappropriate "friendly" cross-examination. In that particular instance, the intervenor expressly stated at the outset that it was reserving its final position pending the hearing of oral evidence. A more nuanced approach would have considered the value of the testimony elicited by the cross-examination in light of the final position of the intervenor, without resorting to after the fact sanctions for cross-examination that was marginally inappropriate at worst. See BCUC Order F-25-08 and accompanying Reasons for Decision, dated November 19, 2008, currently subject to reconsideration.

[11] As noted above, tribunal members will frequently have a more inquisitional role than judges, and will typically ask more, and more "probing," questions than a trial judge.

The foregoing conclusion will be particularly true if the witness perceives the tribunal member to be partial to his or her cause, which raises a further issue, namely reasonable apprehension of bias. That is, if a witness perceives a "friendly" tribunal member, and thus assents too readily to leading questions asked by the tribunal member, those hearing room dynamics will be apparent to other participants in the process. It is clear that reasonable apprehension of bias can be founded solely upon conduct that suggests a lack of impartiality[12] and it follows that a foreseeable consequence of leading questions from tribunal members and eager affirmations from witnesses raises the prospect of a judicial review or appeal on that ground.

Reasonable apprehension of bias can also arise out of leading questions asked by tribunal members where instead of eagerly accepting the propositions put to him or her, the witness steadfastly refuses to allow himself or herself to be led. That situation can quickly lead to the appearance that the witness and the tribunal member are indeed adverse in interest. In such a situation, it may seem difficult for a tribunal member to continue to appear to be impartial, while pursuing his or her mandate of "probing" into the issues and matters before the tribunal. However, in this writer's view, a probing and even extensive examination does not require the use of leading questions and while it may be tempting to do so, tribunal members should refrain from putting words in the mouths of witnesses on any contentious point in issue.

Use of Tone or Style

The authors of *Fundamentals of Trial Techniques* recommend the following practice to would-be cross-examiners:

> On cross-examination, you should be the centre of attention. Consistent with proper procedure and good taste, act the role. Ask questions in a voice and manner that projects confidence, both to the jury and the witness. Let the jury know your attitude about the facts. On direct examination, how a witness answers is as important as the answer itself. On cross-examination, how you ask the question is as important as the question itself. Projecting humour, incredulity, and sarcasm are all a proper part of cross-examination. Use them in appropriate situations. Above all, make sure your witness understands and feels your attitude about the facts of the case and your expectations in your questioning. Projecting that attitude usually has a significant impact in obtaining the answers you want.[13]

Whether one agrees with the above-noted advice on how to use tone and style in cross-examination, there is no doubt that such techniques are commonly used, and given their common use, must be effective from time to time.

The projection to the judge and jury by cross-examining counsel of his of her views on the veracity of the witness' testimony, or the witness' credibility, is likely effective to the extent that counsel are known and trusted by the decision-maker. Counsel trade on that trust, and familiarity, by making their final submissions the unspoken sub-text of each question. In a sense, the reason cross-examining counsel make themselves the "centre of attention" is the same reason underlying the rule regarding leading questions: decision-makers are apt to hear the words of counsel, to the exclusion of those of the witness.

Of course, cross-examining counsel may not be denigrating, but may strive to elevate the veracity of the testimony, and the credibility of the witness. Counsel who convey their views of the case through cross-examination that is fawning, rather than sarcastic, or wide-eyed rather than incredulous, may be faced with objections of "friendly" cross-examination, whether or not any leading questions are asked.

In a tribunal hearing context, and despite the fact that cross-examining counsel may not be adverse in the sense one would expect to see in a courtroom, decision-makers and other participants are unlikely to accept that a party is neutral, or has yet to determine its position, when counsel conveys a position through tone and style of cross-examination. That is, while there may be legitimate reasons for "friendly"

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[12] *Practice and Procedure*, supra note 2 at 39-18 to 39-25; and in particular *Solicitor "X" v. Barristers' Society (Nova Scotia)* (1998), 171 D.L.R. (4th) 310 (N.S.C.A.), referred to at 39-19, where an overly zealous cross-examination of a witness-party by tribunal members founded, in part, a successful appeal on the basis of reasonable apprehension of bias.

[13] Supra note 2 at 212.

cross-examination,[14] counsel that takes a position through tone and style will be presumed to do so with foresight and purpose.

For those reasons, it can be particularly problematic when tribunal panel members make themselves the "centre of attention" in a cross-examination of a witness. The conveyance through tone and word choice of acceptance or rejection of a witness' testimony will cause observers to conclude that the decision-maker has a pre-judged view of the evidence and perhaps even the matters in issue. This of course can lead directly to allegations of reasonable apprehension of bias.[15]

Further, when cross-examining counsel make themselves the "centre of attention," they are purposefully playing to an audience it is their job to persuade. In the case of a tribunal, the only legitimate audience to which it ought to be playing is the legislative body that created the tribunal – and that body will not be in the hearing room, nor ought it to be persuaded of anything other than that the tribunal is properly exercising its statutory duties. For all these reasons, it is important that tribunal panel members not make themselves the "centre of attention."

Conclusion

Courtroom rules and practices, and in particular those regarding cross-examination, have evolved over a very long time in response to the unique demands of an adversarial system in which parties invariably have in mind, at all times, a focused outcome. Tribunal hearings are a relatively recent creation of the modern state, and commonly bring participants together with a multiplicity of conflicting, overlapping and uncertain objectives, many of which have no direct analogue in a courtroom setting. Applying the rules and practices of the former to the latter without regard to their purpose and applicability can result in less than optimal results at best, and render the resulting decisions subject to review at worst. The use in cross-examination of leading questions, and tone and word choice to convey meaning, provide examples of how the failure to consider the purpose of courtroom rules can result in an unnecessarily limited record, or unnecessary risks to the legal validity of tribunal decisions.

[14] The uncertainty of position; lack of skill; and so on.
[15] See *Practice and Procedure*, supra note 1 at 12-8.3 to 12-8.5.

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