Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Guidelines

TIPS FOR EFFECTIVE ADVOCACY

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PURPOSE OF THE GUIDELINES

Further to the recent Practice Notice on case management[1], these guidelines are intended to provide counsel (legal and non-legal) with useful tips for preparing and delivering effective advocacy before the Canadian International Trade Tribunal (the Tribunal). It presents several general recommendations, followed by tips relating specifically to the pre-hearing stage, the hearing itself and closing argument. These insights into the effectiveness of counsel who appear before the Tribunal are based upon the collective experience of members of the Tribunal (the decision makers) and staff.

The Importance of Effective Advocacy

As the main quasi-judicial institution operating in Canada's trade remedies system, the Tribunal has a diverse mandate that includes dumping and subsidy investigations and related appeals, procurement complaints, customs and excise tax appeals, requests for tariff relief and safeguards investigations. Each of these mandates involves different procedures. Some of the cases are conducted with court-like proceedings while others are conducted entirely through the exchange of written documents.

Regardless of the nature of the case, the representations of counsel on behalf of parties – whether it is by way of written submissions, oral submissions or both – play an important role in the Tribunal's decision-making process. Poor representation means the client's case is not put forward in its best light and, by consequence, the Tribunal members may not fully appreciate the subtleties of a party's case. Conversely, cases which are well prepared and effectively presented have a positive effect on the Tribunal members and their thinking.

Succinctness and careful attention to efficiency and the preservation of time are fundamental aspects of effective advocacy before the Tribunal, given its duty to conduct proceedings as informally and expeditiously as the circumstances and considerations of fairness permit.[2]

General Guidelines for Effective Advocacy

The following are general guidelines for preparing and delivering effective advocacy before the Tribunal:

- **Understand the Tribunal's jurisdiction, rules and procedures:** Counsel should develop a comprehensive understanding of the Tribunal's enabling legislation (the *Canadian International Trade Tribunal Act*), the applicable rules of procedure (for example, as set out in the *Canadian International Trade Tribunal Rules* and the *Canadian International Trade Tribunal Procurement Inquiry Regulations*) and any relevant policies, guidelines or practice notices. It is also important to respect case-specific instructions or processes as directed by the Tribunal. Referring to past decisions of the Tribunal may provide further guidance in relation to, for example, matters of jurisdiction.

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1. Canadian International Trade Tribunal "Management of Cases before the Tribunal" *Practice Notice* (April 2014), online: CITT <http:// http://www.citt-tcce.gc.ca/en/Management_cases_before_tribunal_e >.
2. *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*], s. 35; *Canadian International Trade Tribunal Rules*, S.O.R./91-499 [*Rules*], Rule 3.

- **Prepare, prepare, prepare:** It quickly becomes clear to the Tribunal when counsel is well prepared, just as it can be painfully obvious when that is not the case. Thorough preparation typically involves interviewing witnesses, researching facts and law, refining written and oral arguments, dissecting opposing counsel's submissions, identifying not only the strong points of your case but also the weaknesses and determining how to address those weaknesses, and preparing witnesses for questioning.
- **Create and develop a strategy for the case:** Developing a detailed strategy or theory of the case will help counsel to ensure that their submissions are well organized and cogent. Counsel should have a clear picture of what evidence is needed to establish the various elements supporting their theory of the case, and how they will introduce that evidence.
- **Keep it simple:** Dramatic flair, aggressive cross-examination tactics and long, rambling submissions do not make for effective advocacy. Plain language works best. The most effective submissions (oral or written) are clear, logical and convincing presentations of the relevant facts and arguments.

The following tips for effective advocacy are generally applicable in cases before the Tribunal that involve court-like proceedings (e.g. customs and excise appeals or dumping and subsidizing investigations). They should be read together with the relevant Tribunal guidelines on matters of procedure, case management and confidential information.

1. The Pre-Hearing Stage

a) Written submissions: When filing written submissions, remember: less is more. Counsel should refrain from supplementing their submissions with extraneous information and material of only marginal or tangential relevance to the matters in issue. It is easier for the Tribunal to understand the essence of a case where the submissions are succinct and cogent. Every effort should be made by counsel to file concise submissions and only those supporting materials that are relevant to and probative of the matters in issue. That being said, it is also important to file briefs that are complete, to avoid a situation where the Tribunal must request supplementary information. Finally, when citing the Tribunal's legislation[3] or Canada's international trade agreements, it is unnecessary to include the full text of the relevant provisions in written submissions.

b) Witnesses: The Tribunal requires counsel to provide notice of how many witnesses they intend to call at least ten days before the hearing. However, counsel should alert the Tribunal well in advance of the hearing date if a witness will need an interpreter. Counsel should ensure that any witnesses they intend to call are aware of the purpose of examination and cross-examination and the types of questions they may encounter. Poorly prepared witnesses are a liability. Their effectiveness is directly proportionate to their ability to respond truthfully, succinctly and knowledgeably to a range of questions.

c) Experts: Only use expert evidence when necessary. Counsel should carefully consider what value-added the expert will bring to the case and how the expert evidence will support their theory of the case. If an expert report fails to provide a detailed explanation of what the expert intends to say, it may be rejected by the Tribunal. When an expert report is filed,

3. For example, the *Canadian International Trade Tribunal Act*, the *Canadian International Trade Tribunal Rules*, the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, the *Special Import Measures Act*, the *Special Import Measures Regulations*, the *Customs Act*, the *Customs Tariff*, and the *Excise Tax Act.*

it ought to be accompanied by a clear statement of the area of expertise in which counsel intends to qualify the expert. Counsel must ensure that the credentials of proposed experts match the area they are being asked to address and that they have sufficient qualifications to warrant their recognition as an expert in that area.

2. The Hearing

a) Time allocations: For dumping and subsidizing cases, counsel will be canvassed for time estimates. These estimates will be shortened as necessary to meet the hearing time expectations, and availability, of the Tribunal. Counsel should be prepared to confirm the schedule at the outset of the hearing. Counsel are expected to adhere to any established time allocations throughout the hearing.

b) Qualification of experts: Before testifying, an expert witness must be qualified as such by the Tribunal. Counsel responsible for presenting the expert is responsible for convincing the Tribunal that the witness is in fact an expert in the subject matter in which they will be asked to express an opinion by questioning the witness on their qualifications. Opposing counsel has the right to cross-examine the witness in an attempt to disprove or narrow their qualifications or establish that the expert's opinion evidence should be given little weight. In order to satisfy the Tribunal that the witness should be accepted as an expert, counsel must establish that their qualifications and experience match the proposed area of expertise and that their opinion evidence is relevant and necessary to assist the Tribunal in making a well informed decision. The Tribunal can also question the proposed expert's qualifications even if opposing counsel does not take issue with them, and it may reject requests for qualification or narrow the scope of the expert's qualification, as necessary.

c) Direct examination (examination in-chief): Efficiency should be considered of paramount importance when examining one's own witnesses, including regular and expert witnesses. Counsel should ensure that their witnesses are well-prepared and able to give their testimony clearly and succinctly, without counsel leading the witness. Direct examination will be most effective where it elicits from a witness the relevant facts needed to support counsel's arguments and advance their theory of the case, as set out in their brief. Counsel should know the answer their witness is going to give before asking a particular question. Where a witness is poorly prepared and cannot answer questions, it is a direct reflection on their counsel. Such gaffes are obvious to Tribunal members. However, counsel should also avoid over-rehearsing their witnesses. An honest, frank witness will likely be seen as more credible by the members of the Tribunal than a glib one who might be perceived as stretching the truth. Rather than trying hide or gloss over certain aspects of the witness testimony that may not completely line up with counsel's theory of the case, counsel should consider and prepare dealing with that evidence in closing argument.

d) Cross-examination: Effective counsel will have a very clear idea of what issues they want to probe in cross-examination. This can be developed well in advance of the hearing, by separating the key issues from the marginal issues in line with the overall case strategy. While leaving room for spontaneity, counsel should know exactly where they want to focus and refrain from asking non-essential questions. Questions should be kept short and grouped by subject matter. In the Tribunal's experience, counsel often spend too much time asking questions that are of marginal relevance or designed solely to fluster a witness. In particular, counsel should not try to "outsmart" expert witnesses as this will likely result in counsel being drawn into a world of subject matter detail they may not be prepared to effectively deal with, while creating confusion for the Tribunal. An alternate approach would be to probe the experts' weak spots, including their objectivity, and ensure that their testimony is limited to the area in which they have been qualified.

Counsel are advised against using unnecessarily aggressive cross-examination tactics which can make them, not the witness, be looked upon poorly. Counsel may be firm during cross-examination but should be respectful of witnesses. If a witness is evasive or giving clearly incomprehensible answers, counsel is better off moving the testimony along; such witness behaviour is plainly obvious to the Tribunal and will be weighed accordingly.

e) Evidence: The Tribunal has a significant amount of discretion to determine its own procedures and is not strictly bound by the general rules of evidence, provided that it follows the rules of natural justice. Thus, the Tribunal can and typically does admit hearsay evidence. Counsel making hearsay objections should therefore be prepared to identify and explain the weakness of that evidence, aside from the fact that it is hearsay. Where the Tribunal is persuaded that the evidence is unreliable, that will go to the weight accorded the information rather than its acceptability. In cases where counsel is clearly abusing the Tribunal's practice of allowing hearsay evidence, the Tribunal may intervene and refuse to allow the introduction of such evidence. For example, if counsel seeks to rely solely on hearsay evidence despite the availability of other direct sources of the relevant information, they can expect that the Tribunal will ask them to present the relevant documentation or witnesses who have first-hand knowledge.

f) Tribunal questions: When the panel asks where counsel is going with a witness or a particular line of argument, counsel should recognize the cue that the panel is struggling to understand the presentation, or believes that counsel may be lost or focusing on an area that is only of only marginal or tangential relevance to the matters in issue. In such instances, counsel should react to these cues accordingly.

3. Closing Argument

a) Develop a road map: Even before the hearing begins counsel should have a clear sense of the issues and structure for their closing argument. Certainly, matters arising in the hearing will influence counsel's summation, but the road map should be developed in advance and designed to persuade the panel to accept their theory of the case.

b) Frame the argument: As a starting point, providing an outline of the main points that will be argued is a favourable approach. The Tribunal will appreciate the clarity that such a framework gives. This will also set the tone for counsel's arguments and get the panel to start thinking about their analytical approach.

c) Recount the evidence: Counsel must not give evidence in closing argument – that is what witnesses are for. Counsel may find it helpful to prepare a point form outline noting references to the record, for reference during closing argument. However, counsel should avoid recounting all the evidence on each argument and instead focus on the key elements of their case. It is important to be mindful of time allocations. Counsel should be respectful of the witnesses and other counsel, and avoid the use of sarcasm or exaggerated criticism.

d) Argument: The closing argument is essentially a preview of what counsel/the party they represent want the decision to say. Counsel should focus on explaining how the facts and the law combine to allow the Tribunal to adopt their theory of the case. Those counsel who "kitchen-sink" their arguments may take away from their stronger arguments that get mixed in with less persuasive ones. While it is important to highlight the strengths in a party's case, counsel should not ignore weaknesses. The Tribunal cannot ignore them and will want to hear why these problem areas should not affect the party's position. The Tribunal appreciates when counsel are able to admit the weaknesses in their case and perhaps even go so far as to withdraw an argument that was clearly not proven by the evidence.

e) Member's questions: Counsel should be prepared for active questioning from the panel during closing argument. In some cases the panel will notify counsel in advance of the issues they will be asked to address.

f) Reply submissions: These should be kept brief. Counsel should only address issues arising from the submissions of opposing counsel that were not previously addressed, and avoid merely re-stating their arguments.

g) Public versus *in camera* submissions: Counsel should avoid at all costs having to go in camera for the purposes of closing argument. If counsel feels they must refer to confidential information, the best approach is to do so by reference to the relevant part of the testimony and record. The Tribunal can read those references after the hearing.