Duties Administrative Tribunals Owe All Parties

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Graham J. Clarke

Arbitrator / Mediator

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INTRODUCTION[1]

As the years pass, the specifics of a lot of the cases you pleaded fade from memory.

But you never seem to forget those thankfully rare situations where a decision maker failed to respect the duties owed to your clients.

Sometimes, depending on the written reasons, you can succeed on judicial review. Of course, this "win" has already saddled your client with needless additional costs.

On other occasions, though, you may only sense that a fair process did not occur. But to meet the burden of proof for a judicial review, you have to have evidence.

In a labour law practice, the fact lawyers generally choose their labour arbitrator greatly improves accountability. Most decision makers, however, even in some labour matters, are imposed on the parties.

Several of the leading administrative law cases have their genesis in a party somehow learning about what transpired behind the scenes at an administrative tribunal (AT). Only this happenstance allowed the party to then question the AT's process before the courts.

The administrative law cases include situations where someone other than the appointed decision maker may have actually made the decision. This concern can arise upon learning, somewhat by accident, that a group discussion had taken place about a panel's draft decision. Or, a party may learn about the extent of legal advisors' involvement in drafting an AT's decision.

In other situations, the reasons alone may cause a party to suspect that the AT was determined to arrive a certain conclusion, regardless of the facts or the law placed before it.

In these various scenarios, a party may believe that the doctrine of legitimate expectations has not been met[2]. But can they prove it?

What then are some of the duties ATs owe the parties[3]? And how might ATs be assessed to ensure they respect these duties?

By focusing on duties, this paper will examine how ATs are expected to serve the parties[4]. The duties apply to everyone working at ATs; it is not only the appointed decision makers who owe duties to the parties.

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[1] This is a revised version of a paper originally presented at the Canadian Institute's *Advanced Administrative Law & Practice* conference held in Ottawa on October 25-26, 2016.

[2] In Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, 1999 CanLII 699, the Supreme Court of Canada noted, *inter alia*, that a party's legitimate expectations may require, under the duty of fairness, that certain procedures be followed in the decision making process. In Green v. Alberta Teachers' Association, 2016 ABCA 237, the appellant had a legitimate expectation that her appeal would only be dismissed by a panel majority, and not in the case of a 2-2 tie.

[3] This paper uses the term "parties" rather than "client", the latter a term heard frequently in government circles. Parties are usually forced to use an AT's services. True clients, on the other hand, can choose from whom they want to purchase services.

[4] This paper does not address the important issue of the self-represented litigant. That subject has been previously examined in Labour Boards and Self-Represented Litigants, Canadian Association of Labour Lawyers, CALL/ACAMS 2014 Conference, June 12-15, 2014.

This paper will also examine some of the governance initiatives various legislatures have brought forward in an effort to improve AT transparency and accountability. ATs, while falling under the executive branch, are fundamentally different from hierarchical government departments.

In a sense, ATs are more akin to boards of directors. Boards owe duties to shareholders; ATs owe duties to the parties. Governance reviews, including independent audits, can help evaluate the extent to which both boards of directors, and ATs, respect the duties imposed on them.

ADMINISTRATIVE TRIBUNALS ARE NOT COURTS

Administrative tribunals: Creatures of the Executive Branch

Three branches[5] govern Canada: the executive (Government), the legislative (Senate; House of Commons) and the judicial (Courts). ATs fall within the executive branch, rather than under the judicial branch[6].

The varied functions ATs perform readily explain their placement. While some ATs, like labour boards, must act in a quasi-judicial manner and remain at arm's length from government, others exist to help craft government policy[7].

The Supreme Court of Canada's (SCC) decision in *Ocean Port Hotel Ltd. v British Columbia*[8], remains the leading case on the issue of AT independence and the differences between courts and ATs:

> *32 Lamer C.J. also supported his conclusion with reference to the traditional division between the executive, the legislature and the judiciary. The preservation of this tripartite constitutional structure, he argued, requires a constitutional guarantee of an independent judiciary. The classical division between court and state does not, however, compel the same conclusion in relation to the independence of administrative tribunals. As discussed, such tribunals span the constitutional divide between the judiciary and the executive. While they may possess adjudicative functions, they ultimately operate as part of the executive branch of government, under the mandate of the legislature. They are not courts, and do not occupy the same constitutional role as courts.*

[5] Overview of the Canadian Parliamentary System

[6] A note of appreciation to Peter Englemann and Colleen Bauman for sharing their earlier paper: "*A Precarious Balance: The Independence of Administrative Tribunals in Canada*", The Canadian Institute's 14th Annual Advanced Administrative Law and Practice, November 2014 (Ottawa).

[7] For example, under s. 8 of the Telecommunications Act, SC 1993, c 38, the Governor in Council may, by order, issue to the Canadian Radio-Television and Telecommunications Commission (CRTC) directions of general application on broad policy matters. Appeals from those CRTC decisions lie to the federal cabinet: s. 12.

[8] [2001] 2 SCR 781, 2001 SCC 52

Differences between judges and AT decision makers are significant, particularly in the area of independence.

In a recent case, the issue arose whether a newly elected Saskatchewan government could remove a labour board's existing Chair and Vice-Chair, before the end of their fixed term appointments. The Saskatchewan Court of Appeal[9] (SCA) described the issue:

> *[1] Following the Saskatchewan general election held on November 7, 2007, which saw a change of government, the Lieutenant Governor in Council made an order-in-council terminating the appointments of the then chairperson and vice-chairpersons of the Saskatchewan Labour Relations Board and appointing a new chairperson.*
>
> *[2] The order-in-council terminating these appointments was made on the authority of section 20 of The Interpretation Act, 1995, S.S. 1995, c. I-11.2. This section empowers the Lieutenant Governor in Council, on a change of government, to bring to an end the term of office of any member of any board, commission, agency, or other appointed body of the Government of Saskatchewan. There is an exception in the case of persons whose appointments are subject to termination by the Legislative Assembly, but the exception does not apply to members of the Labour Relations Board.*

The SCA, after considering *Ocean Port*, *supra*, reiterated that administrative tribunals did not enjoy the same constitutional protection of their independence that the courts enjoy. Legislatures can reserve the right to replace administrative tribunal members, even if their terms have not expired:

> *[51] These passages plainly contain expressions of principle of general application and, therefore, suggest that in light of the fundamental distinction between courts and administrative tribunals, (including administrative tribunals empowered to make quasi-judicial decisions), the independence of the courts is constitutionally secured, whereas that of administrative tribunals is not—not unless the proceedings before a tribunal engage the rights guaranteed by section 7 or 11(d) of the Canadian Charter of Rights and Freedoms.[3] Otherwise, it is for the legislatures or Parliament, as the case may be, to determine the composition, structure, and degree of independence of administrative tribunals.*
>
> *[52] To be clear about the implications of this in relation to the question before us, I note that the Federation of Labour and two unions did not contend that proceedings before the Labour Relations Board engage the rights guaranteed by sections 7 and 11(d) of the Charter. Rather, they rested their argument on the unwritten constitutional principle of judicial independence grounded in the preamble to the Constitution Act, 1867. And they argued that this principle extended to members of administrative tribunals responsible for quasi-judicial decision-making of the kind required of the chairperson and vice-chairpersons of the Labour Relations Board.*
>
> *…*

[9] Saskatchewan Federation of Labour v Government of Saskatchewan, 2013 SKCA 61, leave to appeal to the SCC refused, 2013 CanLII 83789

> *[56] Given what I regard as the clear import of these passages, I am of the view the argument of the Federation of Labour and the two unions is not only problematic but must fail. In other words, I am of the opinion that, in light of reasons for judgment in Ocean Port, the unwritten constitutional principle of judicial independence grounded in the preamble to the Constitution Act, 1867 cannot be seen to extend to the Saskatchewan Labour Relations Board, including the chairperson and vice-chairpersons of the Board.*

While ATs fall under the executive branch of government, there can still be significant differences in their independence. The SCC, in *Bell Canada v Canadian Telephone Employees Association*[10], noted that some ATs[11] benefit from significant independence from the executive branch, given their structure and duties:

> *24 The fact that the Tribunal functions in much the same way as a court suggests that it is appropriate for its members to have a high degree of independence from the executive branch. A high degree of independence is also appropriate given the interests that are affected by proceedings before the Tribunal — such as the dignity interests of the complainant, the interest of the public in eradicating discrimination, and the reputation of the party that is alleged to have engaged in discriminatory practices. There is no indication in the Act that the legislature intended anything less than a high degree of independence of Tribunal members. Members' remuneration is fixed by the Governor in Council, and is not subject to their performance on the Tribunal: s. 48.6(1). Members hold office for a fixed term of up to five years (or up to seven years, in the case of the Chairperson and Vice-chairperson) (s. 48.2(1)); and their terms may only be extended to enable them to finish a hearing that they have already commenced. Further, the Chairperson is removable only for cause; and before a member is disciplined or removed, the Chairperson may request the Minister of Justice to look into the situation, who in turn may request the Governor in Council to appoint a judge to conduct a full inquiry (s. 48.3). All of these features of the statutory scheme suggest that the legislature intended the Tribunal to exhibit a high degree of independence from the executive branch.*

One currently developing case questions the validity of the executive's decision to remove a decision maker "for cause"[12]. In a companion case[13] examining harassment findings made against the decision maker, the Federal Court criticized the independent investigator for being "closed-minded" and for acting, along with the AT's Chair, in a procedurally unfair way.

Quasi-judicial ATs function with significant independence. They have a concomitant duty to defend that independence, even if it could negatively impact future reappointments. This unease between independence and the appointment process recently led one administrative law expert to opine that most ATs lack "independence", "impartiality" and are only "providentially competent"[14].

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[10] [2003] 1 SCR 884, 2003 SCC 36
[11] Human rights tribunals and labour boards would be two examples.
[12] Shoan v. Canada (Attorney General), 2016 FC 1031
[13] Shoan v. Canada (Attorney General), 2016 FC 1003 at paragraphs 98 and 146.
[14] Ron Ellis, *Unjust by Design: Canada's Administrative Justice System* (Vancouver: UBC Press, 2013)

The next sections of this paper will focus on quasi-judicial tribunals and the various duties they owe the parties.

THE DUTY OF EFFICIENCY (DELAY)

Introduction

ATs have a duty to issue decisions on a timely basis, especially in labour relations matters. Legislators sometimes impose a time limit within which a panel must issue its decision[15].

Where an AT's delay is egregious, the entire proceeding may have to be stayed. However, even delay which does not meet this high threshold still prejudices the parties' interests.

For example, a decision which orders reinstatement in employment and damages harms both parties if the decision maker has taken months, or even years, to issue it.

Excessive Delay Can End a Proceeding

At the extreme end, inordinate delay violates natural justice and procedural fairness. In *Blencoe v. British Columbia (Human Rights Commission)*[16], the SCC's five-person majority focused on prejudice to the hearing process itself:

> *121 To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate (Brown and Evans, supra, at p. 9-68). There is no abuse of process by delay per se. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. While I am prepared to accept that the stress and stigma resulting from an inordinate delay may contribute to an abuse of process, I am not convinced that the delay in this case was "inordinate".*
>
> *122 The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.*

[15] Section 14.2(2) of the Canada Labour Code (Code) requires panels to issue a decision within 90 days of taking a matter under deliberation. The Chair can extend this delay.
[16] [2000] 2 SCR 307, 2000 SCC 44

The SCC's four-person minority[17] gave greater weight to the prejudice to a party, even if the hearing itself might not be compromised:

> *154 Abusive administrative delay is wrong and it does not matter if it wrecks only your life and not your hearing. The cases that have been part of this evolution have sometimes expressed the point differently, but the key consideration is this: administrative delay that is determined to be unreasonable based on its length, its causes, and its effects is abusive and contrary to the administrative law principles that exist and should be applied in a fair and efficient legal system.*

> *155 Unreasonable delay is not limited to situations that bring the human rights system into disrepute either by prejudicing the fairness of a hearing or by otherwise rising above a threshold of shocking abuse. Otherwise, there would not be any remedy for an individual suffering from unreasonable delay unless this same individual were unlucky enough to have suffered sufficiently to meet an additional, external test of disrepute resulting to the human rights system. Such a limitation may arise from a fear that the main remedy available would be the blunt instrument of the stay of proceedings. However, as we will see below, a remedy other than a stay may be appropriate in other cases where ongoing delay is abusive. It is true that some of the cases that have most developed the doctrine of abusive delay involved lengthier periods of time that, in conjunction with other factors, warranted stays of proceedings (see, e.g., the cases cited by Bastarache J. at paras. 117-18). They were cases that passed the highest threshold of abusiveness. Because of this, they did not discuss a lower threshold of unreasonable delay that might warrant some kind of judicial action and different, less radical, remedies than a stay in the administrative proceedings.*

Understandably, courts are reluctant to set aside an AT's process or decision, merely due to excessive delay. In *Walsh v. Canada (Attorney General)*[18], even a four-year delay did not violate procedural fairness[19]. However, in *Totera v The Law Society of Upper Canada*[20], the Ontario Divisional Court agreed that a five-year delay in the investigation of a lawyer prejudiced his disciplinary hearing.

Evidently, if a party causes some of the delay, rather than the AT, then its request for a stay will be weakened[21]:

> *[105] In written submissions, the applicant relied on Blencoe v British Columbia (Human Rights Commission), [2000] 2 SCR 307 to argue the delay in this matter would bring the human rights system into dispute. However, I find the CHRC reasonably addressed this issue in the Report after accepting the respondent's submissions that much of the delay*

[17] The Court was unanimous, however, to lift the stay of proceedings which had been imposed due to delay.
[18] 2016 FCA 157
[19] The case involved a grievance under the *National Defence Act*, RSC 1985, c N-5.
[20] 2016 ONSC 1578
[21] Canada Post Corporation v. Canadian Postmasters and Assistants Association (CPAA), 2016 FC 882

> *occurred due to the applicant's conduct and that "It would appear more likely that a negative impact on the human rights system could occur if the Commission decided not to deal with the complaint given the complexity of the issues, the complexity of a pay equity investigation and the issues between the parties that remain unresolved." While the applicant had the right to make the preliminary objections under subsection 41(1) that contributed to prolonging this matter, this does not mean the time expended on those objections can support an argument for dismissal of the Complaint for delay.*

Inordinate delay may terminate a proceeding without any decision on the actual merits of the case. But what of delay which is not inordinate?

Non-Fatal Delay Still Harms the Parties

Parties have legitimate concerns about the time it takes an AT to process a matter or to render its decision. Even though a significant delay may not terminate an entire proceeding, it still impacts the duty of efficiency that the AT owes the parties. There is simply no excuse for an AT to take years to write a decision, once the hearing has concluded.

Prejudicial delay is not measured solely by how long a matter has taken from beginning to end. Delay attributable to judicial economy may occur if one AT puts its proceeding on hold, due to another concurrent proceeding potentially resolving the matter[22].

But the AT must still remain diligent and monitor the file which has been deferred, since the merits of that file have yet to be addressed.

In *Expertech Network Installation Inc.*[23], an unfair labour practice complaint had been filed in November, 2004. The Canada Industrial Relations Board (CIRB) initially dismissed the complaint, but a reconsideration panel later overturned that decision[24]. The reconsideration panel deferred deciding the complaint, as allowed by the *Code*, so that the matter could proceed to arbitration. An arbitrator issued his decision in December, 2006 at which point the complainant asked that the Board deal with the original complaint.

Up to this point, there was a reasonable explanation for the delay arising since the November 2004 filing of the complaint. Some matters take time, especially if more than one AT has become seized with related aspects of the same matter.

In May, 2007, the Board panel hearing the case advised it could decide the matter based on the parties' pleadings and would "issue its decision in due course".

And then nothing happened.

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[22] For example, section 16(L.1) of the *Code* gives the CIRB the power "to defer deciding any matter, where the Board considers that the matter could be resolved by arbitration or an alternate method of resolution". Judicial economy is a legitimate consideration when multiple, but related, matters are taking place: Bell Mobility Inc., 2012 CIRB 626

[23] 2009 CIRB 481

[24] For an explanation of the CIRB's current reconsideration practice, see Petrovic, 2015 CIRB 788

Finally, in October, 2009, more than two years after that "decision", the parties agreed that a different panel could decide with the case:

> *[26] On May 4, 2007, a different panel of the Board advised the parties of the following:*
>
> *The Board wishes to advise the parties, at this stage, that it is of the view that the issue between the parties in regard to whether all matters have been addressed, and more specifically, whether Expertech is required to offer the VER/STP to a larger number of clerical and associated bargaining unit employees, can be decided by the Board without the necessity of an oral hearing. Consequently, the Board will not be scheduling a hearing and will issue its decision in due course.*
>
> *[27] Unfortunately, that particular panel was not able to issue its promised decision.*
>
> *[28] In October 2009, in order to deal with the CEP's 2004 complaint, the Board suggested that a different panel decide the matter. The parties did not object to this way of proceeding.*

Ultimately, with the parties' consent, a new panel dealt with the case and issued its decision following a review of the parties' positions.

Expertech illustrates, among other things, the potential false economy associated with an AT issuing decisions which do not really decide anything. If detailed reasons will follow within a week or two, then there is nothing wrong with an AT issuing a "bottom line" decision to signal to the parties what is coming down the pipe[25]. This practice can assist the parties when they are in the midst of collective bargaining.

Where the main decision is imminent, the panel issuing the bottom line decision will have already fully analyzed the case and only needs a little more time to polish their full reasons.

However, as noted in this earlier paper[26], a bottom line decision issued before any reasons have been drafted may delude decision makers into believing they have actually accomplished something. Instead, these types of bottom line decisions simply leave the parties in limbo. Without the benefit of reasons, the parties have no idea whether to pursue either reconsideration, or an appeal, before the AT, or judicial review before the courts.

More fundamentally, a court may find that a significant delay between a bottom line decision and the actual reasons suggests the AT never initially conducted a proper legal analysis. The court then asks itself whether the AT later drafted reasons solely to support its hasty and superficial conclusion.

In a criminal case, *R. v. Teskey*[27] *(Teskey)*, the SCC referred to this drafting process as "result-driven reasoning":

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[25] See Canada Post Corporation, 2012 CIRB 635, as well as this bottom line decision which was followed shortly afterwards with detailed reasons for decision: VIA Rail Canada Inc., 2011 CIRB 569

[26] *Efficient Administrative Tribunals: Why Insist on a Cadillac when a Smart Car will do?* 9th Annual Advanced Administrative Law & Practice, The Canadian Institute, October 28-29, 2009.

[27] [2007] 2 SCR 267, 2007 SCC 25

> *18 Reasons rendered long after a verdict, particularly where it is apparent that they were entirely crafted after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge may not have reviewed and considered the evidence with an open mind as he or she is duty-bound to do but, rather, that the judge has engaged in result-driven reasoning. In other words, having already announced the verdict, particularly a verdict of guilt, a question arises whether the post-decision review and analysis of the evidence was done, even subconsciously, with the view of defending the verdict rather than arriving at it…*

The Ontario Court of Appeal (OCA) came to a similar conclusion recently when it concluded that a judge's amended endorsement was an after the fact justification for his decision, rather than an articulation of the reasoning leading to the conclusion[28].

That same analysis applies to ATs[29]. For example, in *Jacobs Catalytic Ltd. v. International Brotherhood of Electrical Workers, Local 353*[30], the OCA applied the *Teskey* rationale when it took issue with an original OLRB panel issuing supplementary reasons:

> *[52] While Teskey is a criminal case, the rationale applies here. When an adjudicator purports to issue the final reasons for a decision and later issues supplementary reasons, without explaining why the supplementary reasons did not form part of the initial reasons, a reasonable person may apprehend that the adjudicator engaged in results-based reasoning in order to shore up the decision.*

Efficiency is important. But never at the expense of proper analysis.

Delay Does Not Include the Time Required for Proper Deliberation

Notwithstanding the problems which can arise from an AT's undue delay, an overemphasis on timeliness alone can lead to unwise shortcuts.

Not all ATs are required to hold a traditional oral hearing. Generally, under the *audi alteram partem* rule, an AT must hear from both sides before making a decision. However, in certain situations, a hearing can take place based on the parties' pleadings, if the underlying legislation provides for it[31].

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[28] Stuart Budd & Sons Limited v. IFS Vehicle Distributors ULC, 2016 ONCA 60

[29] See Johanna Braden, *Procedural Fairness/Bias: The Latest Word*, Law Society of Upper Canada, 6 Minute Administrative Lawyer, February, 2010

[30] 2009 ONCA 749

[31] For example, section 16.1 of the Code reads: "The Board may decide any matter before it without holding an oral hearing".

An AT does not decide whether to hold an oral hearing based on its current workload or to cut down expenses. Rather, only the specific facts in each case determine whether natural justice requires an oral hearing[32].

Adjournment requests must also be considered fully, unless it appears that a party is intentionally attempting to delay a proceeding[33].

An overemphasis on timeliness may lead to another potential false economy if an AT ignores legitimate questions about its jurisdiction. It does not matter if the parties purport to consent to jurisdiction or do not even raise the issue. An AT has an independent duty to ensure it is acting within its jurisdiction[34]:

> *[33] The parties do not limit the scope of any constitutional issue before the Board. Whether CUPW raised the issue of the proper characterization of TNT Canada's undertaking or not, the Board must still satisfy itself that it has jurisdiction over the application.*
>
> *[34] The same principle applies when the parties purport to consent to the Board's jurisdiction. If the Board is not certain whether the Code applies, the parties will be called upon to provide appropriate facts and legal submissions (see, for example, Allcap Baggage Services Inc. (1990), 79 di 181; and 7 CLRBR (2d) 274 (CLRB no. 778), at pages 184–185; and 276–277).*

An AT which raises legitimate jurisdiction questions on its own motion does not cause delay. Rather, it ensures that it respects its duty to prepare a proper record for any reviewing court[35].

Ignoring such questions, especially in the labour law context, could create a jurisdictional house of cards with potentially devastating consequences for the parties down the road. Years of successful collective bargaining could disappear solely for jurisdictional reasons.

ATs track their file statistics very well. A lot of hard work by staff goes into preparing statistical reports[36]. Just like in private law firms, tracking performance is essential.

Focusing solely on statistics, however, is like scoring a hat trick during the national anthem. ATs have to respect many other equally important duties in order to serve the parties properly.

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[32] Global Television v. Communications, Energy and Paperworkers Union of Canada, 2004 FCA 78

[33] The Law Society of Upper Canada v. Igbinosun, 2009 ONCA 484 and Law Society of Upper Canada v. Daniel Frank Daly, 2013 ONLSHP 151

[34] TNT Express (Canada) Ltd., 2012 CIRB 629 . This tends to arise more often at the federal rather than provincial level.

[35] Northern Telecom v. Communications Workers, [1980] 1 SCR 115

[36] See, for example, the CIRB's Annual Report. Due to the creation of the Administrative Tribunals Support Service of Canada, the CIRB no longer produces for Parliament a Report on Plans and Priorities and a Departmental Performance Report.

THE DUTY TO EXPLAIN (REASONS)

Introduction

A quasi-judicial panel owes the parties an explanation of the reasons for its decision. The days of the "Because I Said So" school of decision writing have long since passed.

This duty obligates decision makers to make sometimes difficult findings of fact and to explain how those findings were made[37]:

> *[26] In providing reasons for a decision, a decision-maker must explain both what is being decided and why it is being decided (Law Society of Upper Canada v. Neinstein (2010), 2010 ONCA 193 (CanLII), 99 O.R. (3d) 1, [2010] O.J. No. 1046 (C.A.)). The obligation to give reasons -- to explain why it has reached the decision it has -- is part of the duty of procedural fairness. A breach of the rules of procedural justice is a sufficient ground, standing alone, to quash the decision (Clifford v. Ontario Municipal Employees Retirement System (2009), 98 O.R. (3d) 210, [2009] O.J. No. 3900, 2009 ONCA 670 (CanLII), at para. 22).*
>
> *[27] The arbitrator did not make factual findings with respect to material allegations. It is not clear from his reasons why he did not do so. This failure satisfies neither a standard of reasonableness nor correctness.*

Evidently, a panel must make its own findings of fact, as well as draft its own reasons. In *Khan v. College of Physicians & Surgeons of Ontario*[38], a case which examined the involvement of counsel in the drafting of a panel's reasons[39], the OCA noted the self-evident rationale that only the appointed decision makers can make the decision:

> *I accept both of the underlying principles put forward by Mr. Thomson and Mr. Scott. The reasons for a decision made by the Committee must be those of the Committee: Del Core v. College of Pharmacists (Ontario) (1985), 1985 CanLII 119 (ON CA), 51 O.R. (2d) 1, 10 O.A.C. 57 (C.A.), at p. 8 O.R., p. 62 O.A.C., leave to appeal to the Supreme Court of Canada refused, [1986] S.C.R. viii, 57 O.R. (2d) 296 (note). The rationale underlying this principle is self-evident. In discipline proceedings the parties are entitled to know, and if so inclined challenge on appeal the Committee's decision. Someone else's explanation for or rationalization of that decision is no substitute for the Committee's reasons. Without the reasons of the Committee, a party cannot know why the decision was made, or who made the decision. The right of appeal also becomes illusory.*

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[37] Thames Valley District School Board v. Elementary Teachers' Federation of Ontario (Thames Valley Local), 2011 ONSC 1021

[38] 1992 CanLII 2784

[39] Counsel had explained at a party's request his role in the decision making process. This provided the underlying facts on which this case was argued.

The OCA accepted, however, that decision makers may receive assistance. An AT does not have to sequester decision makers away so that they can draft their reasons in a perfect vacuum.

In *Khan*, the OCA was satisfied that nothing inappropriate occurred when counsel assisted a panel, because the following procedure had been followed: i) a panel member drafted the reasons; ii) then, and only then, did legal counsel provide his/her comments and iii) the panel then reviewed the comments, its original draft and finalized the reasons themselves.

While the OCA did not suggest that this was the only possible procedure for ATs to follow, it emphasized that this process ensured "The drafting process followed by the Committee maintained the responsibility of authorship with the Committee and avoided any inference that counsel had co-opted or had delegated to him the reason-writing function".

In the OCA's view, the process leading to the decision makers' written reasons, even though it involved counsel at one point, did not deny Khan a fair hearing.

The Manitoba Court of Appeal has noted that panel members, and no one else, must perform the key tasks "such as organizing the evidence, reaching essential findings of fact and supporting conclusions with respect to credibility, that form a fundamental part of the reasoning that leads to a decision"[40].

In this section, we will examine the duties decision makers must respect when writing their reasons. This process may occasionally involve the assistance of legal counsel, but with some clear limits[41]. ATs as institutions may also adopt internal consultative processes to develop uniform policies.

Ultimately, an AT must maintain a proper balance between a decision maker's duty to draft his/her own reasons, with permissible levels of assistance and/or policy discussions.

The Drafting Process Ensures Decision Makers Fully Understand the Case

Orders and Reasons are different legal concepts[42]. A decision maker's reasons explain the analytical process followed when reaching the decision. The reasons allow a reviewing court to conduct judicial review.

Preliminary panel views following an in camera may change once the designated drafter has finalized a written decision. Accountability to the parties results from the decision maker explicitly:

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[40] Wolfrom v. Assn. of Professional Engineers and Geoscientists of the Province of Manitoba, 2001 MBCA 152 at para 23

[41] In DeMaria v Law Society of Saskatchewan, 2015 SKCA 106, the Saskatchewan Court of Appeal criticized the Law Society for the procedure used in generating a panel's decision, but did not find fault with legal counsel's role which was described as "merely of a clerical or formatting nature".

[42] Section 23 of the *Code* mentions this distinction when indicating how a Board order may be enforced in Federal Court: "The Board shall, on the request in writing of any person or organization affected by any order or decision of the Board, file a copy of the order or decision, *exclusive of the reasons therefor*, in the Federal Court…".

i) explaining the key findings of fact; ii) summarizing the applicable legal principles; and iii) applying those principles to the facts.

A drafter never fully understands a case's intricacy until writing his/her reasons. Lawyers in adversarial proceedings often "offer" to draft a settlement document. They know the importance of being in charge of the draft to ensure it says precisely what they want and nothing else. In order to do that draft, they have to know the case thoroughly.

Decision drafters often discover that a case which may have initially appeared simple contains some unexpected nuances. A drafter may well change his/her preliminary conclusion after properly wading through the evidence and the parties' submissions.

It is for this reason that the courts frown upon premature bottom line decisions and "result driven reasoning", *supra*.

Three person panels demonstrate the challenge of truly understanding a case.

While one person will draft the reasons on behalf of the panel, the review of those draft reasons by the other two panel members can be a surprisingly complex task. The question is not whether the result is correct. Rather, each panel member must satisfy himself or herself that they can live with the reasons from a substantive law perspective. This requires a thorough comprehension of the facts, as well as the applicable law.

It is often easier simply to draft the decision yourself rather than review someone else's reasons.

An analytical drafting process does not mean that the resulting reasons have to be long and legalistic. A proper analysis should result in shorter reasons[43].

In *Vancouver International Airport Authority v. Public Service Alliance of Canada*[44] *(VIAA)*, the Federal Court of Appeal (FCA) emphasized that it is the content, rather than the length, which determines the adequacy of reasons:

> *The adequacy of reasons is not measured by the pound. The task is not to count the number of words or weigh the amount of ink spilled on the page. Instead, the task is to ask whether reasons, with an eye to their context and the evidentiary record, satisfy, in a minimal way, the fundamental purposes, above. Often, a handful of well-chosen words can suffice. In this regard, the respondent emphasized that very brief reasons with short-form expressions can be adequate. That is true, as long as the fundamental purposes, above, are met at a minimum.*

A decision maker drafting reasons is not that different from a lawyer pleading a case. Only a full understanding of the facts and the applicable law allows that lawyer to prepare a proper opening statement, lead evidence, conduct cross-examinations and deliver final argument.

Neither a decision maker nor a lawyer pleading a case can perform properly without doing the sometimes heavy analytical lifting.

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[43] "I didn't have time to write a short letter, so I wrote a long one instead." – Mark Twain

[44] 2010 FCA 158 at paragraph 17

Reasons Must Explain and Not Just Conclude

It is easy to state bald conclusions rather then provide a reasoned decision. The courts do not react favourably to reasons which contain nothing but conclusions[45]:

> *[19] Measured against the fundamental concerns and principles, set out above, the Board's reasons fall well short of the mark. They are inadequate.*
>
> *[20] In 13 of the 23 positions found to be in the bargaining unit, the Board simply wrote that "there is no basis to exclude given the job duties," "there is no basis in the information supplied to exclude the position from the unit," or "job duties do not require exclusion." Did the Board apply any principles in these rulings? If so, what are the principles? It is a mystery. The applicants have no idea why they lost, they cannot meaningfully assess whether a judicial review is warranted or formulate any grounds for it in the case of these 13 positions, this Court is unable to conduct any meaningful supervisory role, and there is no transparency, justification or intelligibility in the senses set out above. All we have are conclusions, laudably definitive, but frustratingly opaque.*
>
> *[21] In effect, for these 13 positions, the Board is telling the parties, this Court, and all others, "Trust us, we got it right." In this regard, this case is strikingly similar to Canadian Association of Broadcasters, supra, where the administrative decision-maker asserted a bottom-line conclusion with no supporting information, in effect immunizing itself from review and accountability.*
>
> *[22] In 6 of the 23 positions found to be in the bargaining unit, the Board offered slightly more than a bare conclusion in support of its ruling. On these occasions, the Board included a position in the bargaining unit because it was "at the same level on the organizational chart" or because it was similar, for some undisclosed reason, to a position in the bargaining unit. What was it about the level on the organizational chart or the particular position that led to this conclusion? It is a mystery. In effect, the Board is saying, "Trust us, but here is a hint." But the hint does not shed light on the bases for its decision.*

In a subsequent decision, the FCA noted that evolving case law emphasized that the role of a reviewing court was to decide whether the decision, viewed as a whole in the context of the record, was reasonable[46], *infra*. The reasons form just one part of that record.

Decision makers have the obligation both to demonstrate their reasoning, as well as to come to a reasonable result. In *Dunsmuir v. New Brunswick*[47], the SCC described the importance of the analytical process leading to the decision:

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[45] *VIAA, supra*

[46] *Library of Parliament v. Canadian Association of Professional Employees*, 2013 FCA 237 at paragraph 33.

[47] [2008] 1 SCR 190, 2008 SCC 9

> *[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.*

A reviewing court can go beyond a decision maker's written reasons and consider the proceeding's record[48] when deciding whether a particular decision meets the reasonableness standard[49].

A decision maker must demonstrate how he or she calculated a financial penalty, lest it be suggested that the amounts were simply plucked out of the air[50]:

> *[28] The first step for the Director was to choose a base amount within the $1 to $100,000 range to reflect the harm, potential or actual, caused by the particular violation. He chose the figures of $50,000, $75,000 and $25,000 for the three violations. There is nothing in his summary of calculation or any of the letters he wrote to tell us why those figures reflect the actual or potential harm. We may presume that the Director considered the actual or potential harm to be at the mid-range, upper-end and lower-end of the range, respectively. But we simply do not know what evidence or analysis of harm he relied upon. For all we know, the Director might have selected these numbers in order to raise revenue, an improper purpose under this legislation. Or he might have plucked the numbers from the air, equally improper.*

It is too late on judicial review to suggest an undisclosed "secret guideline" helps explain the decision's calculations[51]. Courts take issue with vague AT decisions which hinder their ability to conduct a judicial review[52]:

> *[32] For all we know, the 20% and 95% percentages might have been plucked out of the air or adopted for reasons extraneous to the legislation. Maybe the Director did not investigate the case enough to gather the evidence necessary to support a decision. We*

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[48] In order to ensure a proper judicial review, it is vital that ATs and the parties ensure a proceeding's full record is placed before any reviewing court.
[49] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62
[50] *Canada v. Kabul Farms Inc.*, 2016 FCA 143 (Kabul)
[51] Kabul, paragraph 37
[52] *Kabul*, supra

> *simply cannot tell. We are left in the dark. In this case, we are a reviewing court that cannot review.*

Adjudicators who award damages must similarly explain their calculations, rather then just conclude with a number[53].

The courts have clearly indicated to decision makers the duties they are expected to satisfy when deciding the parties' cases. The next section explores the appropriateness of decision makers receiving some assistance with their cases.

The Role of Legal Advisors

AT staff serve a vital role. The workload at some ATs would be overwhelming if staff, such as labour relations officers at labour boards, did not settle a large of number of cases prior to the adjudication stage.

Legal advisors may provide advice to decision makers. Decision makers must be aware that sometimes this advice imposes on them a duty to give the parties an opportunity to comment, in order to ensure transparency and fairness[54].

An AT may also have to give notice if it intends to decide a case based on factors neither party put forward.

For example, an AT had its decision overturned when it ignored the parties' positions and, without any notice, adopted a novel interpretation of their collective agreement[55]. Similarly, an adjudicator had his decision overturned after he raised an issue for the first time in his reasons, but without ever allowing the parties to comment[56].

That does not mean, however, that an AT cannot rely on its existing case law, even if the parties' submissions did not refer to all of those cases[57].

Despite AT staff's important role, parties will always have concerns whether third party involvement impacted their entitlement to a fair hearing.

Many cases about the role of legal advisors come from disciplinary bodies which traditionally retain counsel for advice. These cases may also arise more frequently since counsel's role in disciplinary matters is often far more visible to the parties than that of an AT's legal staff. But the principles remain the same.

In *Adair v. Ontario (Health Disciplines Board)*[58], the Ontario Divisional Court intervened when the evidence indicated that the AT's reasons were those of legal counsel, rather than of the panel:

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[53] First Nation Sipekne'katik v. Paul, 2016 FC 769
[54] British Columbia (Attorney General) v. Lee, 2016 BCSC 707
[55] Arsenault v. Canada (Attorney General), 2016 FCA 179 at para 32
[56] First Nation Sipekne'katik v. Paul, 2016 FC 769
[57] Canadian Broadcasting Corporation, 2003 CIRB 253 at paras 61-64
[58] 1993 CanLII 8499

> *When the affidavit of Ms. McIntyre is read with the reasons of White J. made on a motion in this matter, one is driven to the conclusion that a substantial and material portion of the reasons of the board are in the very words of the solicitor to the board. Those words were passed on to the board as advice from the solicitor but in such form that they could be, and in fact were, placed in the reasons.*
>
> *Bearing in mind that the proposition that illegal strike action is, or could be, in itself, dishonourable, unprofessional or disgraceful conduct, was the idea of the solicitor, not the board, that the complainant, in asking the board to review the decision of the Complaints Committee specifically accepted the proposition that illegal strike action was not per se professional misconduct, one cannot have confidence that the decision and reasons of the board are truly its decision and reasons. The appearance exists that the board abandoned its responsibility to make a decision, and give its reasons therefor, to its solicitor. This leaves the reasonable impression that the board did not treat the nurses fairly.*

The Legislator may make it explicit what decision makers have to do if they receive legal advice in the absence of the parties.

For example, section 32(5) of Ontario's *College of Teachers Act, 1996*[59] requires that any legal advice provided to the panel be disclosed to the parties for comment:

> *Members holding hearing not to have taken part in investigation, etc.*
>
> *(4) Members of the Discipline Committee or Fitness to Practise Committee holding a hearing shall not have taken part before the hearing in any investigation of the subject-matter of the hearing other than as a member of the Council or Executive Committee considering the referral of the matter to the Discipline Committee or Fitness to Practise Committee, and shall not communicate directly or indirectly about the subject-matter of the hearing with any person or with any party or representative of a party except on notice to and opportunity for all parties to participate. 1996, c. 12, s. 32 (4).*
>
> *Same*
>
> *(5) Despite subsection (4), the Discipline Committee or Fitness to Practise Committee may seek legal advice from an adviser independent from the parties and, in that case,* ***the nature of the advice shall be made known to the parties so that they may make submissions as to the law.*** *1996, c. 12, s. 32 (5).*
>
> *(Bold added)*

[59] SO 1996, c 12

The involvement of legal advisors, whether external or internal, may raise questions of solicitor-client privilege. This legal advisor role is different from that of "Independent Counsel" at certain types of inquiries. Independent Counsel, as that role is understood for inquires, has no client[60].

The courts accept that an AT's legal staff may attend a hearing. In *Conseil des Innus de Pessamit v. Association des policiers et policières de Pessamit*[61], the FCA dismissed the suggestion that a Board lawyer's presence somehow demonstrated bias:

> *[32] The applicant also complained of the presence of a CIRB lawyer at the hearing before the CIRB. It stated that her presence at the hearing gave rise to a reasonable apprehension of bias. In this regard, suffice it to say that the applicant failed to show that the lawyer's presence could give rise to such an apprehension.*

The courts also accept that there is nothing inherently wrong if panels run their draft reasons past an AT's legal advisors, though only the decision makers make findings of fact[62].

ATs have a duty to ensure its employees and appointed decision makers understand what they can, and cannot, do given their differing roles[63]. Like many things in the challenging area of administrative law, there are no black and white rules. The important thing is to be aware of the issues, educate those working at ATs about the duties they owe the parties and then monitor to ensure everyone follows proper procedures.

The recent decision in *British Columbia (Attorney General) v. Lee*[64] (*Lee*) provides a helpful review of some of the key requirements in this area. The British Columbia Supreme Court (BCSC) examined whether certain legal documents, which had been inadvertently produced, nonetheless remained subject to solicitor-client privilege[65].

The BCSC in *Lee* noted that statutory decision makers and adjudicators can receive legal advice which sometimes even includes drafting assistance:

> *[34] Part of this chain identifies three issues with respect to which legal advice is offered on a specific subject file. In my view, it is neither unusual nor inappropriate for statutory decision-makers and adjudicators to seek, receive, and in some cases, agree with and follow or adopt legal advice provided by legal advisors. In Persons Seeking to Use the Pseudonyms of John Witness and Jane Dependant v. Canada (Commissioner of the Royal*

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[60] Douglas v. Canada (Attorney General), 2014 FC 299 at para 167.
[61] 2010 FCA 306
[62] Bovbel v. Canada (Minister of Employment and Immigration), [1994] 2 FCR 563, 1994 CanLII 3465 (FCA)
[63] All lawyers, whether AT staff or decision makers, remain subject to the oath they took when becoming members of the Bar. For Ontario lawyers, that oath includes: "I shall seek to improve the administration of justice. I shall champion the rule of law and safeguard the rights and freedoms of all persons. I shall strictly observe and uphold the ethical standards that govern my profession".
[64] 2016 BCSC 707
[65] The parties never would have known about this evidence, but for this inadvertent disclosure. Many key administrative law cases have their genesis in one or more parties inadvertently learning about an internal AT procedure which then raised significant fairness concerns.

> *Canadian Mounted Police), 1997 CanLII 6381 (FC), [1998] 2 F.C. 252 (T.D.), relying on Khan v. College of Physicians and Surgeons of Ontario 1992 CanLII 2784 (ON CA), [1992] O.J. No. 1725 (C.A.) [Khan], Mr. Justice Reed commented at para. 18 that:*
>
> *[18] The jurisprudence is clear, then, that a decision maker in the position of the Commissioner may use someone else to write reasons for his decision providing he retains control of the decision-making process and providing that such decision written by another [does] "not . . . create an appearance of bias or lack of independence".*
>
> *[Emphasis added.]*

However, *Lee* noted a fundamental difference between providing advice versus making the actual decision. *Lee* referred to the OCA's comments in *Khan*[66], *supra*, which had raised concerns that individuals, other than the appointed decision makers, might draft the reasons and effectively make the AT's decision:

> *[36] In Khan, Mr. Justice Doherty, writing for the Court, held at paras. 124 and 128:*
>
> *[124] Apart from any specific statutory requirement, the involvement of counsel in the preparation of the reasons for the Committee's decision may raise questions as to the fairness and integrity of the proceedings before the Committee. Mr. Thomson, for the Committee, and Mr. Scott as amicus curiae, addressed these broader concerns. Both argued that the Committee was entitled to the assistance of counsel in the preparation of their reasons. At the same time, both recognized that there were limitations on the extent and nature of the assistance which counsel could provide. They submitted that the involvement of counsel for the Committee in the drafting process fell well within the bounds of permissible assistance and did not impair either the fairness or integrity of the discipline process.*
>
> *…*
>
> *[128] The line between permissible assistance and that which is forbidden must be drawn by regard to the effect of counsel's involvement in the drafting process, on the fairness of the proceedings and the integrity of the overall discipline process. Without attempting an exhaustive description of these concepts, fairness includes considerations of bias, real or apprehended, independence, and each party's right to know the case made against them and to present their own case. Integrity concerns encompass those fairness concerns, but include the broader need to ensure that the body charged with the responsibility of making the particular decision in fact makes that decision after a proper consideration of the merits. If the reasons presented for the decision are not those of the decision-maker, or do not appear to be so, it raises real concerns about the validity of the decision and the genuineness of the entire inquiry.*

Lee also considered when an AT should disclose to the parties the nature of legal advice given to decision makers:

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66 1992 CanLII 2784

> *[37] In Dhillon v. University of Alberta, 1999 ABQB 683 (CanLII), Madam Justice Acton commented that solicitor-client privilege is only lost where a statutory decision-maker's legal advisor oversteps the boundaries of legal advice. This situation can arise where a legal advisor acts in two capacities: as both a legal advisor to the decision-maker and the drafter or primary recommender of the decision on its merits.*
>
> *[38] In such circumstances, the parties ought to be given an opportunity to respond to the points raised by the legal advisor, and thus the material should be disclosed. This point was explained by Mr. Justice Harvey in Hammami v. College of Physicians and Surgeons, 2000 BCSC 1555 (CanLII) at para. 42:*
>
> *[42] The requirement that utilization of legal counsel by an administrative tribunal must be in accordance with the principles of natural justice, may require that when the parties ought to be given an opportunity to make submissions in relation to legal advice, that advice should be disclosed. An example when the parties ought to be allowed to make submissions in relation to legal advice is in relation to advice as to the jurisdiction of the tribunal. ...*

Lee concluded that most of the documents remained subject to solicitor-client privilege, but not when it was clear that the legal advisor had moved beyond giving advice and attempted to influence the adjudicator's decision-making role:

> *[44] While a part of this exchange was certainly legal advice to the responsible adjudicator, another part of the exchange went beyond the lawyer's role as legal adviser by purporting to influence the responsible adjudicator's decision-making or adjudicating role. For the reasons I have discussed above with respect to the three-page email exchange between two government solicitors, the Superintendent of Motor Vehicles and several individuals at RoadSafetyBC, the following part of this exchange (similarly excerpted in deliberately cryptic form) cannot enjoy solicitor-client privilege…*

In a subsequent 2016 case, *Bui v. British Columbia (Superintendent of Motor Vehicles)*[67] *(Bui)*, the BCSC summarized the three key *Lee* principles:

> *[32] The Lee case therefore confirms the following propositions:*
>
> • *it can be appropriate for statutory decision-makers and adjudicators to seek, receive and even adopt legal advice provided by legal advisors;*
>
> • *however, the advisor must not become the primary recommender or default draftsman of the decision on its merits and the adjudicator must retain and independently exercise throughout the ultimate decision-making power; and*

[67] 2016 BCSC 1572

- *certain types of legal advice received by the decision-maker or adjudicator, e.g., advice as to the jurisdiction of the Tribunal, should be disclosed to the other party who should then be allowed to make submissions in relation to same.*

The BCSC in *Bui* noted the "conundrum"[68] that if the AT itself does not disclose the extent of the involvement of third parties in the drafting process, then how is a party, which would have the burden of proof before any reviewing court, to have any realistic and practical recourse:

> *[33] There is, of course, a "catch-22" problem associated with this issue: if disclosure of both the solicitation and nature of the legal advice is not made, how can a person such as Mr. Bui (or his counsel) determine whether any overstepping of boundaries has occurred?*

The courts apply a presumption of regularity for ATs' internal workings: *Ellis Don, infra*. Only evidence of actual, rather than presumed, irregularities behind the scenes at an AT will convince a court to intervene.

This is obviously an area of concern for the parties. It represents a "trust me" situation.

In order to merit that trust, ATs should be ensuring that everyone, whether staff members or appointed decision makers, is fully informed about the duties they owe the parties. Education is an essential part of good governance, *infra*.

Plenary Discussions

The concept of quorum requires that only decision makers make decisions on behalf of the AT. The assigned panel embodies the AT once it is seized with a specific case. Reasons are not a group project.

But a panel does not work in a total vacuum. An AT has an interest in ensuring some consistency in its application of policy and in its decisions. The SCC has noted the benefits when ATs arrive at "consensus positions"[69]:

> *59 This Court has stressed the importance of the consensus positions adopted by administrative tribunals. Consensus allows for a degree of consistency and predictability in the law that fosters the equitable resolution of administrative disputes…*

[68] *Bui*, paragraph 34
[69] Ivanhoe inc. v. UFCW, Local 500, [2001] 2 SCR 565, 2001 SCC 47

An AT process which leads to consensus positions "favours a very high degree of judicial constraint"[70].

The courts strive to balance the importance of decision makers' independence with the parties' legitimate expectations of a fair and transparent process, while still allowing ATs to engage in policy discussions, even for pending decisions.

The Consolidated Bathurst "Trilogy"

The well known *Consolidated Bathurst*[71] (*CB*) case examined these issues. As often happens in some of these cases, a party somehow learned that its case was being discussed by non-panel members at the Ontario Labour Relations Board[72] (OLRB). Just as is the case with the possible involvement of legal staff in a panel decision, experienced counsel will always have concerns about the impact any group discussions may have on the case it pleaded.

In *CB*, an OLRB panel had an important policy issue concerning an employer's obligation to disclose plant closure plans to its bargaining agent during negotiations. The panel therefore asked that the full board discuss the issue. When one of the parties learned of this process, it applied for reconsideration of the original decision.

In the reconsideration decision, then OLRB Chair, George Adams, described the full board process at length[73]. The full board meetings were a way to foster coherence and maintain a high level of quality in board decisions.

The SCC noted ATs had to be able to benefit from the accumulated experience of its members without automatically violating natural justice:

> *The rules of natural justice should not discourage administrative bodies from taking advantage of the accumulated experience of its members. On the contrary, the rules of natural justice should in their application reconcile the characteristics and exigencies of decision making by specialized tribunals with the procedural rights of the parties.*

The SCC also noted on a practical level that discussions about cases by decision makers do not automatically impugn the decision:

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[70] Transport Besner Atlantic ltée v. Syndicat des travailleuses et travailleurs de Transport Besner (CSN), 2006 FCA 146 at paragraph 54

[71] IWA v. Consolidated-Bathurst Packaging Ltd., [1990] 1 SCR 282, 1990 CanLII 132

[72] Counsel knew generally about the OLRB's practice, but had never known it to occur in one of his cases.

[73] In cases involving allegations of procedural fairness issues or bias, the practice is for the AT, or the individual decision maker, to put the pertinent facts on the record. See, for example, Wewaykum Indian Band v. Canada, [2003] 2 SCR 259, 2003 SCC 45 in which the SCC considered an allegation of bias against Mr. Justice Binnie. Due to his former position as Associate Deputy Minister of Justice many years previous, Justice Binnie, as part of the process, issued a factual statement concerning suggestions he was biased. For the proper process to follow for bias allegations against a labour board Vice-Chair see: Terceira v. Labourers International Union of North America, 2014 ONCA 839.

> *I am unable to agree with the proposition that any discussion with a person who has not heard the evidence necessarily vitiates the resulting decision because this discussion might "influence" the decision maker. In this respect, I adopt Meredith C.J.C.P.'s words in Re Toronto and Hamilton Highway Commission and Crabb (1916), 37 O.L.R. 656 (C.A.), at p. 659:*
>
> *The Board is composed of persons occupying positions analogous to those of judges rather than of arbitrators merely; and it is not suggested that they heard any evidence behind the back of either party; the most that can be said is that they -- that is, those members of the Board who heard the evidence and made the award -- allowed another member of the Board, who had not heard the evidence, or taken part in the inquiry before, to read the evidence and to express some of his views regarding the case to them . . . . [B]ut it is only fair to add that if every Judge's judgment were vitiated because he discussed the case with some other Judge a good many judgments existing as valid and unimpeachable ought to fall; and that if such discussions were prohibited many more judgments might fall in an appellate Court because of a defect which must have been detected if the subject had been so discussed. [Emphasis added.]*

The SCC agreed that the procedural protections Chair Adams put in place ensured that the actual decisions makers would be free to decide the actual case as they saw fit:

> *A full board meeting set up in accordance with the procedure described by Chairman Adams is not imposed: it is called at the request of the hearing panel or any of its members. It is carefully designed to foster discussion without trying to verify whether a consensus has been reached: no minutes are kept, no votes are taken, attendance is voluntary and presence at the full board meeting is not recorded. The decision is left entirely to the hearing panel. It cannot be said that this practice is meant to convey to panel members the message that the opinion of the majority of the Board members present has to be followed. On the other hand, it is true that a consensus can be measured without a vote and that this institutionalization of the consultation process carries with it a potential for greater influence on the panel members. However, the criteria for independence are* not absence of influence but rather the freedom to decide according to one's own conscience and opinions. In fact, the record shows that each panel member held to his own opinion since Mr. Wightman dissented and Mr. Lee only concurred in part with Chairman Adams. It is my opinion, in agreement with the Court of Appeal, that the full board meeting was an important element of a legitimate consultation process and not a participation in the decision of persons who had not heard the parties. The Board's practice of holding full board meetings or the full board meeting held on September 23, 1983 would not be perceived by an informed person viewing the matter realistically and practically -- and having thought the matter through -- as having breached his right to a decision reached by an independent tribunal thereby infringing this principle of natural justice.*

The SCC further agreed that discussing the case in the absence of the parties, subject to certain safeguards like not debating the facts, did not violate the *audi alteram partem* principle:

> *I therefore conclude that the consultation process described by Chairman Adams in his reconsideration decision does not violate the audi alteram partem rule provided that factual issues are not discussed at a full board meeting and that the parties are given a reasonable opportunity to respond to any new ground arising from such a meeting. In this case, an important policy issue, namely the validity of the test adopted in the Westinghouse case, was at stake and the Board was entitled to call a full board meeting to discuss it. There is no evidence that any other issues were discussed or indeed that any other arguments were raised at that meeting and it follows that the appellant has failed to prove that it has been the victim of any violation of the audi alteram partem rule. Indeed, the decision itself indicates that it rests on considerations known to the parties upon which they had full opportunity to be heard.*

CB established several safeguards ATs must respect in order to ensure a plenary consultation process does not prejudice the parties: i) only the panel initiates the consultation process; ii) the consultation does not lead to any group decision, since the panel alone decides the case; iii) facts are not debated; and iv) notice must be given to the parties of any new issues raised.

In *Tremblay*[74], the SCC revisited the issue of full board meetings. In this case, unlike in *CB*, the SCC found that the AT's mandatory consultation procedure had gone too far and impacted the decision makers' independence. The SCC also rejected an argument about deliberative secrecy which would have limited the evidence available to the party challenging the case:

> *Additionally, when there is no appeal from the decision of an administrative tribunal, as is the case with the Commission, that decision can only be reviewed in one way: as to legality by judicial review. It is of the very nature of judicial review to examine inter alia the decision maker's decision-making process. Some of the grounds on which a decision may be challenged even concern the internal aspect of that process: for example, was the decision made at the dictate of a third party? Is it the result of the blind application of a previously established directive or policy? All these events accompany the deliberations or are part of them.*

> *Accordingly, it seems to me that by the very nature of the control exercised over their decisions administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals. Of course, secrecy remains the rule, but it may nonetheless be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice…*

[74] Tremblay v. Quebec (Commission des affaires sociales), [1992] 1 SCR 952, 1992 CanLII 1135

In essence, while the burden remains with the party contesting the matter, the SCC foresaw the relevance of an AT's deliberative process for a judicial review. In *CB*, Chair Adams fully disclosed in the reconsideration decision how the OLRB's full board system worked given that relevance.

In *Tremblay*, even though the AT's consultation process had been reduced to writing, the compulsory requirement for all decisions to go to legal counsel, as well as the Chair's overview of others' decisions, caused the SCC concern. It had a potentially negative impact on the key principle that only the quorum, and no one else, had the duty to decide the parties' case.

The SCC also had concerns that the keeping of minutes, as well as holding a vote, exerted undue pressure on the decision makers and violated the parties' right to a decision by an independent tribunal:

> *In my view, the mere fact that the president can of his own motion refer a matter for plenary discussion may in itself be a constraint on decision makers. In such circumstances, they may not feel free to refuse to submit a question to the "consensus table" when the president suggests this. Further, the statute clearly provides that it is the decision makers who must decide a matter. Accordingly, it is those decision makers who must retain the right to initiate consultation; imposing it on them amounts to an act of compulsion towards them and a denial of the choice expressly made by the legislature.*

> *The Commission apparently wishes by this machinery to make the expertise of the Commission as a whole available to its members and to inform them of existing precedents. This is a praiseworthy motive. If the quorum has the advantage of the experience and opinions of its colleagues it may be in a position to render a more thoughtful decision. However, it is the quorum, and only the quorum, which has the responsibility of rendering the decision. If it does not wish to consult, it must be truly free not to do so. This constraint, which is subjective for the decision makers, may also cause litigants to have an impression of objective bias. Compulsory consultation creates at the very least an appearance of a lack of independence, if not actual constraint.*
>
> *…*
>
> *Accordingly, the Commission's decision, as a product of this system of internal consultation, seems to me to have been made in breach of the rules of natural justice. The present practice of the Commission of holding plenary meetings without members of a quorum having requested them, as well as the voting procedure and the keeping of minutes, may exert undue pressure on decision makers. Such pressure may be an infringement of a litigant's right to a decision by an independent tribunal. I consider that the institutionalized consultation process currently being used by the Commission may also give rise to a reasonable apprehension of bias in an informed litigant.*

In *Ellis Don*[75], the SCC upheld a second case involving an OLRB internal full board consultation, even though the panel later changed its original draft decision. A party again somehow learned

[75] Ellis-Don Ltd. v. Ontario (Labour Relations Board), [2001] 1 SCR 221, 2001 SCC 4

that an initially favourable draft decision had changed following the full board meeting. In the party's view, this change resulted from the OLRB debating the original facts.

Interestingly, the party in *Ellis Don* did not request reconsideration, unlike the situation in *CB* where the original panel described in its reconsideration decision the full board process which had taken place. The party's request to obtain evidence by examining several board members was ultimately rejected[76].

The SCC dismissed the appeal in part because the appellant had not provided evidence that something untoward had occurred at the full board meeting. In the absence of such evidence, the SCC applied the presumption of the regularity of an administrative process:

> *35 The appellant faced difficult evidentiary problems when it launched its application for judicial review. The only facts it knew were that a draft decision dismissing the grievance had been circulated, that a full meeting of the OLRB had been called at the request of Vice-Chair Susan Tacon, that such a meeting had indeed been held and that the final arbitration award upheld the grievance.*
>
> *36 The final decision was silent as to what had happened during the full Board meeting. As stated above, there has been no request for reconsideration, and thus, perhaps, an opportunity was lost to obtain information on the consultation process within the OLRB. From these facts, there is no direct evidence of improper tampering with the decision of the panel. Ellis-Don sought to strengthen its case by obtaining evidence of what had happened during the consultation process. The appellant tried to get this evidence through an interlocutory motion to examine certain members and officers of the OLRB. After the dismissal of its motion by the Divisional Court, Ellis-Don found itself in an impasse, as it could not obtain evidence of the process followed in the particular case from the OLRB through the interrogation of its members or officers.*
>
> *…*
>
> *51 In the present case, the Court must apply the normal standards of judicial review in matters involving the audi alteram partem rule. In support of its allegation of a breach of the audi alteram partem rule, Ellis-Don had to demonstrate an actual breach. As stated above, it could not get directly at the evidence after the dismissal of its interlocutory motion. The record as such does not indicate any breach of this nature. The only information available is that discussions took place at the full Board meeting and that a change was made on a question of law and policy in the draft decision. This is not sufficient to warrant judicial review.*

Both *CB* and *Ellis Don* had dissents. *Tremblay*, on the other hand, was unanimous. Justices Sopinka (*CB*) and Binnie (*Ellis Don*), two of the SCC justices with the most extensive litigation

[76] Ellis-Don Ltd. v. Ontario Labour Relations Board, 1994 CanLII 10531 (ON SC). Leave to appeal was also dismissed.

experience, who had been appointed directly to the SCC from private practice, dissented due to their natural justice concerns arising from the consultation process.

The Canada Labour Relations Board's Plenary Process

The Canada Labour Relations Board[77] (CLRB), under Chair Marc Lapointe's leadership, had a transparent plenary process which eliminated many of the concerns with which the SCC seemed to grapple in *CB*, *Tremblay* and *Ellis Don*.

The CLRB's reconsideration of its own decisions always involved the parties[78]. The CLRB understood the evident problems which could occur if one three-person panel overturned another three-person panel. Instead, a summit or reconsideration panel made up of the Chair and/or Vice-Chairs, acting as a screening mechanism, would decide whether a party had raised a sufficiently significant issue which should go to the full Board sitting in plenary session.

If the matter did not warrant review by a plenary session, then the reconsideration panel would simply dismiss the application[79].

Under this CLRB process, the Board sitting in plenary session examined challenging labour relations issues. In recognition of the expertise of the parties coming before it, the CLRB included them in the process. Indeed, in some cases of significant importance to the labour relations community as a whole, the CLRB granted intervenor status to third parties.

A CLRB plenary decision bound future panels. It resulted in the type of "consensus positions" to which the SCC would later refer with approval in *Ivanhoe*, *supra*. The CLRB adopted binding policies and *Code* interpretations on contentious issues such as what constituted a sale of business[80], the standard to be applied in duty of fair representation cases[81] and how to apply the statutory freeze during collective bargaining[82].

CLRB Chairs like Mr. Lapointe and Mr. Weatherill were not always on the side whose interpretation prevailed in a plenary. But they understood and accepted that the transparency and fairness of the process was just as important as the ultimate conclusion.

Evidently, the success of any plenary process is dependent on each decision maker's experience and knowledge of both the AT's substantive law and of administrative law.

In *Telus*[83], *infra*, the FCA accepted the CIRB's position that it had not retained the CLRB's plenary process when it took over responsibilities for labour relations in federal private sector. The CIRB, unlike the CLRB, had become a representative board, meaning that most panels had to have representatives of both labour and management.

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[77] The CIRB replaced the CLRB in 1999.
[78] For a comparison of the CLRB, CIRB and OLRB reconsideration powers, see *Ontario Labour Relations Board v. Canada Industrial Relations Board: Three MORE key differences*, The Six-Minute Labour Lawyer 2012, Law Society of Upper Canada, June 12, 2012
[79] Brewster Transport Co. Ltd (1986) 66 di 133 (no live link available)
[80] *Terminus Maritime Inc.* (1983), 50 di 178
[81] *Brenda Haley* (1981), 41 di 311
[82] *Bank of Nova Scotia* (1982), 42 di 398
[83] *Telus Communications Inc. v. Telecommunications Workers Union*, 2005 FCA 262

Both the CLRB and the CIRB have almost always functioned using three person panels, though the CIRB now has a greater discretion on when to use single person panels.

Despite being a representational board, the CIRB currently uses three-person reconsideration panels, almost always composed of the Board's neutrals, to reconsider recent decisions.

In terms of transparency, the parties continue to initiate the reconsideration process and have the opportunity to file their submissions with the reconsideration panel.

Summary

Just as judges do, every AT decision maker has to do the hard work required to produce a proper explanation for the parties about why they won or lost. This duty cannot be contracted out.

However, the courts have provided some flexibility. As a result, decision makers may have recourse to legal advisors, as long as it is clear that that assistance has important limits.

There is a big difference between the law clerks courts employ and legal staff at ATs. Most court clerks are just out of law school and are articling[84].

Conversely, legal advisors at ATs may have decades of experience, sometimes exclusively with one tribunal. They invariably know far more than most of the appointed decision makers. They must therefore remain vigilant about the duties the actual decision makers owe the parties.

ATs may also develop a formalized consultation process to discuss important policy issues. This can occur even during a panel's deliberations.

Healthy ATs have such discussions. Expert decision makers need to debate differing points of view on new legal issues[85]. The process only works, however, if the AT ensures all decision makers have, or obtain soon after their appointment, a thorough understanding of both the relevant substantive law, and the duties they owe all parties.

THE DUTY OF FAIRNESS (NATURAL JUSTICE)

The duty of fairness envelopes numerous duties, some of which have already been examined above. This section will examine two topics: i) Understanding what constitutes proper evidence and ii) Bias.

[84] As one former SCC clerk remarked, students just out of law school do not run the court and do not know more than the experienced judges.

[85] Despite many provisions of the *Code* being in existence since the 1970's, counsel continue to raise novel and sometimes compelling legal arguments.

Decisions Flow Solely from the Evidence in the Record

The essence of a fair hearing is that the parties have a chance to submit and address the evidence which is central to the determination of their case[86]. Except for certain special situations[87], it is simply improper for a decision maker to rely on evidence about which one or more of the parties remains unaware[88].

In *CB*, the SCC clearly had concerns whether new evidence might be communicated to the panel, but without the parties' knowledge: "It is already recognized that no new evidence may be presented to panel members in the absence of the parties: *Kane v. Board of Governors of the University of British Columbia, supra,* at pp. 1113-14"[89].

In the days of the internet, and social media, this concern has only increased[90]. ATs, just like courts, can take judicial notice of well-known facts[91]. But they cannot conduct their own evidentiary investigation, or receive other evidence, behind the parties' backs.

In *R. v. C.D.H.*[92], the Ontario Court of Appeal found a judge was biased when he conducted his own factual investigation during his deliberations:

> *[14] We agree that the conduct of the trial judge created a reasonable apprehension of bias. He conducted his own research into a website that had been the subject of evidence at trial while his decision was under reserve, contrary to the basic principle that judges and jurors must make their judicial decisions based only on the evidence presented in court on the record. Jurors are specifically told not to conduct any Internet searches about anything in the case.*

In the administrative law context, the Saskatchewan Court of Appeal quashed a decision of the Saskatchewan Labour Relations Board (SLRB) due to the panel conducting its own research following its oral decision[93]. The SLRB's later reasons were based in part on its review of a party's

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[86] Irwin v Alberta Veterinary Medical Association, 2015 ABCA 396 at paras 57-60
[87] For certain specific labour relations matters, evidence of employee wishes is kept confidential, *infra*.
[88] Kane v. Bd. of Governors of U.B.C., [1980] 1 SCR 1105, 1980 CanLII 10
[89] Consolidated Bathurst, page 336
[90] In R. v. Pannu, 2015 ONCA 677, the OCA commented on the challenges if juries obtain extrinsic information during their deliberations. See also R. v. Farinacci, 2015 ONCA 392.
[91] In R. v. MacIsaac, 2015 ONCA 587, the OCA overturned a conviction due to a judge's attempt to take judicial notice of hockey strategy which resulted in multiple examples of speculative reasoning. Factual conclusions must be based solely on the evidence in the case.
[92] 2015 ONCA 102
[93] Saskatoon Co-operative Association Limited v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, 2016 SKCA 94. My thanks to fellow panelist Ronni Nordal for bringing this recent decision to my attention.

website. The website's information on which the panel relied contradicted that party's actual evidence:

> *[23] According to Judicial Review, "when performing essentially adjudicative functions, administrative decision-makers, like judges, are generally precluded from ex parte fact-finding" (footnotes omitted, at 12-3). Ultimately, "when evidence is obtained … other than through the hearing process and it is not disclosed, the decision will likely be set aside, usually after an inquiry into the prejudicial effect of that evidence" (footnotes omitted, (Rel May 2016) vol 2 at 9-66). This general rule is qualified "to the extent that it is permissible for administrative adjudicators to make use of information that can be judicially noticed … ." (at 12-4).*
>
> *[24] The Board's resort to the historical information provided on RWDSU's website was a breach of procedural fairness. It is made particularly so because the relationship between the two unions, and the impact the bad blood between them might have on future industrial stability, was addressed by the parties as a matter of evidence and oral argument. The testimony of UFCW's representative could be taken as showing the difficulty the two unions were having in reaching consensus on a series of issues. RWDSU led evidence that the two unions could not get along and, at the Board hearing, did not seek to put in the very evidence from its own website that the Board relied upon; indeed, their officer's evidence directly contradicted what the Board said it found on the website. Nonetheless, the Board's research allowed the majority of the Board to arrive at a result in favour of RWDSU. The parties had no notice that the Board would look to RWDSU's website and could not anticipate the Board would do so.*

If a panel relies on evidence not found in the record, other than for those notorious facts of which it may take judicial notice, it must provide the parties with an opportunity to comment.

What then is proper evidence?

Mediation discussions are confidential

Virtually everyone realizes that successful mediated settlements will not occur if parties, who lay their cards squarely on the table at mediation, later have their candour used against them. Indeed, most mediations, whether in civil litigation or before ATs, require the signing of a mediation agreement which highlights the privileged nature of all discussions[94].

[94] ADR Chambers provides a Mediation Sample Agreement for those using its services in civil litigation matters. The HRTO similarly requires parties to sign a mediation agreement which emphasizes that the process is confidential.

The Human Rights Tribunal of Ontario, for example, has prepared an illustrated guide to mediation to assist laypeople with the process[95]. That guide emphasizes the confidentiality of the process.

The OLRB notes on its website that mediation sessions with its labour relations officers are confidential[96]:

> *LROs are not adjudicators; they do not decide the case. Nor do they represent or advise any of the parties. LROs are professional neutrals with extensive backgrounds in labour relations and employment law. They have considerable knowledge of all Board practices and procedures. Their role is to help the workplace parties reach a settlement of the application. During mediation, they may refer to existing case law as it relates to the issues in dispute in order to assist the parties in realistically evaluating their positions and assessing any settlement offers. LROs do not give legal advice.*
>
> *In order to encourage frank and open discussion between the workplace parties, LROs consider everything said during the mediation to be confidential. The mediation process is separate from any hearing which may result in the application. LROs do not give their file or notes, or any documents they receive, to the Board in the event of a hearing. Parties are required to bring all their documents and witnesses to a hearing, as if the mediation had never taken place.*

Quebec's labour legislation[97] creating its labour board reminds mediators of their obligation never to disclose the content of settlement discussions:

> *25. A person designated by the Tribunal to attempt to bring the parties to an agreement may not disclose or be compelled to disclose anything revealed to or learned by the person in the exercise of the person's functions, nor produce personal notes or any document made or obtained in the course of those functions, before a court or a body or person exercising judicial or quasi-judicial functions.*

In short, unless the parties decide otherwise, *infra*, ATs have a duty to keep any mediation discussions confidential. Information from those sessions cannot be disclosed to the panel, or others, without prejudicing the parties. Every AT panel has the obligation to prevent any attempted disclosure of privileged information, from any source[98].

Mediation by the Deciding Panel

The usual rules regarding privileged mediation discussions apply to most labour matters.

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[95] A Guide to Mediation at the Human Rights Tribunal of Ontario
[96] OLRB Processes: Mediation
[97] An Act to establish the Administrative Labour Tribunal, CQLR c T-15.1
[98] Mughal, 2008 CIRB 418 at paras 51-56

Federally, information disclosed during conciliation[99] can never be communicated to the CIRB. Similarly, any information obtained during mediation sessions with Board staff remains privileged. In order to protect this type of privileged information, the *Code* provides that conciliators and mediators may not be required to testify in any proceeding[100].

Notwithstanding the importance of confidential and privileged discussions, labour legislation may allow an assigned panel to attempt to settle the case, without impacting its ability to decide the case on the merits[101]. This means a panel, or some members thereof, may be privy to confidential discussions.

Section 15.1(1) of the *Code* allows the panel to decide the case on the merits, if mediation does not succeed:

> *The Board or any member of the Board or an employee of the Administrative Tribunals Support Service of Canada who is authorized by the Board may, if the parties agree, assist the parties in resolving any issues in dispute at any stage of a proceeding and by any means that the Board considers appropriate, without prejudice to the Board's power to determine issues that have not been settled.*

The most important words in section 15.1(1) are "*if the parties agree*". The Board had no authority to disseminate privileged information. However, if the parties agree to having the panel mediate a settlement, then the *Code* provides for that opportunity.

The *Code* similarly gives labour arbitrators the authority to mediate a case they are hearing, but, again, only "if the parties agree"[102].

In either situation, if the case has to be decided on the merits, then the original decision maker retains jurisdiction, despite his/her involvement in settlement discussions. Evidently, that decision has to be based on the evidence, though the parties may agree that the AT can consider a lot of the background information discussed during mediation. This is how a "med-arb" process often works.

The power for decision makers to meet separately with the parties is a creature of statute. In normal circumstances, as noted in both *Kane*, *supra*, and *CB*, *supra*, that type of meeting would violate natural justice.

Not all legislators believe that it is appropriate for the decision makers to mediate or meet separately with the parties. While Quebec does allow members of some ATs subject to its *An Act*

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[99] Conciliation, found at sections 71-79 of the Code, is a process designed to assist parties to conclude a collective agreement, with the assistance of a conciliator.

[100] Section 119 of the *Code* states: "No member of the Board or a conciliation board, conciliation officer, conciliation commissioner, officer or employee employed in the federal public administration or person appointed by the Board or the Minister under this Part shall be required to give evidence in any civil action, suit or other proceeding respecting information obtained in the discharge of their duties under this Part".

[101] This topic was examined at some length in *Labour Boards' Use of Mediation-Arbitration Procedures*, Advanced Administrative Law & Practice, The Canadian Institute, October 28-29, 2008

[102] Code, s. 60(1.2)

Respecting Administrative Justice[103] (*ARAJ*) to mediate cases with the parties, it does not provide this authority to members of its labour law tribunal[104].

Moreover, if a Quebec AT member has attempted to mediate a case, but without success, then that member cannot hear the case on the merits[105]:

> *121.2. A member of the Tribunal presiding a conciliation session may, if necessary, modify the proceeding timetable.*
>
> *However, if no settlement is reached, a member of the Tribunal having presided a conciliation session may not hear any application regarding the dispute.*

Thus, without consent and/or statutory authority, the regular rules would apply. Privileged information cannot be disclosed. Moreover, an AT cannot receive and consider even non-privileged evidence if one or more of the parties remains unaware of that fact.

While the expression "knowledge is power" may apply in some situations, it is wholly inapplicable to an AT's decision making process. An AT can only respect its statutory duty if it makes decisions based solely on properly admissible evidence[106].

Confidential Evidence

In rare situations, an AT may have a public policy role requiring it to deal with confidential evidence. The importance of fulfilling this public duty properly cannot be overstated.

In labour relations, employees may wish to change their employment *status quo*. This usually involves joining a trade union. However, it can also involve joining a raiding trade union if they are already in a bargaining unit, or deciding to decertify their existing union.

In each scenario, employees may have legitimate concerns that the exercise of their fundamental *Code* rights may result in unlawful reprisals from those who prefer the *status quo*[107]. As a result, evidence of employee wishes remains confidential. It represents a rare situation, since the proceeding may impact the parties' legal rights, but without them having access to, and being able to comment on, every piece of evidence.

A labour board's ability to decide a case on the basis of confidential evidence of employee wishes did not come without a fight. The CLRB's Chair, Marc Lapointe, retained counsel and took the

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[103] CQLR c J-3

[104] Contrast s. 21 in the *An Act to establish the Administrative Labour Tribunal, CQLR c T-15.1* (*AALT*) with s. 120 of the ARAJ

[105] ARAJ, s. 121.2

[106] S. 16(c) of the *Code* allows the CIRB "to receive and accept such evidence and information on oath, affidavit or otherwise as the Board in its discretion sees fit, whether admissible in a court of law or not". Obviously, that statutory right refers to evidence about which the parties are fully aware and on which they can make submissions.

[107] For a review of the CIRB's process when it comes to confidential employee wishes, see Rooley, 2015 CIRB 759 and WestJet, an Alberta Partnership, 2015 CIRB 785.

issue all the way to the SCC, given how vital it was in labour relations cases to keep employees' wishes confidential.

In *Canada Labour Relations Board v. Transair*[108], the SCC confirmed that the CLRB could rely on confidential evidence about employee wishes and could prevent cross-examination about numbers, as well as any inquiries which might identify individual employees.

In a later case, the FCA confirmed the Board did not need to produce confidential membership evidence, despite a party raising allegations of impropriety, even for the purposes of a judicial review[109]. The *Code* already contains a provision which allows the Board to hear a party's application alleging that fraud occurred in the certification process[110].

Given the Board's public policy role when evaluating confidential evidence about employee wishes, it is essential that the Board conduct a proper investigation into the reliability of that evidence[111]. Information received is not just rubberstamped.

The Board's investigation also requires the Board to distinguish between evidence which is confidential and that which is not.

The distinction is crucial. But in one case, the CIRB mistakenly treated a party's intervention request as employee wishes and made it subject to the confidential process. This fact only came out when the intervenors raised it on reconsideration[112].

In order to cure the original failure to ensure all parties had access to all the relevant evidence before the Board, the reconsideration panel granted the employees intervenor status. It them allowed all parties to make further submissions.

In *Rooley,*[113]*,* the Board commented on the importance of distinguishing between confidential evidence of employee wishes and legal submissions which must be disclosed to all parties:

> *[50] The problem examined in TD 363 did not arise in the instant case. Nonetheless, IROs and Board panels must remain vigilant that only employee wishes, including allegations about their bona fides as occurred in Genesee 388, fall within the confidential process. For obvious reasons, employee submissions which, for example, comment on the merits of the particular case, or include disparaging allegations about a party, could not be treated in confidence.*

Subject to rare situations involving either confidential evidence like that for employee wishes, or judicial notice, an AT violates its duty to the parties by relying on any information about which the parties remain unaware.

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[108] [1977] 1 SCR 722, 1976 CanLII 170
[109] Maritime Ontario Freight Lines Ltd. v. Teamsters Local Union 938, 2001 FCA 252
[110] *Code* s. 40
[111] In Rooley, supra, the Board described this detailed process at paras 37-45.
[112] TD Canada Trust in the City of Greater Sudbury, Ontario, 2006 CIRB 363
[113] 2015 CIRB 759

Bias

Introduction

Accusations of bias are among the most serious that counsel can raise. Experienced lawyers never make such allegations lightly.

In *Douglas v. Canada (Attorney General)*[114], the Federal Court provided a succinct review of the test for bias. There is a presumption that a decision maker will act impartially. An applicant will have the burden of demonstrating, based on the case's facts, that a reasonable, fully informed person would conclude that the decision maker would not decide the case fairly:

> *[149] "Bias" was defined by Mr. Justice Cory in R. v. S. (R.D.), 1997 CanLII 324 (SCC), [1997] 3 SCR 484, [1997] SCJ no 84 at para 105 as denoting "a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues". As discussed by the Supreme Court in Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities), 1992 CanLII 84 (SCC), [1992] 1 SCR 623 at para 22, the state of mind of an administrative decision-maker may be difficult to discern. To ensure fairness, the conduct complained of is measured against the standard of a reasonable apprehension of bias.*
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> *[150] The test for a reasonable apprehension of bias and the proper manner of its application is that set out in the dissenting judgment of de Grandpré J. in Committee for Justice and Liberty v National Energy Board, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at 394 and later adopted by the Supreme Court as a whole in R v S(R.D.), 1997 CanLII 324 (SCC), [1997] 3 SCR 484:*
>
> *the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically--and having thought the matter through--conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."*
>
> *[151] The question is whether a reasonably informed bystander could reasonably perceive bias on the part of the decision-maker. It is an objective test and essentially fact-based. The notional observer must be presumed to have two characteristics - full knowledge of the material facts and fair-mindedness. Ultimately it is a matter of impression and assessment whether the test is satisfied on the facts of any particular case: Belize Bank Limited v AG [2011] UKPC 36 at para 72.*
>
> *[152] The presumption is that a decision maker will act impartially: Zundel v Citron, 2000 CanLII 17137 (FCA), [2000] 4 FC 225 (FCA), leave to appeal to SCC refused, [2000] SCCA no 332. The burden of proof lies with the person making the claim. The threshold is high and requires more than an allegation: Gagliano v Canada (Ex-Commissioner of Inquiry into the Sponsorship Program & Advertising Activities), 2008 FC 981 (CanLII) at para 66.*

[114] 2014 FC 299

> *[153] Where institutional bias is alleged, the same factors apply but the test requires that the well-informed person, viewing the matter realistically and practically -- and having thought the matter through -- would have a reasonable apprehension of bias in a substantial number of cases. The Court must also give special attention to the guarantees provided for in the legislation to counter the prejudicial effects of certain institutional characteristics: 2747-3174 Québec Inc v Québec (Régie des permis d'alcool), 1996 CanLII 153 (SCC), [1996] 3 SCR 919 [Régie] at para 44.*

A difference exists between bias and an AT simply overlooking a relevant and novel legal issue which required analysis[115].

Examples

There is a line between a decision maker being overly interventionist thus demonstrating bias and one fulfilling his/her duty to run an efficient, but fair, hearing. A decision maker, just like counsel, has to go beyond imitating a potted plant[116].

The courts have recently examined where that line may be.

In *Stuart Budd & Sons Limited v. IFS Vehicle Distributors ULC*[117], the OCA highlighted several reasons to justify a finding of bias. For example, the judge had "adjourned the motion on his own initiative to give the respondents an opportunity to correct a flaw that he identified as being fatal to their position". The judge had moreover concluded that a motion was an abuse of process, but "provided no factual or legal foundation for his comments".

The OCA similarly had issues when the judge, without justification, "repeatedly criticized appellants' counsel on matters including their advocacy skills, knowledge of the law, and handling of the matter". The OCA also found that a judge's later amended endorsement "was an after-the-fact justification for the decision rather than an articulation of the reasoning that led to the decision".

The cumulative effect of these incidents meant "that an informed, reasonable observer, viewing the proceedings as a whole, would conclude that the appellants did not receive the fair hearing to which they were entitled".

Decision makers, particularly in difficult circumstances, are not expected to be perfect, however. In *Clayson-Martin v. Martin*[118], the OCA overturned a decision due to certain fatal errors of law. However, the court did not find bias, despite having some concerns with the judge's manner of posing questions, his unfortunate choice of language at times when referring to a party's evidence ("blah, blah, blah") and his interrupting of the flow of counsel's cross-examination for no proper reason.

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[115] *Rooley, supra*, at paras 134-158

[116] During the Iran-Contra Hearings, attorney Brenden Sullivan commented, in response to a Senator's suggestion that his client Oliver North should object to any questions: "Well sir, I'm not a potted plant. I'm here as the lawyer. That's my job".

[117] 2016 ONCA 60

[118] 2015 ONCA 596

The BCCA in *R. v. Corby*[119] commented when considering a judge's actions "that the timing and sheer number of interventions bring this case close to the line of permissible judicial conduct". However, when it analyzed those interventions along with the later reasons, the BCCA concluded that a fair trial had taken place.

A recusal motion against the entire panel hearing an appeal was dismissed in Bossé et al. v. Lavigne[120]. The fact the judges had been involved in past decisions which found against the party did not demonstrate bias.

The existence of transcripts provides the courts with a full record when examining bias allegations. Not all ATs have transcripts due to their impact on the hearing's efficiency and cost[121].

As mentioned, some administrative law cases reach the courts as a result of unplanned information reaching the parties. The test for bias remains the same, though the conundrum mentioned in *Bui, supra*, continues.

Decisions makers have to be circumspect in discussing their cases publicly, lest their comments lead to allegations of bias[122]. A court may conclude bias exists, in part, from a decision maker's social media activities, despite the parties initially agreeing to the person's appointment[123].

In *Telus Communications Inc. v. Telecommunications Workers Union (Telus)*[124], a trade union alleged bias existed based on allegations that an AT's Chair had told staff to advise the losing party that the initial decision in favour of the union would be overturned if they applied for reconsideration.

The FCA dismissed the allegation of bias on the basis of mootness. A subsequent AT panel, which did not include the Chair, had heard the reconsideration application. It overturned, in part, the original Board decision which had found in favour of the trade union.

The FCA did find it necessary to comment, however, that the Chair ought to have responded to the trade union's specific allegations[125]. Such a process would have been similar to the comments Chair Adams made in *CB, supra,* which provided the parties with important facts about what had transpired in their absence:

> *[30] The only person who could have effectively responded to this evidence was the Chairperson himself. In my view, it was incumbent on the Chairperson, if the allegations were untrue, to deny or explain them. He simply failed to respond.*

Evidently, a decision maker cannot indicate what might happen in an appeal or a reconsideration of one of its decisions. It would be no different if an AT picked a panel in order to ensure a

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[119] 2016 BCCA 76
[120] 2015 NBCA 54
[121] Ms. Z, 2015 CIRB 752 at paras 34-38
[122] Canadian Union of Postal Workers v. Canada Post Corporation, 1998 CanLII 8207
[123] Canadian Union of Postal Workers v. Canada Post Corporation, 2012 FC 975
[124] 2005 FCA 262. This was also the case in which the CIRB argued before the FCA that it no longer followed the CLRB's plenary process.
[125] Rather than responding to the specific factual allegations, the Chair had issued a decision which found that the trade union's evidence, based on hearsay, did not satisfy the test for bias.

particular result despite different schools of thought existing on an issue. Process is just as important as the result.

The courts have clearly indicated their support for an AT's plenary process, such as the one the CLRB once used[126], or the one at the OLRB, in order to examine important policy issues. The courts give significant deference to whatever principles result from those discussions[127].

GOVERNANCE: ENSURING FAIRNESS

The importance of good governance[128] for organizations has been described this way[129]:

> *The results of good governance are trust, credibility, legitimacy, results that matter, the ability to weather crises, strong relationships with members and stakeholders, and a climate and relationships that are receptive to fundraising. The ramifications of inadequate governance can be equally great. If an organization fails to carry out this role effectively, it stands to lose credibility with its members and the public at large, damage its ability to carry out policies or deliver services, and ultimately fail at its primary mission or objectives.*

Five main principles help define the relatively new field of governance[130], including performance, accountability and fairness.

Many organizations now accept the benefits of governance reviews. The Law Society of Upper Canada recently proposed the creation of a task force to examine its governance[131]. The task force would "Review the Law Society's governance structure including achieving the goals of transparency, inclusiveness, effectiveness, efficiency, and costs and, where appropriate, obtain the opinions of experts".

As mentioned in the Introduction, ATs, given decision makers' non-hierarchical structure, are not overly different from Boards of Directors at not for profit organizations[132] or Crown Corporations[133]. In both instances, selection, training and assessment are vital to effectiveness.

For ATs, good governance also promotes accountability, though this can differ depending on how decision makers are appointed.

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[126] The FCA in *Telus*, supra, did accept that the CIRB had the authority to use three person non-representative panels to do reconsiderations. The issue did not arise whether those decisions would constitute "consensus positions", as that term was used in *Ivanhoe, supra*.
[127] Ivanhoe, supra
[128] Disclosure: a close family member is a governance expert who regularly conducts governance audits for various types of non-adjudicative institutions in both the public and private sectors.
[129] Institute on Governance, The Not for Profit Board's Role in Stakeholder Relations: Survey Results and Analysis (page 2)
[130] Defining Governance
[131] Proposed Governance Task Force 2016, Report to Convocation, September 22, 2016
[132] Chartered Accountants of Canada: Board Recruitment, Development and Assessment
[133] Treasury Board of Canada: Crown Corporation Guidance - Assessing Board Effectiveness

For example, at one end of the spectrum, the parties consensually appoint labour and others types of arbitrators. Labour arbitrators can still be imposed on the parties in some situations; this happens relatively rarely in Ontario[134] and Federally[135], but is quite common in Quebec[136].

At the other end of the spectrum are those decision makers who are imposed on the parties. Most AT decision makers fall into this category. The parties have little choice but to accept them if they want to bring a matter, or defend one, pursuant to the applicable legislation[137].

Accountability is relatively straight forward for the decision makers the parties appoint. Parties tend not to appoint decision makers who lack competence, experience or knowledge of their procedural duties. Even someone who may be appointed consensually understands that, just as with lawyers in private practice, clients have no obligation to use you again.

Accountability is more complicated for those AT decision makers who are imposed on the parties. Unlike consensual arbitrators who usually operate as a one-person show, AT decision makers often work in large institutions. As part of good governance, ATs have the obligation to ensure that the duties decision makers owe the parties are taught, understood and respected.

Sources of Governance Requirements

A non-exhaustive review indicates that many legislatures have set out various expectations for AT governance.

Ontario

In Ontario, the *Statutory Powers Procedure Act*[138] governs the processes which many, but not all, ATs must follow when exercising a statutory power of decision[139].

Article 1 of Ontario's *Adjudicative Tribunals Accountability, Governance and Appointments Act*, 2009[140] (*ATA*) sets out its purpose: "The purpose of this Act is to ensure that adjudicative tribunals are accountable, transparent and efficient in their operations while remaining independent in their decision-making".

The *ATA* requires ATs to prepare various plans, including those related to consultations with the public[141], a complaint process about the services the AT provides[142] and an ethics plan[143]. The AT determines complaints made about its services.

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134 *LRA, 1995*, s.48(4)
135 *Code*, s. 57(2)
136 *Labour Code*, s. 77
137 This is not to suggest that decision makers who are imposed on the parties lack ability. Many of Canada's top labour arbitrators over the past decades started their careers as labour board decision makers.
138 R.S.O. 1990, CHAPTER S.22
139 Labour arbitrators are just one of the types of tribunals which fall outside the SPPA (s.3(2)), as are ATs which have the power to make Regulations.
140 SO 2009, c 33, Sch 5
141 *ATA*, section 4
142 *ATA*, section 5
143 *ATA*, section 6

The *ATA* also provides for a review of an AT every six years, including its governance structure and management systems[144], *infra*.

For example, compliance documents prepared by the OLRB include a Member Accountability Framework, including a Code of Conduct; a Complaint Resolution Process, and Service Standard Policies.

The OLRB's accountability framework for its decision makers requires them to i) "Review and analyze all evidence and submissions thoroughly and make decisions based on the evidence, giving due consideration to relevant law"; ii) "Participate in initial training and stay current in the field by engaging in ongoing professional development"; iii) "participate in scheduled and ad-hoc meetings of the Board and its Members"; as well as iv) "participate on committees and working groups related to the work of the Board"[145].

Quebec

Quebec, perhaps due to its civil law tradition, operates its ATs much like courts. AT decision makers are called "administrative judges". By statute, they have been granted court-like independence when carrying out their functions.

Quebec's *An Act Respecting Administrative Justice*[146] *(ARAJ)*, describes the general duties the ATs owe citizens. The *ARAJ*, which sets up the Administrative Tribunal of Quebec, requires that all decisions be made in accordance with "rules of law":

> *4. The Administration shall take appropriate measures to ensure*
>
> *(1) that procedures are conducted in accordance with legislative and administrative norms or standards and with other applicable rules of law, according to simple and flexible rules devoid of formalism, with respect, prudence and promptness, in accordance with the norms and standards of ethics and discipline governing its agents and with the requirements of good faith;*
>
> *(2) that the citizen is given the opportunity to provide any information useful for the making of the decision and, where necessary, to complete his file;*
>
> *(3) that decisions are made with diligence, are communicated to the person concerned in clear and concise terms and contain the information required to enable the person to communicate with the Administration;*
>
> *(4) that the directives governing agents charged with making a decision are in keeping with the principles and obligations under this chapter and are available for consultation by the citizen.*

[144] *ATA*, section 21
[145] See key duties for Vice-Chairs, section 1B.
[146] CQLR c J-3

The *ARAJ* requires those tribunals under its jurisdiction to establish codes of ethics regarding the duties they owe the parties. It further requires decision makers to "maintain their competence":

> *181. The code of ethics shall set out the rules of conduct and the duties of the members of the Tribunal towards the public, the parties, their witnesses and the persons who represent them. It shall indicate, in particular, conduct that is derogatory to the honour, dignity or integrity of the members. In addition, the code of ethics may determine activities or situations that are incompatible with their office, their obligations concerning disclosure of interest, and the duties they may perform gratuitously.*
>
> *The code of ethics shall also set out rules concerning the maintenance of competence of members in the exercise of their functions.*
>
> *The code of ethics may provide special rules applicable to part-time members.*

Quebec's "labour board", now called the Administrative Labour Tribunal (ALT), has its own separate legislation[147] though some of the *ARAJ*'s provisions apply for complaints and discipline[148]. The ALT's governing legislation requires that the government, by Regulation, pass a code of conduct[149].

Among the requirements contained in the code of ethics are administrative judges' obligations: i) to maintain and upgrade their knowledge and skills (s. 4); ii) to perform their duties with complete independence and free of any influence (s. 8); and iii) to uphold the integrity of their office and defend its independence in the best interests of justice (s. 9)[150].

Saskatchewan

The Province of Saskatchewan separates the role assigned to its Auditor General, who oversees financial matters, from that of the Ombudsman Saskatchewan[151] (OS), whose role is to hold the government accountable in matters of general fairness[152]:

> *What is Ombudsman Saskatchewan?*

[147] *An Act to establish the Administrative Labour Tribunal*, CQLR c T-15.1
[148] Section 74
[149] *Code of ethics of commissioners of the Commission des relations du travail*, CQLR c C-27, r 2. Quebec recently combined numerous administrative tribunals, all of which remain subject to their existing codes of conduct until new ones come into force.
[150] As noted in *Ocean Port*, supra at paragraph 28, the Legislature is free to grant ATs the same guarantees of independence that the courts enjoy. But there is no obligation to do so.
[151] *Ombudsman Act*, 2012, SS 2012, c O-3.2
[152] Ombudsman Saskatchewan

> *Ombudsman Saskatchewan is an independent office, headed by the provincial Ombudsman. The Legislative Assembly appoints the Ombudsman. As a result, the office is separate from the government of the day and free to come to its own conclusions.*
>
> *Just as the provincial Auditor holds the government accountable in matters of money, the Ombudsman holds the government accountable in matters of fairness.*

The OS has issued various reports specifically aimed at ATs. In 2007, the OS issued a report which identified 21 "best practices"[153] ATs could adopt and also made 27 recommendations for improvement[154].

Among the identified "best practices", the OS suggested that: i) members be appointed on the basis of merit; ii) members have access to sufficient training; and iii) members operate within a performance management system.

The OS followed up on this 2007 report by preparing a detailed manual to help members working at ATs entitled: *Practice Essentials for Administrative Tribunals*[155]. The manual examines governance, the importance of tribunal members and employees fully understanding their roles and responsibilities, as well as the need for accountability.

The OS responds to formal complaints. The OS may investigate the circumstances of an AT's decision, but not where the remedy is found in other accessible processes. It is not a substitute for judicial review.

Federal

The Federal Government has not been as specific as some of the provinces when it comes to reminding ATs about the duties they owe the parties. Each AT's governing legislation provides some guidance, however.

Unlike some of the provinces, the Federal Government does not have a general Ombudsperson. The Federal approach in this area proceeds on a subject by subject basis[156]. For example, there are "speciality OmbudsOffices"[157] for subjects like official languages; privacy; veterans; and procurement.

The *Public Servants Disclosure Protection Act*[158] *(PSDPA)* is whistleblower legislation which is not unrelated to the general subject of governance.

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[153] The term "best practices" is frequently used in governance circles

[154] *Hearing Back: Piecing Together Timeliness in Saskatchewan's Administrative Tribunals*, Ombudsman Saskatchewan, December, 2007.

[155] Ombudsman Saskatchewan, Practice Essentials for Administrative Tribunals

[156] Stewart Hyson, A Primer on Federal Specialty OmbudsOffices, Canadian Parliamentary Review (vol. 34, no. 2, summer 2011) and Don Rowat, Time for a Federal Ombudsman, Canadian Parliamentary Review (vol. 18, no. 4, winter 1995-96).

[157] Hyson, supra.

[158] SC 2005, c 46

The *PSDPA* notes that "confidence in public institutions can be enhanced by establishing effective procedures for the disclosure of wrongdoings and for protecting public servants who disclose wrongdoings, and by establishing a code of conduct for the public sector".

The *PSDPA* required ATs to create a code of conduct[159]. Some ATs publish their code of conduct on their website[160].

The *PSDPA* also created the Office of the Public Sector Integrity Commissioner and the Public Servants Disclosure Protection Tribunal.

Evidently, a "wrongdoing" as defined in the PSDPA[161] is not always the same as poor governance. Ignorance can lead to failed governance; but it does not follow that the actors involved knowingly engaged in wrongdoing.

Federal ATs may also decide to post information for the parties indicating the applicable legal duties for their hearings[162].

Practising Good Governance

Several common themes arise from the above governance legislation for ATs.

Codes of conduct remind decision makers of some of the duties they owe the parties. For example, decision makers cannot have an undisclosed personal interest in a case.

The Legislatures also expect AT decision makers to be experts. That is the only reason courts give deference to AT decisions. Since an appointment, by itself, does not magically transform a decision maker into a subject matter expert, ATs must have a process to develop and maintain this expertise.

Lawyers in private practice need to stay current to serve their clients properly. The need is no less important for AT decision makers[163] who wield sometimes extensive power over parties who have no choice but to use them.

Proving Good Governance: Independent Audits

It is somewhat disconcerting that many key administrative law decisions arose from the inadvertent or unintended disclosure of certain behaviour behind the scenes at ATs. Whether that conduct might violate natural justice depended on the point of view of a particular party.

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[159] Section 6
[160] See, for example, the code of conduct at the Social Security Tribunal of Canada's website.
[161] Section 8
[162] See, for example, the comments from The Occupational Health and Safety Tribunal Canada about the quasi-judicial nature of its appeals process.
[163] Ironically, the Law Society of Upper Canada exempts lawyers on ATs from the CPD obligations which were applicable to them if they had been practising law.

In *Telus*, *supra*, allegations somehow reached the successful party that an AT Chair had told staff to let the losing party know they would win if they filed a reconsideration application. In *CB*, *supra*, a lawyer inadvertently learned that the entire OLRB was discussing his case.

In *Ellis Don*, *supra*, counsel somehow learned that an originally favourable decision had changed following a full board meeting. In *Lee*, *supra*, a party learned of the extent of counsel's involvement with an AT's decision after documents, which were later alleged to be subject to solicitor-client privilege, were inadvertently disclosed under a freedom of information request.

Since the courts understandably enforce a presumption of regularity for ATs, how does one answer the "conundrum" mentioned in *Bui*[164]*,supra?* How can a party contest alleged irregularities if an AT fails to disclose information which ought to have been disclosed, or acts in an inappropriate way behind the scenes?

There are some processes available, like whistleblower and Ombudsman complaints, which may indirectly lead to third party oversight. But they are not really designed as mechanisms to encourage ongoing good governance.

Quebec and Ontario legislation governing AT's does provide for party-initiated complaints, but it is premised on a party being in possession of the relevant facts.

For example, Quebec's *ARAJ* sets up the "Conseil de la justice administrative" which, among other things, examines complaints made against administrative decisions makers:

> *177. In addition to the functions assigned to it by law, the functions of the council in respect of the Administrative Tribunal of Québec and its members are*
>
> *(1) (subparagraph repealed);*
>
> *(2) to establish a code of ethics applicable to the members of the Tribunal;*
>
> *(3) to receive and examine any complaint lodged against a member pursuant to Chapter IV;*
>
> *(4) to inquire, at the request of the Minister or of the president of the Tribunal, into whether a member is suffering from a permanent disability;*
>
> *(5) to inquire, at the request of the Minister, into any lapse raised as grounds for removal of the president or a vice-president of the Tribunal from his administrative office in the case provided for in section 66;*
>
> *(6) (subparagraph repealed).*
>
> *The council may also report to the Minister on any matter the Minister may submit to the council and make recommendations to the Minister concerning the administration of administrative justice by the bodies of the Administration whose president or chairman is a member of the council.*

[164] 2016 BCSC 1572

The *ARAJ* provides citizens with the right to file complaints about decision makers who allegedly breach the code of ethics or a duty owed to the parties:

> *182. Any person may lodge a complaint with the council against a member of the Tribunal for breach of the code of ethics, of a duty under this Act or of the prescriptions governing conflicts of interest and incompatible functions.*

In *Poitras et Leclerc*[165], the complaints committee hearing a complaint recommended[166] that an administrative judge be suspended for a period of two months due to numerous violations of the code of conduct applicable to him, including a lack of respect and civility towards the complainant.

Such proceedings can take place because Quebec ATs, like the courts, record their hearings. A full record exists of what transpired during the hearing.

Canada's Conflict of Interest and Ethics Commissioner can also consider referrals from the Public Sector Integrity Commissioner concerning alleged conflicts of interest involving AT members[167].

But party-initiated complaints do not fully address the *Bui* conundrum. There is no perfect answer, since ATs are entitled to some measure of deliberative secrecy, in the absence of demonstrated procedural defects[168].

One partial solution which respects deliberative secrecy, but examines an AT's respect of the duties it owes the parties, comes from third party governance audits. Ontario's *ATA* already foresees this type of process. The *ATA* mandates a public servant, or any other person, to conduct a review of administrative tribunals every six years:

> *21. (1) An adjudicative tribunal's responsible minister shall direct a public servant employed under Part III of the Public Service of Ontario Act, 2006 or any other person to conduct a review of the adjudicative tribunal at least once every six years. 2009, c. 33, Sched. 5, s. 21 (1).*
>
> *Matters for review*
>
> *(2) The review required by subsection (1) must address,*
>
> *(a) the tribunal's mandate and whether it continues to be relevant;*
>
> *(b) the functions performed by the tribunal, and whether they are best performed by the tribunal or whether they would be better performed by another entity;*

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[165] 2016 CanLII 43218 (This decision is only available in French)
[166] Recommendations for a suspension or dismissal go to the Conseil de la justice administrative, which can forward them to the Minister of Justice: *ARAJ*, section 192.
[167] Referrals from the Public Sector Integrity Commissioner
[168] Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval, 2016 SCC 8 at paragraph 58

> *(c) the tribunal's governance structure and management systems, and whether they continue to be appropriate to its mandate and functions;*
>
> *(d) the tribunal's financial and human resources and its financial and information systems;*
>
> *(e) the tribunal's business planning, performance measurement and reporting practices;*
>
> *(f) whether the tribunal has effective processes in place to ensure its compliance with any applicable Act, regulation or directive of the Management Board of Cabinet;*
>
> *(g) whether the tribunal is effective in achieving its mandate and serving the public;*
>
> *(h) whether changes should be made to the tribunal or whether the tribunal should be discontinued; and*
>
> *(i) any other matter specified in the regulations or in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 21 (2).*
>
> *Additional reviews*
>
> *(3) An adjudicative tribunal's responsible minister may at any time direct a public servant employed under Part III of the Public Service of Ontario Act, 2006 or any other person to conduct a review of the adjudicative tribunal in respect of any of the matters listed in subsection (2). 2009, c. 33, Sched. 5, s. 21 (3).*

A useful review needs to involve someone with extensive knowledge of how government works. But a full review would also need an expert in the challenging area of administrative law. It is the latter area which creates many of the duties mentioned in this paper. Administrative law is far from simple, especially for those with no experience in it. Our own Chief Justice, quoting former U.S. Supreme Court Justice Scalia, noted a year ago that "Administrative Law is not for Sissies"[169].

Moreover, even judges candidly comment about the challenges administrative law creates[170].

A judge, who as a lawyer pleaded cases and later decided judicial review applications, might be the ideal person to assist with AT governance audits.

A governance audit usually involves an expert examining an institution's mandate and duties, interviewing individuals in order to ascertain whether reality reflects what is found in writing, and then preparing a report. The goal is to identify "best practices", rather than to find fault.

For institutional ATs, an audit by an appropriate expert might examine the extent to which everyone, regardless of specific role, understands how the tribunal differs fundamentally from a regular government department.

The audit could also evaluate the extent to which an AT ensures its decision makers have the requisite knowledge and expertise and whether they apply it in practice.

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169 "Administrative Law is Not for Sissies": Finding a Path Through the Thicket

170 Justice David Stratus, Federal Court of Appeal, The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency

And an AT audit would examine the processes through which decision makers arrive at their decisions and whether any assistance from others respects the limits the courts require.

CONCLUSION

While some laypersons might see ATs as something similar to the courts, the executive branch controls how ATs function. The executive branch has a broad discretion regarding AT independence. That independence varies depending on whether the AT is acting in a quasi-judicial manner, or is found more at the policy end of the spectrum.

Administrative law has set out many of the duties ATs owe the parties who come before them. Legislation establishes other AT duties.

It is not surprising that many legislatures emphasize the need for education at ATs. Without decisions makers and others fully understanding an AT's substantive law, and the duties imposed by administrative law, how can they serve the parties fairly?

An AT's delay in processing a file, or in issuing a decision, prejudices the parties. Inordinate delay may undermine the entire process, without any examination of the merits.

Issuing a decision quickly, while encouraging, does not by itself demonstrate whether an AT served the parties properly. An AT's duties extend much further.

AT decision makers owe the parties the duty of determining the facts, thoroughly reviewing the parties' submissions, and then drafting a decision. While ATs do have some margin for discussing issues with legal advisors or in a plenary setting, the decision maker alone retains the ultimate responsibility for the drafting of the reasons. There is no other way for a decision maker to properly understand each case without performing this analytical work.

Natural justice requires decision makers to understand the record of evidence on which they can rely to make their decision. Decisions must also be based on the facts and law in the case, rather than on the decision maker's personal preference.

While any complaint-based process may help with AT accountability, it can only proceed based on the parties' actual knowledge, rather than on presumptions.

Good governance goes beyond these party-initiated processes and, especially with third party expert audits, helps identify "best practices" for ATs. It is just one way to narrow the wide accountability gap between ATs whose decision makers are imposed on the parties and decision makers the parties appoint consensually.

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Graham J. Clarke, a bilingual labour arbitrator/mediator, served as a Canada Industrial Relations Board Vice-Chair from 2007-2016. He is the author of Clarke's Canada Industrial Relations Board. In addition to acting as legal counsel to the Canada Labour Relations Board's first Chair, Mr. Marc Lapointe, Q.C., Graham practised labour, employment and administrative law for two decades in private practice. Graham is currently a roster arbitrator for the Canadian Railway Office of Arbitration and Dispute Resolution, a member of the Federal Minister of Labour's list of approved arbitrators and a part time Vice-Chair at the Ontario Labour Relations Board. Conference attendees can find on www.grahamjclarke.com previous administrative and labour law papers.