CIRB 2017: The Importance of Process for Parties, Tribunals and Courts*

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Introduction[1] [2]

Have we started overlooking the importance of the process leading to sound decisions? Or does social media just make it seem that way? Some social media adherents, whether knowingly or not, seem to follow their spiritual leader, sometimes known as POTUS. They focus on conclusions without letting facts or analysis get in their way.

Experienced decision makers know that the actual decision is the least important part of the process. Any greenhorn can say "yay" or "nay", or sign an executive order. A decision maker's challenge comes from ensuring a procedurally fair process.

Recent Canada Industrial Relations Board (CIRB or Board) decisions, as well as those of its predecessor, the Canada Labour Relations Board (CLRB), help illustrate the importance of process and analysis.

This paper will examine the decision-making processes of trade unions, employer representatives, administrative tribunals like the CIRB and, to a lesser extent, the courts.

Some of the questions this paper will examine include: i) when can a trade union hold a membership vote to decide whether to take a member's grievance to arbitration? ii) when are "bottom line" decisions appropriate? and iii) why does an administrative tribunal have an essential role on judicial review?

In every situation, process and analysis take precedence over conclusions.

The Parties

The *Code*[3] assigns the CIRB the task of examining the parties' decision-making process. A significant part of the Board's workload involves duty of fair representation (DFR) complaints. While the duty is most commonly associated with trade unions, an employer representative for employers subject to a geographical certification has a similar obligation.

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[1] Reading this paper on a computer provides live hyperlinks to cases and other material. Full citations may be repeated for ease of access to these hyperlinks.

[2] The comments in this paper represent a labour arbitrator's musings and are not attributable to any administrative tribunal, whether past or present.

[3] Canada Labour Code, RSC 1985, c L-2

A bargaining agent subject to a DFR cannot act in an arbitrary, discriminatory or bad faith manner regarding its members' rights under the collective agreement. The Board does not sit in appeal of a representative's decision, but it will focus on the process it followed.

A Trade Union's DFR[4]

How much process must a trade union follow before concluding whether to take a grievance to arbitration? To what lengths must it go when a grievor disputes the employer's facts?

In *Gagné*[5], an employer had terminated an employee for allegedly threatening to kill his supervisor. The Board had to consider the extent of a trade union's disclosure obligations to the grievor during its investigation. Did it have to reveal the identity of a fellow employee who had confirmed the threats during an interview?

The Board generally requires a trade union to put the employer's case to a grievor, since he or she is best situated to comment on the allegations[6]:

> [104] In the Board's view, an agreement between the Teamsters and UPS not to show key documents to Mr. Singh, as a condition for Mr. Randall viewing them, deprived Mr. Singh of an important opportunity to know and comment upon the case against him. At an arbitration hearing, any evidence in support of a just cause dismissal would have to be produced in its entirety, subject to any orders allowing limited redaction and admissibility.
>
> [105] Experienced employers and trade unions often share information early in the grievance process. This process helps trade unions make the difficult judgment calls. But if an employer insists on confidentiality, and this demand hinders a grievor's ability to assist his or her union, then the union and the employer will have to live with the possible repercussions arising from this practice.

The Board concluded in *Gagné* that the trade union was not required to disclose the identity of the bargaining unit member who confirmed the death threat made against the supervisor:

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[4] The Board issued a new DFR complaint form in December 2016 to help focus complainants on the relevant issues.
[5] 2016 CIRB 834
[6] Singh, 2012 CIRB 639

> [37] The Board is of the view that CUPW was not required to disclose the identity of the witness to Mr. Gagné.
>
> [38] The investigation process of a union is not the same as the legal proceedings of an administrative or civil tribunal. Procedural fairness and natural justice are not applicable to a union when it is deciding which of its members' grievances will be referred to arbitration.
>
> [39] Rather, a union must, within its means, conduct an investigation and it must refrain from acting in a manner that is arbitrary, discriminatory or in bad faith, as required by the Code. It would be incorrect to impose the same standards on unions, in their day-to-day work, that apply to administrative tribunals or to police officers conducting criminal investigations.
>
> [40] These comments by the Board are applicable only within the administration of collective agreements. Other standards may apply to a union in a process regulated by its own constitution.

The Board distinguished the *Singh* decision because Mr. Singh had no idea about the specifics of the allegations which had led to his termination. In *Gagné*, on the other hand, the only fact the trade union had to confirm in analyzing its arbitration chances was whether a witness, other than the supervisor, had also heard the death threat:

> [44] In this case, CUPW also was not under any obligation to give Mr. Gagné the opportunity to challenge its investigation in fine detail. There was only one piece of evidence to verify and that was whether Mr. Gagné had threatened his supervisor. CPC's position was clear.
>
> [45] CUPW obtained Mr. Gagné's version of the facts and spoke with other members of the unit. CUPW had the right, after consulting with other potential witnesses, to assess its chances of succeeding at arbitration. Given that there was only one piece of evidence to verify, CUPW was not in any way required to hold a formal hearing or to disclose the identity of the key witness to Mr. Gagné.
>
> [46] The facts in Mr. Gagné's case differ from those in Singh 639, in which the employer's allegations and evidence were withheld from the complainant.

Conversely, in *Lang*[7], the Board determined that a trade union had not reviewed the employer's evidence sufficiently with the employee.

A trade union's process may also come under scrutiny when it uses a general membership vote to decide whether to take a grievance to arbitration. In *Pearson*[8], a union's membership voted down the executive's recommendation to take a supervisor's termination grievance to arbitration. Some employees working for the supervisor had used the membership meeting to raise new issues alleging mistreatment and fraud.

In the past, the CLRB had accepted that a trade union could use bargaining unit votes to determine which cases would go to arbitration[9]. But the procedure followed would be crucial. In *Pearson*, the Board concluded that, while the union had tried to focus the debate on the actual issues, it ultimately failed to ensure that the voting process was fair and that the bargaining unit decision-makers gave due and proper consideration to the merits of the actual grievance:

> [138] There is little doubt in the Board's opinion that the new allegations, such as Ms. Pearson's alleged mistreatment of staff for years or allegations of past fraudulent actions, had the potential to highly influence the membership given the allegations already raised in the termination letter. As the Board stated in Patry, supra, when the voting membership includes employees with divergent interests, the union must exercise a higher degree of diligence to ensure that fairness and due process are upheld. The Board finds that the union failed to do so in this case.
>
> [139] The Board accepts that the union tried its best at the meeting to refocus the debate and encourage the voting membership to turn its mind only to the relevant and proper considerations, in order to ensure that the decision-makers and decision-making process complied with the union's DFR. However, the Board finds that this was not sufficient. The membership's views and opinions of the grievance had already been affected by the new allegations made against Ms. Pearson, without the benefit and opportunity of hearing her side of the story. Even though the membership indicated that it was prepared to vote, the Board finds that it did not have and could not have had all of the information in hand to arrive at a thoughtful judgment about what to do, after considering the various relevant and conflicting considerations. While the Board is unable to conclude that the union entirely lost control of the meeting or that it amounted to a "mob scene" as suggested by counsel for the complainant during the hearing, the decision-making process appears to have resulted in an irrational conclusion, with many of the voting members having chosen to ignore the real merits of the issue.
>
> [140] In light of the above, the Board finds that the union failed to ensure that the voting process was fair and that the decision-makers were in a position to give due and proper

[7] 2017 CIRB 848
[8] 2016 CIRB 841
[9] See, for example, *M.A. Ladds* (1991), 85 di 160.

> consideration to the merits of the grievance and make a reasoned and informed decision. Consequently, by allowing the vote to proceed in circumstances where new information and allegations were raised by the cash office employees, without Ms. Pearson present and without obtaining her explanation, the union acted arbitrarily and breached its DFR.

In *Cadieux*[10], two earlier Board panels had decided, based on the paper record, to dismiss a DFR complaint. The Federal Court of Appeal remitted the matter back to a differently constituted panel which held an oral hearing. That panel found, among other things, that the union's investigation and its process during a group vote had been arbitrary.

An Employer Representative's DFR

Section 34 of the *Code* allows for multi-employer geographic certifications. Currently, that special regime applies only to the longshoring industry. A geographic certification binds multiple longshoring employers operating in a port and obliges the naming of an employer representative.

Section 34(6) of the *Code* imposes a DFR on the employer representative which is comparable to the one applying to trade unions, though, for obvious reasons, it is not limited to "rights under the collective agreement"[11]:

> In the discharge of the duties and responsibilities of an employer under this Part, an employer representative, or a person acting for such a representative, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers on whose behalf the representative acts.

Just like a trade union, an employer representative can decide whether to settle a grievance lodged against one of the port's longshoring employers.

In *Quebec Ports Terminals Inc*[12]., the Board confirmed that essentially the same principles which apply to trade unions govern how an employer representative must fulfill its obligations:

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[10] Cadieux, 2016 CIRB 809
[11] 1985 *Code* amendments restricted a trade union's DFR to "rights under the collective agreement". For a review of the narrowing of the DFR, see Torabi, 2015 CIRB 781.
[12] 2015 CIRB 765

> [70] The duty of representation of an employer association is not an issue that the Board has addressed very often. There are few decisions relating to complaints filed against an employer representative under section 34(6) of the Code. However, the fundamental principles applicable to section 37 complaints must, by analogy, be applied in this case, with the appropriate adjustments of course. At least, that is what the Federal Court of Appeal ruled in Quebec Ports Terminals Inc. v. Canada (Labour Relations Board), [1995] 1 F.C. 459; (1994) 175 N.R. 372; (1994) 29 Admin. L.R. (2d) 189; and (1994) 95 CLLC 210-010 (FCA, file no. A‑1584‑92).

While a member employer may not agree with the employer representative's decision to settle a grievance, the latter has the authority to make that determination:

> [97] The Board considers that, given the difference of opinion between QPT and the MEA, the discretion lay with the MEA to interpret and apply the collective agreement binding it to the union. In fact, like a union, the employer representative has ultimate responsibility for deciding on its interpretation of the collective agreement. Differences of opinion between a complainant and a bargaining agent on the interpretation of the collective agreement are not sufficient to show that the bargaining agent—or in this case, an employer representative—acted in a manner that was arbitrary, discriminatory or in bad faith (see Pelletier, 2010 CIRB 490).
>
> [98] In the matter before the Board, the MEA conducted a thorough investigation of the grievance by obtaining QPT's version of the facts, meeting with the persons concerned by the grievance, and considering the evidence adduced by the union at the hearing. The MEA then obtained a draft legal opinion, which it sent to QPT for input. In the end, given the circumstances, the MEA decided that it was preferable to settle the grievance. The MEA informed QPT that it intended to settle the grievance, which it proceeded to do on November 5, 2010.

In *Parrish & Heimbecker, Limited*[13], the Board again examined an employer representative's procedure. In this case, the employer's representative, after reading a CIRB "bottom line decision" in a related case, decided to settle a grievance.

The CIRB had issued its bottom line decision[14] on August 28, 2014. The employer representative settled the grievance on September 12, 2014. Three months later, on December 18, 2014, the CIRB provided its reasons for the bottom line decision.

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[13] 2015 CIRB 786

[14] This paper examines the issue of bottom line decisions, *infra*.

The member employer argued that the employer representative could not properly settle the grievance until the Board had provided its actual reasons for the bottom line decision. The Board cited extracts of the parties' differing viewpoints on the impact of the August 2014 bottom line decision:

> [83] Counsel for P&H responded to the MEA's September 10 request for input on September 12, 2014, shortly after the expiry of the noon deadline, at 12:18 p.m. In his email response, P&H's counsel reiterated the request for an adjournment, failing which he advised that P&H would make a request to the arbitrator to defer proceedings, seek a ruling on the scope of the grievance and deal with P&H's status at the hearing, if required. The email stated, in part:
>
> Am surprised at the timing of the ILA's response on the adjournment question, but as I indicated last week, P & H is not able to assess its position until the Board has rendered the full Reasons for its "bottom-line" finding of estoppel in this matter. In order to allow time for that to happen, P & H is willing to undertake that it will continue its current practice of engaging ILA members for the loading of vessels ship-side, at least until such time as the question of the application of the 2010 MOS has been finally determined, whether by P & H accepting the finding of the Board based on the pending Reasons, or seeking to have the matter determined through Judicial Review. In the latter regard, P & H agrees to file any Judicial Review application within 3 weeks of its receipt of the Board's Full Reasons, or be deemed to have waived its right to seek Judicial Review of the Board's decision.
>
> ...
>
> I will be out of E-mail range entirely now for the rest of today and the week-end, but will be back in Toronto first thing Monday morning.
>
> [84] The MEA wrote to P&H on September 12, 2014, at 2:09 p.m., again attempting to seek P&H's point of view on the proposed settlement:
>
> As you may be aware the ILA offer to settle the grievance for $12000 ends today. Our legal counsel has recommended that we accept the offer considering the "bottom line decision" issued by the CIRB. We don't require the consent of P&H to settle the matter however we would like your point of view on this. It is our intention to cancel the arbitration hearing scheduled for September 17th.

The member employer did not satisfy the CIRB that the employer's representative acted too quickly, despite the fact that the Board in a related case had not yet issued its reasons for a bottom line decision. The employer representative could therefore settle the grievance with the union:

> [90] Furthermore, the Board does not accept P&H's allegations that the full reasons of the section 65 referral were necessary for P&H to assess its position. The Board finds that the conclusion and brief analysis of the bottom-line decision, wherein the Board was clear that the "own product" exception did not apply, were sufficient for the MEA and P&H to determine whether it had any chance of successfully defending the grievance at arbitration. The Board accepts that, by that time, P&H had also admitted to loading the seven vessels that were at issue in the grievance. As such, the Board accepts that the only issue for the MEA to consider in terms of the settlement offer was the potential damages.

Summary

Other recent cases have highlighted the importance of the parties' process, including a proper investigation of the facts.

The Ontario Court of Appeal in *Doyle v. Zochem Inc.*[15], found that a cursory investigation into, and attendant dismissal of, a sexual harassment complaint were proper considerations for an award of moral damages.

In *Joshi v National Bank of Canada*[16], the Court refused to strike out a claim for damages arising from an alleged unfair investigation into an employee's suspected wrongdoing:

> [26] While not explicitly clear, I understood the plaintiff to be alleging that an investigation into his alleged misconduct was commenced before he resigned, and that he was not made aware of that investigation nor given an opportunity to respond. While the contents of paragraph 12 ought to be expanded with further particulars, in my view I find that it is not plain and obvious that the plaintiff's claim for breach of the duty of good faith cannot possibly succeed. There is no doubt that the defendant owed a duty to perform employment contractual obligations and without misrepresentation. If an investigation into alleged misconduct on the part of the plaintiff was ongoing during his employment, it was, at a minimum, an implied contractual obligation to afford the plaintiff due process and allow him to respond and/or refute such allegations.
>
> [27] If the defendant was not afforded such an opportunity, this could qualify as a breach of the duty of good faith. The defendant's subsequent acts as alleged in the pleading (adding the plaintiff to the BCPIO database without a proper investigation and making the representations to member banks) would be premised upon a potential breach of the duty of good faith and carried out in furtherance of that alleged breach.

[15] 2017 ONCA 130
[16] 2016 ONSC 3510

In *Shoan v. Canada (Attorney General)*[17], the Federal Court found that an outside investigator conducting a harassment investigation had had a closed mind when doing her investigation:

> [146] It is not for the Court to speculate as to what the result would have been had the Investigator done what she said and just focused on the words used in the impugned emails and kept an open mind. Similarly, given the Chairman's views of Commissioner Shoan as he expressed them to the Investigator, his involvement in the final decision is procedurally unfair. The failure of procedural fairness by the Investigator and the Chairman make the entire Report and the corrective measures suspect and unreliable.

In short, process and analysis matter. Conclusions, not so much.

Administrative Tribunals

Administrative tribunals fulfill important public policy duties, in addition to ensuring their determinations respect procedural fairness.

The CIRB regularly comments on the process carried out by parties and must similarly follow proper procedures when deciding its cases. Evidence regarding employee wishes and the use of bottom line decisions help illustrate these obligations.

The Board has recently reiterated the importance of its public policy role when verifying evidence of employee wishes. A failure to meet this duty in all cases involving employee wishes[18] would undermine the Board's reputation and ability to serve the parties.

The Board has also referred in several recent decisions to earlier "bottom-line" decisions. These decisions can be helpful in certain labour relations situations, though a significant gap in time between a bottom line decision and proper reasons may raise legal issues.

[17] 2016 FC 1003. See also Canadian Pacific Railway Company v Teamsters Canada Rail Conference, 2017 CanLII 5291

[18] Cases involving employee wishes include certifications, raids, revocations and sometimes bargaining unit reviews

Labour board oversight of membership evidence

Papers prepared for the 2015 and 2016 versions of this conference described how Bill C-4 would reinstate the card-based certification system which the CLRB and CIRB had used throughout most of their history[19]. The Senate recently returned Bill C-4 to the House of Commons with proposed amendments designed to keep mandatory representation votes[20]. The House then sent its original bill back to the Senate.

The Senate ultimately relented and passed Bill C-4 without amendments. Bill C-4 received Royal Assent on June 19, 2017 and "comes into force on the third day after the day on which it receives royal assent"[21]. In addition, further important changes to the Board's jurisdiction were proposed in the most recent budget[22].

The CIRB's public policy role requires it to evaluate the confidential evidence of employee wishes. 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*[23]. 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.

The CLRB's ability to decide a case based on confidential evidence of employee wishes did not come without a fight. The CLRB's Chair, Marc Lapointe, retained counsel and took the issue to the Supreme Court of Canada (SCC), given how vital it was in labour relations cases to keep employees' wishes confidential[24].

In *Canada Labour Relations Board v. Transair*[25], the SCC confirmed that the CLRB could rely on confidential evidence about employee wishes and could prevent cross-

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[19] Copies of those papers can be found at https://www.grahamjclarke.com/en/conferencesarticles/
[20] This link provides the history of Bill C-4
[21] Section 17 of Bill C-4
[22] Proposed Code amendments in the recent omnibus Budget Bill C-44 would enlarge the Board's jurisdiction to include, *inter alia*, Part III unjust dismissal complaints, authority over a new Part III reprisal complaint process and an appellate role for appeals under a new Part IV of the Code (Administrative Monetary Penalties) and under the Wage Earner Protection Program Act.
[23] 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.
[24] The topic of an administrative tribunal appearing as part of the judicial review process will be examined, *infra*.
[25] [1977] 1 SCR 722, 1976 CanLII 170

examination about numbers, as well as any inquiries which might identify individual employees.

In a later case, the CIRB retained outside counsel to object to a request for the disclosure of membership evidence. The FCA confirmed the Board did not need to produce this evidence, despite a party raising allegations of impropriety, even for the purposes of a judicial review[26]. The *Code* already contains a different provision which allows the Board to hear a party's application alleging that fraud occurred in the certification process[27].

Given the Board's public policy role when evaluating confidential evidence about employee wishes[28], it is essential that the Board conduct a proper investigation into the reliability of that evidence[29]. Information received cannot just be rubberstamped[30].

Three recent certification (raid) decisions demonstrate the attention the CIRB pays to any defects it discovers with membership cards filed in support of an application[31]. The decisions all found that certain employees had either failed to pay the $5.00 fee themselves, or had never signed cards[32].

It is not clear from the Board's reasons what process it followed once it became aware of membership evidence irregularities. Generally, an employer is not involved in such issues[33]. But trade unions as well are not entitled to know who may have signed cards for a competing union. So how can the Board satisfy itself in a procedurally fair way about the information coming from an Industrial Relations Officer's confidential investigation[34]?

Traditionally, without identifying employees, the Board has asked for an applicant's submissions on its findings[35]. Not surprisingly, if the applicant does not provide submissions, but instead asks for a vote, the Board usually dismisses that request[36].

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[26] Maritime Ontario Freight Lines Ltd. v. Teamsters Local Union 938, 2001 FCA 252
[27] *Code* s. 40
[28] Section 35 of the CIRB's Regulations allows the Board to keep this information confidential
[29] In Rooley, supra, the Board described this detailed process at paras 37-45.
[30] In International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 680 v Imperial Theatre Inc., 2017 CanLII 5273, the New Brunswick Labour and Employment Board reaffirmed its stringent practice of scrutinizing membership evidence to protect the integrity of its card-based certification regime (paragraph 33)
[31] See A.S.P. Incorporated, 2016 CIRB 828; AJW Technique Inc., 2016 CIRB 814; and Harbour Link Container Services Inc., 2015 CIRB 804
[32] Section 31(1) of the CIRB's Regulations sets out the criteria for valid cards
[33] Bell Mobility Inc., 2011 CIRB 579 paragraphs 39-45
[34] The panel has the ultimate responsibility to satisfy itself about the conclusions in a staff report: Rooley, 2015 CIRB 759 starting at paragraph 40.
[35] See Technair Aviation Ltée (1990), 81 di 146; and 14 CLRBR (2d) 68 (CLRB no. 812) and Genesee & Wyoming Inc., cob as Huron Central Railway HCRY, 2007 CIRB 388
[36] AJW Technique Inc., 2016 CIRB 814 at paragraph 46

When are bottom line decisions[37] appropriate?

In *Parrish & Heimbecker, Limited, supra*, the issue arose whether an employer's representative could settle a related grievance based, in part, on the Board's bottom line decision, but before receipt of the actual reasons. It appears from the extracts cited above that that bottom line decision had contained some explanation for its conclusion.

Bottom line decisions may assist parties in some situations. At the CIRB, labour relations imperatives may require an immediate decision or order to avoid a remedy for the aggrieved party becoming illusory[38].

In *Ontario Northland Transportation Commission*[39], the Board found that an employer engaged in an illegal lockout when it refused to allow employees, who were still being paid, to work during the 72-hour period covered by a notice of lockout[40]. Since that notice period was only 72 hours long, the remedy of reinstatement would become illusory if the Board could not act until it had provided full reasons.

As a result, the Board heard the parties on November 12, 2015 and issued an order that same day. The Board later provided its full reasons on March 22, 2016. Those reasons emphasized the importance of immediate intervention:

> [66] As remedy, the Board ordered that the workers be permitted to return to work commencing with the 8:00 a.m. shift on November 13, 2015. Upon finding that Ontario Northland's actions constituted an illegal lockout under the Code, the Board found that permitting employees to return to the workplace would respect and uphold the labour relations purpose of the notice period, and return to what was supposed to have been the status quo until the legal lockout commenced. Ordering the employees to return to work would ensure that this timeline was reinstated and not cut short.
>
> [67] This remedy also serves the labour relations purpose of disincentivizing employers from ignoring the 72-hour notice requirements. If the Board in this situation had issued only a declaration, as suggested by Ontario Northland, it would be less likely that employers in the future would be deterred from engaging in this form of unlawful lockout.

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[37] This topic has been explored in earlier papers. See, for example, 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.
[38] The Board also has the power to issue interim orders under s.19.1 of the *Code*.
[39] 2016 CIRB 820
[40] Several Board decisions have arrived at the same conclusion. See, for example, Bell ExpressVu LP, 2012 CIRB 649

For decisions not falling within the Board's expedited process[41], the Board has on occasion issued "bottom line" decisions and provided more detailed reasons shortly thereafter[42]. This practice can assist the parties, especially during collective bargaining. But the bottom line decision should provide some explanation to the parties about why the Board decided the way it did.

Bottom line decisions can raise concerns if a significant delay ensues before proper reasons are issued. Procedural fairness requires a written explanation for a decision[43]. While the SCC's later decisions in *Dunsmuir*[44] and *Newfoundland Nurses*[45] may have impacted a court's analysis of a tribunal's reasons[46], the view from the trenches considers tribunal decisions as akin to private sector legal opinions.

In both situations, excessive delay[47] is unacceptable.

In private practice, a lawyer who maintains a successful practice will have to provide clients with legal opinions in a timely manner. In labour arbitration, consensually appointed arbitrators may be looking for work if they do not provide reasons expeditiously, following a procedurally fair process.

While appointed decision makers who are imposed on the parties will not face this same level of accountability, there is no reason the Executive, if it wanted, could not link excessive delays in the rendering of decisions with the "good behaviour" condition for appointments[48]. While the courts, for obvious reasons, may tolerate years of delay before

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[41] Section 14 of the Canada Industrial Relations Board Regulations, 2012, SOR/2001-520 enumerates which cases fall within the Board's expedited process.

[42] 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

[43] Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, 1999 CanLII 699 at paragraph 43

[44] Dunsmuir v. New Brunswick, [2008] 1 SCR 190, 2008 SCC 9

[45] Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), [2011] 3 SCR 708, 2011 SCC 62

[46] Matthew Lewans, "Deference and Reasonableness Since Dunsmuir", (2012) 38:1 Queen's LJ at page 87

[47] The Code at section 14.2(2) requires the CIRB to issue its decisions within 90 days of taking a matter under reserve, though this time limit can be extended. There is no reason that most decisions cannot be issued within this generous time frame.

[48] For example, section 10 of the Code imposes the "good behaviour" standard for all CIRB appointments. Exceptionally, section 12.06 of the *Code* contains provisions regarding Inquiries into appointed CIRB decision makers' behaviour which may limit the Executive's usual "good behaviour" authority over these appointees, other than for the Chair. The Inquiries process may *de facto* provide board members, except the Chair, with enhanced tenure. Contrast the *Code's* Inquiries process with that used to remove an appointed decision maker at the CRTC: Shoan v. Canada (Attorney General), 2017 FC 426

deciding to stay a proceeding[49], there is no reason why the Executive could not demand timely decisions as a continuing "good behaviour" requirement for all appointments[50].

The potential problem with bottom line decisions is that they may delude decision makers into thinking they have actually done something, when they have not.

The OCA, albeit in a criminal case[51], recently expressed its frustration with a judge who had provided a bottom line decision, but never prepared reasons, despite her promises to do so:

> [39] Our order directing a new trial is a terrible result for everyone involved in this proceeding. The trial judge's failure to give reasons, despite her repeated promises to do so, has frustrated the proper administration of justice. Nor is this the first time that this trial judge's failure to provide reasons has required this court to order a new trial. It must be the last time.

The Canadian Judicial Council will consider a complaint against the judge[52].

A bottom line decision, in situations where no reasons arrive soon thereafter, leaves the parties in a state of limbo. To protect their interests, should they apply for reconsideration or judicial review from the date of the bottom line decision? Or do they have to wait for the promised reasons which, in extreme cases, may take years to arrive[53]?

A tribunal should issue its reasons expeditiously if it decides to use a bottom line decision. In one extreme case, an arbitrator waited two years after the arbitration ended before issuing a bottom line decision[54]. The actual reasons did not follow for a further 12 months.

Numerous recent CIRB decisions refer to bottom line decisions[55]. In some of the cases, detailed reasons did not follow quickly afterward. For example, in *Belzile*[56], the Board

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[49] Blencoe v. British Columbia (Human Rights Commission), [2000] 2 SCR 307, 2000 SCC 44. See also Bergey v. Canada (Attorney General), 2017 FCA 30

[50] In Shoan v. Canada (Attorney General), 2017 FC 426 the Federal Court overturned the removal of an appointee by the Governor In Council due to procedural concerns

[51] R. v. Sliwka, 2017 ONCA 426

[52] New trial ordered in sex assault case after Ontario judge refuses to explain her verdict

[53] Belzile, 2016 CIRB 821

[54] Misra v City of Toronto, 2016 ONSC 2246

[55] A few examples include: Société de transport de l'Outaouais, 2017 CIRB 849; AJW Technique Inc., 2016 CIRB 814 and Matimekush-Lac John Innu Nation Band Council, 2016 CIRB 843

[56] 2016 CIRB 840

issued a bottom line decision on February 20, 2014. The reasons came out on September 29, 2016, over 2.5 years later[57].

In another recent case, the Board issued a bottom line decision, but would only issue reasons at a party's request[58]:

> After having considered all of the submissions of the parties, the Board has decided to dismiss the employer's application.
>
> Given the urgent matter of this application, the Board has issued this bottom-line decision and sent it to the parties immediately. Detailed reasons for its decision will be provided should either party request them.

A tribunal no doubt has good intentions when it issues a bottom line decision. The goal is to provide a quick answer to the parties with a minimum of delay. But counsel may well find it awkward to have to ask a tribunal to satisfy its legal obligation to provide reasons. The same awkwardness arises when counsel must consider whether to plead bias on judicial review or ask a court for an order of mandamus.

Counsel in all these situations will wonder whether repercussions might follow down the road if they ask that a tribunal do the job assigned to it. Counsel will have these concerns, whether objectively rational or not, especially for decision makers who are imposed on them, rather than those who are consensually appointed. Ultimately, counsel do what is in the best interests of their clients.

The scenario might be otherwise if counsel themselves have requested a bottom line decision, though a decision maker may nonetheless prefer to provide actual reasons[59].

In addition to concerns over delay, an overreliance on bottom line decisions may also raise questions whether the decision maker properly conducted its analysis before reaching a conclusion. The longer the delay between a bottom line decision and the explanatory reasons, the greater the inference that a decision maker later drafted its reasons solely to defend its bottom line decision.

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[57] Medical reasons were one element which contributed to this delay: See paragraph 61. See also MedReleaf Corp. 2016 CIRB 829 where the reasons came out almost a year after the bottom line decision.
[58] Société de transport de l'Outaouais, 2017 CIRB LD 3781. This decision was available on the CIRB's website at the time of this paper's submission. CIRB Letter Decisions, as opposed to its Reasons for Decision, usually remain unreported.
[59] United Food and Commercial Workers International Union, Local 175 v CapsCanada Corporation, 2017 CanLII 6064 (ON LRB) at paragraph 2. See also International Union of Operating Engineers, Local 793 v Hornblower Canada Co., 2016 CanLII 79477 (ON LRB) for another example of party-initiated requests for a bottom line decision.

The Supreme Court in *R. v. Teskey*[60] described this situation as "result-driven reasoning":

> 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…**
>
> (Empahsis added)

The result-driven reasoning principle applies equally to administrative tribunals[61].

In summary, tribunals must also focus on their process when considering the duties they owe the parties. It is not always easy to balance procedural fairness with, for example, a public policy role involving confidential evidence of employee wishes.

The Courts

Labour law might have looked quite different had the CLRB not taken an active role on judicial reviews to protect its ability to serve its community.

As noted above, the CLRB, when faced with a decision which would have undermined its ability to rely on confidential membership evidence for certification matters, appealed the matter to the SCC. To some lawyers, if not many, including some SCC judges at the time, fairness required that a party be able to cross-examine witnesses about confidential membership evidence, *infra*.

This section of the paper will focus on how labour law practices differ by jurisdiction and how this context is essential for the judicial review process. The SCC recently reaffirmed the obvious assistance that tribunals can bring to reviewing courts.

[60] [2007] 2 SCR 267, 2007 SCC 25

[61] Jacobs Catalytic Ltd. v. International Brotherhood of Electrical Workers, Local 353, 2009 ONCA 749. See also Stuart Budd & Sons Limited v. IFS Vehicle Distributors ULC, 2016 ONCA 60.

The Lack of Uniformity in Canadian Labour Law

Significant labour law differences exist across the country[62]. These cultural differences constitute essential context for any judicial review, particularly if judges with a civil litigation background, but no labour experience, are called upon to analyze a labour board's procedures.

As Mr. Justice Stratus candidly opined in *Maritime Broadcasting System Limited v. Canadian Media Guild*[63]: "I would add that if I, an appellate judge with no labour relations experience, were forced to step into the shoes of the Board and assess the fairness of the Board's original decision on a correctness standard, I would have agreed with the Board largely for the reasons it gave".

In *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*[64], the SCC, when examining the parol evidence rule and ambiguities for collective agreement interpretations, had the impression that labour arbitrators were often "untrained in the law themselves":

> There is also the issue of whether an ambiguity need be a patent one to warrant the introduction of extrinsic evidence or whether a latent ambiguity involving the uncertain application of otherwise clear words to the facts of the case is sufficient. If a latent ambiguity is taken to be sufficient, the further question arises as to whether extrinsic evidence may be introduced for the purpose of determining the existence of the ambiguity. **The difficulties faced by courts of law in resolving these issues are magnified in the case of arbitrators charged with the interpretation and application of a collective agreement, as these individuals are often not only untrained in the law themselves but are required to adjudicate upon arguments made by lay persons.**
>
> …
>
> While provisions such as these do not oust judicial review completely, they enable the arbitrator to relax the rules of evidence. **This reflects the fact that arbitrators are often not trained in the law and are permitted to apply the rules in the same way as would be done by reasonable persons in the conduct of their business.** Section 84(1) evinces a legislative intent to leave these matters to the decision of the arbitrator.

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[62] See, for example, previous papers from this conference about the significant differences between the OLRB and CIRB.
[63] 2014 FCA 59, at paragraph 65.
[64] [1993] 2 SCR 316, 1993 CanLII 88

It is unclear why the SCC concluded that labour arbitrators are often untrained in the law and that lay persons plead most grievances. However, *Bradco* dates from 1993, which has apparently given vast hordes of labour arbitrators a chance to go to law school to learn about this "law thing".

As experienced lawyers know they, like judges, cannot be substantive law experts in all subject areas. That is why, at the federal level, one does not find a lawyer who is a maritime law expert on Monday, an immigration expert on Tuesday, an intellectual property guru on Wednesday, a labour law expert on Thursday and an administrative law professor on Friday. A judicial appointment, just like a tribunal appointment, does not magically confer subject matter expertise or experience.

Fortunately, it appears anecdotally that most judges have decades of experience pleading cases. Moreover, they have available to them extensive substantive law training opportunities, something which administrative tribunals rarely provide to their members. This difference arises perhaps under the assumption that appointees have spent their careers practising law in the tribunal's specific area of expertise[65].

Most labour lawyers practice predominantly in provincial jurisdiction. They may rarely have cases involving the *Code*. This may place them at a disadvantage at times on judicial review, since their instincts were honed in a different jurisdiction.

Here are just a few labour law differences between the federal and provincial jurisdictions:

- *Bargaining Unit Descriptions*: In Ontario, a bargaining unit description is considered spent as soon as the OLRB has issued it. The parties are then free to amend it. Labour arbitrators will interpret it, when necessary. Conversely, federally, as well as in Quebec, the labour boards retain jurisdiction over bargaining unit descriptions.

As a result, subject to any explicit *Code* provisions[66], the Board must approve changes to bargaining unit descriptions. The CIRB uses its continuing jurisdiction over bargaining units to determine, for example, whether new employees might fall within the existing scope of a bargaining unit[67].

While parties under federal jurisdiction, within the context of a grievance, can ask labour arbitrators to make almost any decision the CIRB itself could make under Part I of the *Code*[68], including for alleged unfair labour practices, some caution appears appropriate. When interpreting the scope of a bargaining unit, the CIRB often has access to

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[65] The SCC recently confirmed that a law society can impose mandatory education requirements on lawyers: Green v. Law Society of Manitoba, 2017 SCC 20. Strangely, lawyers have CLE obligations when practising law, but not when they sit on administrative tribunals.
[66] See, for example. S.18.1 of the *Code.*
[67] Garda Cash-In-Transit Limited Partnership, 2010 CIRB 503
[68] See section 60(1)(a.1), as well as, Canada Post Corporation v. Canadian Union of Postal Workers, 2013 BCCA 108 (BCCA) and Canada Post Corporation v. Canadian Union of Postal Workers, 2011 CanLII 5486.

background and historical information which is highly relevant to that interpretation exercise[69]. An arbitrator may not have access to this information or a full understanding of the Board's practice.

- *Reconsideration*: The reconsideration of recent decisions similarly differs among tribunals. In *Bossé v. Canada (Attorney General)*[70], which examined the Canadian Human Rights Commission's refusal to reconsider a complaint, the Federal Court summarized the reconsideration exercise for a tribunal which is master of its own procedure, but whose statute mentions nothing about reconsideration:

> [10] While the Act is silent on the Commission's jurisdiction to reconsider past decisions not to refer a matter to the Tribunal, the Commission, as "master of its own procedure", has the discretion to reconsider decisions: Kleysen Transport Ltd v Hunter, 2004 FC 1413 (CanLII) at paras 8 and 13. **Weighing against the Commission's ability to reconsider a past decision, is the doctrine of functus officio, which favours the finality of decisions and holds that generally tribunals may not reconsider past decisions** (Chandler v Association of Architects (Alberta), 1989 CanLII 41 (SCC), [1989] 2 SCR 848 at 861-863 [Chandler]). Justice Sopinka held in Chandler that the functus officio doctrine applies to administrative tribunals, where it is somewhat more flexible than in a judicial context.
>
> [11] Justice Mainville, in Merham at paras 23-25, after considering Justice Sopinka's ruling in Chandler as well as other cases, specifically ruled on the Commission's discretion to reconsider its decisions. He held that this discretion should only be used sparingly and in exceptional circumstances.
>
> [12] More recently, Justice Scott summarized four exceptions that Chandler established to the functus officio doctrine, which are limited to grounds of (1) new evidence, (2) natural justice, (3) jurisdictional error or (4) neglecting an open issue: Chopra v Canada (Attorney General), 2013 FC 644 (CanLII) at paras 64-65 [Chopra]. The Applicant, in this case, has argued on the basis of (A) new evidence, and (B) natural justice.
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> (Emphasis added)

Labour boards often have an explicit statutory authority to review their decisions[71]. The CIRB's reconsideration of recent decisions, which is not a statutory right[72], allows it to

[69] Maritime Employers Association v. International Longshoremens' Association, Local 1879, 2012 CanLII 64177
[70] 2017 FC 336
[71] Section 18 of the *Code* reads: The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.
[72] See, for example, Petrovic, 2015 CIRB 788 at paragraphs 19 and 20.

consider a decision's policy implications. At the CLRB, that reconsideration process included the Board meeting in plenary session and issuing a decision which would bind future panels.

A plenary session, as the name implies, ensured every appointed Board member participated in such an important decision[73]. The SCC in *Ivanhoe inc. v. UFCW, Local 500*[74], stressed the importance of, and the respect it would give to, administrative tribunals adopting "consensus positions". In *Wilson v. Atomic Energy of Canada Limited*[75], the FCA noted that tribunals should be allowed to come to institutional decisions and "reviewing courts should lay off and give the tribunal the opportunity to work out its jurisprudence, as Parliament has authorized it to do"[76].

Evidently, too great a focus on the concept of *functus officio,* and treating a tribunal as if it were the same as a court, could undermine a longstanding reconsideration process.

A reconsideration process can impact the general principle that parties should exhaust internal remedies before proceeding to judicial review[77]. Federally, the time limit for judicial review runs from the date of each CIRB decision. There is no obligation to ask for reconsideration before proceeding on judicial review. A judicial review of a reconsideration decision cannot be used as a collateral attack on the Board's earlier and original decision[78].

- *Practice and Procedure*: Hearing practices differ substantially, depending on the jurisdiction. In Quebec, an employer can call the grievor as its first witness and will not be bound by his/her answers. The witness is considered a *de facto* hostile witness. A similar approach has not found favour in Ontario[79]. The CIRB adapts its procedures to reflect these cultural differences, depending on the hearing's location[80].

- *Panel Mediation*: In Ontario, it is the norm for decision makers to mediate cases, with the parties' consent, without impacting their authority to decide the case. Both federal and Ontario legislation make this power explicit[81], even though traditional civil litigators might be aghast that a decision maker would ever meet alone with one party.

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[73] In an unfortunate case involving allegations of bias against the Chair, the CIRB advised it no longer used plenary sessions and had moved to the current three-person neutral panels for reconsiderations: Telus Communications Inc. v. Telecommunications Workers Union, 2005 FCA 262
[74] [2001] 2 SCR 565, 2001 SCC 47
[75] 2015 FCA 17, overturned by the SCC on a different point.
[76] Ibid. at paragraph 53
[77] S. & T. Electrical Contractors Ltd. v Iron Workers District Council of Ontario, 2017 ONSC 2926
[78] Madrigga v. Teamsters Canada Rail Conference, 2016 FCA 151
[79] Essar Steel Algoma Inc v United Steelworkers of America, Local 2251, 2014 CanLII 100499
[80] Plante, 2011 CIRB 582 at paragraphs 54-55.
[81] See, for example, section 15.1(1) of the Code.

Conversely, some labour jurisdictions forbid this panel-focused resolution method. In Quebec, a labour board panel has no authority to mediate a case with the parties. Other Quebec administrative tribunals, if their legislation provides for limited panel mediation, will however oblige the decision maker to step aside, if the mediation does not result in a settlement[82].

- *Arbitrator Appointments and Remuneration*: In Quebec, arbitrators are appointed far more frequently than in Ontario[83]. Quebec also sets appointed arbitrators' fees[84]. In Ontario, most labour arbitrators charge a per diem which includes the drafting of the award, if necessary. In Quebec and elsewhere, labour arbitrators charge an hourly rate, just like most lawyers. Guess which jurisdiction has more settlements and where labour lawyers can charge higher hourly rates?

- *Transcripts*: The Quebec Board records its hearings; the CIRB does not, except in rare situations[85]. This can lead to lawyers from one province contesting a procedure which lawyers in another province view as perfectly normal. There is no "correct" view on transcripts. Recordings may increase accountability for the way tribunal members treat the parties[86]. They also make a reviewing court's job easier. But they can also lead to Judge Ito-esque grandstanding, additional cost and delays, which is the reason most labour proceedings do not have transcripts.

The lack of a transcript generally does not open the door to the filing of affidavit evidence which in labour matters is usually permissible only to demonstrate a complete absence of evidence on an essential point or a breach of natural justice[87]. There may be non-labour situations, however, where additions to, or explanations of, the original record before the tribunal are more appropriate[88].

Tribunals should appear on judicial reviews and speak to the significant risks to their procedures if courts start routinely accepting "unofficial transcripts", arising from one or more parties' hearing notes. This practice can graft civil litigation rules onto long time labour law practices and undercut a tribunal's ability to control its own procedure. Tribunals need to know how to make proper submissions; it is not up to a court to advise a tribunal how to protect its interests on a judicial review[89].

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[82] Contrast s. 21 in *An Act to establish the Administrative Labour Tribunal, CQLR c T-15.1 (AALT)* with s. 120 of An Act Respecting Administrative Justice, CQLR c J-3.
[83] The most recent statistics suggest Quebec arbitrators are appointed non-consensually roughly 33% of the time: Données sur l'arbitrage des griefs en 2011-2012
[84] Regulation respecting the remuneration of arbitrators, chapter C-27, r. 6
[85] Ms. Z, 2015 CIRB 752 at paragraphs 34-38.
[86] Poitras et Leclerc, 2016 CanLII 43218, available only in French.
[87] Association of Professors v University of Ottawa, 2016 ONSC 2897 (Ont. Div Crt)
[88] Tsleil-Waututh Nation v. Canada (Attorney General), 2017 FCA 116 at paragraphs 24, 28, 29 and 32.
[89] Bernard v. Canada (Revenue Agency), 2015 FCA 263

A court's reviewing role would no doubt be easier if every case had a transcript to go along with it. But procedural choices are not made solely to make a decision maker's life easier. By analogy, the CLRB and the CIRB have always limited an employer's right to comment on the merits of a DFR complaint filed by a member against his/her trade union[90].

Would it be easier for the Board to receive scholarly employer submissions on the merits? Of course. But the labour relations considerations that DFR matters should be between a member and the trade union, rather than a tag team match against a usually unrepresented party, far outweighs the Board's convenience. Exceptionally as well, the Board may award costs to a represented and successful DFR complainant[91].

In one surprising recent case[92], a trade union failed to respond to a member's DFR complaint, despite several requests for a response from the Board[93]. The Board decided the case based solely on the record and sent the matter to arbitration.

- *Expedited Arbitration*: Canada's railways and their trade unions have successfully used expedited arbitration to resolve their grievances for over 50 years[94]. An arbitrator[95] may hear up to 21 cases during each monthly 3-day session and must provide reasons for each decision within 30 days[96].

CROA decisions are not simply "thumbs up or thumbs down" conclusions; the reasonableness test regularly applied by reviewing courts[97] would continue to apply to those decisions. The parties have the right to hold arbitrators accountable by judicially reviewing a decision. But an understanding of the hearing process, which is quite unique even in the labour relations world, provides essential context for the review of any decision.

Administrative Tribunals and Judicial Review

In a recent talk at the Law Society of Upper Canada's 2017 Six-Minute Administrative Lawyer, Mr. Justice Stratus of the Federal Court of Appeal noted the numerous complex

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[90] Canada Post Corporation, 2010 CIRB 558 at paragraphs 16-21. An employer has a full right to comment on remedy, however.
[91] For an analysis of the CIRB's awarding of costs, see Federal Labour Law 2016: Back to the Future, The Six-Minute Labour Lawyer 2016, Law Society of Upper Canada, May 26, 2016
[92] Sutcliffe Heinrichs, 2016 CIRB 819
[93] The employer commented only on remedy in conformity with the Board's practice
[94] Canadian Railway Office of Arbitration and Dispute Resolution (CROA)
[95] Disclosure: the author is one of the roster arbitrators.
[96] The parties proceed by way of written brief.
[97] Bergey v. Canada (Attorney General), 2017 FCA 30

issues facing reviewing courts[98]. Two of those issues included administrative tribunals' standing on judicial review and the content of the "record" before a reviewing court. For example, if a tribunal does not record its hearings, can a party file the notes it took at the hearing? Similarly, how clear is a tribunal's standing for judicial reviews of its decisions?

There is evidently a highly complex and academic aspect to the judicial review of administrative tribunal decisions[99]. The courts, as well as academics, can contemplate these issues.

From a front line perspective, a tribunal requires not just efficiency, but also a process that laypeople can understand. In employment standards cases before the OLRB, panels often engage in active adjudication[100]. This may require objective questioning from the panel and significant procedural explanations. In some cases, lay parties, at the conclusion of a 3-hour hearing, have commented: "I did not know this would take so long". If only they knew……

Clearly, administrative proceedings are not civil trials. And tribunals with the requisite expertise are best positioned to provide courts with context for those thankfully rare cases where a decision may hurt a tribunal's ability to serve its community.

Labour Board Participation in Judicial Reviews

The question might be asked why should labour boards appear on judicial reviews if labour arbitrators do not? The two "boards" are quite different, despite usually being governed by the same legislation. Labour arbitrators, even in those rare cases where they are imposed on the parties by ministerial appointment, decide private disputes. They serve the parties and cannot amend the collective agreement.

A labour board, on the other hand, forms part of the executive branch of government, albeit at arm's length[101]. A labour board has legislation to apply. That legislation authorizes a labour board to implement and create policy through its regulatory power. The CLRB, and the CIRB, have used the regulatory power granted under the *Code*[102], to implement various policies on topics such as the confidentiality of employee wishes, the

[98] Mr. Justice Stratus has described these and other issues at some length in his paper: David Stratas, "The Canadian Law of Judicial Review: Some Doctrine and Cases," April 20, 2017.
[99] See Chief Justice McLachlin's article: "Administrative Law is Not for Sissies: Finding a Path through the Thicket" (2016) 29 Can. J. Admin. L. & Prac. 127.
[100] Ian Mackenzie, "Active Adjudication and Impartiality"
[101] See "Duties Administrative Tribunals Owe All Parties", (2017) 30 Can. J. Admin. L. & Prac. 247. An earlier online version of the paper can be found here.
[102] See section 15 of the Code

payment requirement for valid membership cards and the imposition of 6-month bans following an unsuccessful certification or revocation application[103].

A labour board will also develop its own line of jurisprudence, even though some parties will disagree with it[104]. A tribunal creates a jurisprudential culture and, except in special situations, its choices should be respected.

The CLRB always appeared on judicial reviews of its decisions. Until about 2005, the CIRB sometimes engaged outside counsel to represent it in judicial review matters[105], but now rarely appears. The OLRB appears on all judicial review applications, by preparing the full record for the court, as well as a factum and book of authorities. A recent OLRB job posting[106] for legal counsel required representing the board in legal proceedings, including on judicial review and before the Human Rights Tribunal of Ontario[107].

While most judicial reviews do not require any oral tribunal submissions, a physical presence ensures, at a minimum, that the tribunal can answer any court questions, particularly about policies and procedures. A tribunal which appears may also protect its ability to appear on any subsequent appeals[108].

As referred to above, the confidentiality of a trade union's membership evidence is a fundamental principle in Canadian labour law. But that principle was never a generally accepted fundamental truth. The CLRB achieved recognition of that principle by taking the matter to the SCC.

In *Canada Labour Relations Board v. Transair Ltd.*[109], the CLRB appealed a Federal Court decision about the confidentiality of membership evidence. While the SCC was divided over the extent to which the CLRB could be the appellant, as opposed to a party[110], the majority overturned the Federal Court's decision. The SCC, per former labour arbitrator Laskin, C.J., 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:

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[103] Canada Industrial Relations Board Regulations, 2012, SOR/2001-520

[104] As just one example among many, the CIRB has held that a refusal to cross a picket line can constitute an unlawful strike, even if the parties have negotiated language about crossing picket lines in their collective agreement: British Columbia Terminal Elevator Operators' Association, 2008 CIRB 428.

[105] See, for example, Maritime Ontario Freight Lines Ltd. v. Teamsters Local Union 938, 2001 FCA 252

[106] Ontario Reports, May 19, 2017 at page xlvi

[107] The HRTO has been applying the doctrine of adjudicative immunity when dealing with complaints from a losing party against a decision maker, like a labour board Vice-Chair. See, for example, John v. Ontario Labour Relations Board, 2017 HRTO 552 and Azaranka v. Ministry of Labour, 2017 HRTO 207.

[108] Re Canada Labour Code, [1992] 2 SCR 50, 1992 CanLII 54

[109] [1977] 1 SCR 722; 1976 CanLII 170

[110] This was an issue distinct from the CLRB's right to make representations on judicial review about its jurisdiction.

The main submission of counsel for the Board on this phase of the case was that the Board's function in relation to a certification application was essentially investigatory, and he pointed in this connection to s. 118(a), (c), (k) and (p), emphasizing that it was for the Board to receive and examine evidence solicited by it and to do so without being required to have a hearing, in contrast to the requirement of a hearing under s. 188(1)(b) where an unsettled complaint of an unfair practice is involved. The Board did carry out an investigation through an authorized officer on the question of majority membership and announced that it was satisfied that the union had an absolute majority of membership support in a bargaining unit of sixty-six employees. **I think it would have been advisable for the Board to announce the number of supporting members of the union which the investigation revealed but I see no reversible error of law in its failure to do so and I share, in this connection, Jackett C.J.'s opinion, that the usefulness of disclosure of numbers escaped him.**

In point of fact, it was the investigating officer and not MacEvoy who had the precise knowledge of the members of the union who were employees in the proposed bargaining unit since it was to him that the Board delegated the duty to ascertain who were the employees who complied with the Regulations respecting proof of union membership. The Board was entitled to act on his report without disclosing it in this respect, having regard to s. 29(4) of the Regulations, once it was clear that he had made the required investigation. Of that there was no doubt in the present case. Indeed, so far as union membership was concerned the union was as much in the hands of the Board as was the employer Transair once it had supplied the Board with its membership data and once the employer had supplied the Board with its employee lists against which to make a check of the union claim.

In my opinion, the Federal Court erred in its view as to the obligation of the Board to permit

[Page 742]

cross-examination as to numbers and, certainly, as to any further inquiries which could only involve identity. Section 29(4) of the Regulations, declaring that evidence submitted to the Board with respect to employee membership in the union was for the confidential use of the Board, is a reinforcement of the policy of the Act with respect to the authority of the Board in the determination of a union's membership position. There was no such policy delineated as clearly in the legislation which was before the Courts which considered Toronto Newspaper Guild v. Globe Printing Co.[5]. Jackett C.J. remarked in a note to his reasons herein that the Globe case turned on the question whether the particular issue of majority membership support should have been investigated and, if so, how. In Re Jackson and Ontario Labour Relations Board[6], at p. 96, McRuer C.J.H.C. viewed the Globe case as turning on the fact that the Board there had refused to make a necessary inquiry rather than that cross‑examination as such had been refused. The cross-examination would have supplied information which the Board had not obtained and which was a necessary part of an inquiry which it was obliged to but failed to make. That is not this case, apart from the legislative changes since the Globe case was decided. The Board had made an

> investigation through a delegated officer and it had before it the information upon which it could exercise its statutory power to certify.
>
> (emphasis added)

The SCC minority would have permitted cross-examination on the union's membership evidence:

> **It is, therefore, apparent that counsel for the respondent sought to cross-examine the witness in order to determine the number of members of the suggested unit who were in favour of its certification. Since that was a matter upon which the union's right to certification depended and also a matter which the Board had to find in order to determine whether or not it should direct a vote, it was critical to the determination of the Board's right to make a certification order**. It is true that the Board had carried on an investigation and the report of the Board's officer had been to the effect that a majority did exist but that was only an investigator's report. What was at issue here was whether or not the Board should so order and once the Board had determined that there should be a hearing then it was the essence of the applications of the principles of natural justice that the Board should hear all relevant evidence upon that subject. Since such evidence was peculiarly within the knowledge of the representatives of the union, it could best be obtained by the cross-examination of the very union officer who had already been sworn and who had given sworn testimony.
>
> (Emphasis added)

The difference of opinion in *Transair* is relatively simple to characterize. If a labour tribunal should act like a court, then the minority opinion was correct. But the majority saw a labour board in a different light, and decided accordingly.

Both the Federal Court and the SCC stated that the importance of a trade union's numbers "escaped" them. The importance of a union's support is well known to labour lawyers. A low majority, compared to a strong majority, can impact subsequent collective bargaining positions[111]. By analogy with the "implied undertaking rule" in civil litigation, the certification process should not be used to determine the strength of an opposing party's bargaining position[112].

A labour board is perfectly situated to comment about such Caramilk-like labour relations mysteries. One can surmise from its reasons in *Transair* that the SCC did not ask the

[111] TD Canada Trust in the City of Greater Sudbury, Ontario, 2006 CIRB 363 at paragraph 73

[112] This concern may lose some relevance in jurisdictions with mandatory certification votes. Bill C-4, if passed, will reinstate card-based certification at the CIRB.

experienced labour lawyers appearing before it why the CLRB considered numbers so important.

Another area where labour relations policies once conflicted with civil litigation practices concerned the importance of the filing date for a certification application. The CLRB had used the application's filing date to determine a trade union's support. Generally, membership evidence can neither be subtracted from, nor added to, after the application's filing date[113].

However, in 1977 the FCA disagreed with that approach and ordered that the Board determine support as of the date it certified a trade union[114]. A later amendment[115] to the *Code* allowed the Board to return to its original policy[116].

The CLRB's application filing date policy addressed the mischief which sometimes occurred if there was a significant delay between the filing of the application and the certification decision. Even for those jurisdictions with mandatory certification votes, the vote takes place forthwith to reduce the occurrence of unfair labour practices which may occur if a party has months to influence employee wishes.

The SCC in *Transair* had commented, using older administrative law terminology which was appropriate for the time, on the limits of an administrative tribunal's representations on judicial review. A few years later, it added further comments in *Northwestern Utilities Ltd. and al. v. Edmonton*[117].

In the SCC's 1989 decision in *Paccar*[118], the majority considered a labour board's role on judicial review:

> The union argued that the Industrial Relations Council, having had the opportunity in two lengthy sets of reasons to offer a rational basis for its conclusion, has no standing to make submissions before this Court in support of the reasonableness of its decision. It takes the position that while the Board could legitimately show that it had jurisdiction to embark upon the enquiry it did, a point the union concedes in any event, it cannot argue that it has not subsequently lost that jurisdiction through a patently unreasonable decision. **With respect, I cannot accept this argument. In my view, the Industrial Relations Council has standing before this Court to make**

[113] FedEx Ground Package System, Ltd., 2010 CIRB 522
[114] Re Ckoy Ltd. And Ottawa Newspaper Guild, 1977 CanLII 1706
[115] The FCA had determined that this wording did not allow the CLRB to use the application's filing date to determine support: "Where the Board…(c) is satisfied that a majority of employees in the unit wish to have the trade union represent them as their bargaining agent, the Board shall…certify the trade union…". The FCA found in this wording a temporal requirement which had eluded the CLRB.
[116] For a review of the importance of the application date, see Rooley, 2015 CIRB 759 at paragraphs 52-60
[117] [1979] 1 SCR 684; 1978 CanLII 17
[118] Caimaw v. Paccar of Canada Ltd., [1989] 2 SCR 983, 1989 CanLII 49

> **submissions not only explaining the record before the Court, but also to show that it had jurisdiction to embark upon the inquiry and that it has not lost that jurisdiction through a patently unreasonable interpretation of its powers**.
>
> …
>
> Before this Court, the Industrial Relations Council confined its submissions to two points. It first argued that the Court of Appeal erred in applying the wrong standard of review to the decision of the Board. It submitted that the Court of Appeal reviewed for correctness instead of for reasonableness. As I have already indicated, I agree that the Court of Appeal erred in adopting such an approach. The second branch of the Council's submissions was to show that the Board had considered each of the union's submissions before it, and had given reasoned, rational rejections to each of the arguments. The argument before us emphasized that the Council had made a careful review of the relevant authorities and had made a decision that was within its exclusive jurisdiction. At no point did it argue that the decision of the Board was correct. Rather it argued that it was a reasonable approach for the Board to adopt. The Council had standing to make all these arguments, and in doing so it did not exceed the limited role the Court allows an administrative tribunal in judicial review proceedings.
>
> (emphasis added).

The CLRB, and the CIRB in the 1999-2005 period, sometimes retained top legal counsel from either the union or employer side to represent it on judicial reviews[119]. The FCA dismissed arguments which had suggested the Board would be biased when deciding other cases involving those same counsel[120]:

> **The Board stated that the part played by it in judicial review proceedings is limited, depending on the circumstances, to providing the Court with information on the special context in which it carries out its duties, on the practices and procedures developed in order to administer the Code in a way which will make it possible to achieve its fundamental objectives, on the administrative process used in disposing of applications before it and on certain special factors pertaining to labour relations**. The specialized nature of this information is such that private law firms who are retained by the Board must be able to fully master the Code, procedure and practices used before the Board and those used in the Federal Court. **This special expertise required by the Board means that the firms from which it can choose are generally limited to those firms regularly appearing before it**. In

[119] The Administrative Tribunals Support Service of Canada, and not the CIRB, would now have the final say whether to engage outside counsel to protect the Board's interests: See s. 11(2) of the Administrative Tribunals Support Service of Canada Act, SC 2014, c 20, s 376

[120] Quebec Ports Terminals Inc. v. Canada (Labour Relations Board), [1995] 1 FCR 459, 1994 CanLII 3526

> its selection the Board stated that it also takes into account the area where the application for judicial review originated and the interests being defended.
>
> …
>
> In the case at bar the conflict of interest presented is not that of a lawyer who changes sides. So far as the evidence is concerned no one, like the plaintiff in MacDonald Estate v. Martin, sought to show the existence of a prior connection between the two situations complained of by QPT. On the contrary, it is clear that there is no connection between these two cases. The fear expressed by QPT had to do not with the transmission of confidential information from one case to another but the possibility that the Board wished to favour the firm Ogilvy Renault by ruling in its favour since that firm was representing it in the Supreme Court of Canada. At the same time, what benefit would there have been for the Board in favouring this law firm since ultimately it is not Ogilvy Renault but the Supreme Court of Canada which would be deciding on its application for leave to appeal?
>
> …
>
> In the case at bar a reasonable person would refrain from any comment as he would quickly realize that this allegation of bias is groundless.

The FCA did not always welcome the Board's participation[121]. The Sims Task Force, which in the mid-90's recommended major amendments to Part I of the *Code*, suggested codifying the Board's standing on judicial review[122]:

> The Board is an expert tribunal. It has ongoing responsibility for the administration of a complex and carefully balanced statute. While the Federal Court has taken a somewhat restrictive view of the Board's right to appear, the Supreme Court of Canada and many provincial superior courts have recognized the propriety and even desirability of administrative tribunals appearing to:
>
> - Explain the record before the court and the process that took place in the case under review;
>
> - Explain their role, internal functioning, policies and procedures including the rationale behind such matters
>
> - Address questions concerning their jurisdiction and special expertise

[121] Ferguson Bus Lines Ltd. v. A.T.U., Local 1374, [1990] 2 F.C. 586

[122] Seeking a Balance: Canada Labour Code, Part I, Review (Ottawa: Human Resources Development Canada, 1995) at page 214.

In 1999, Parliament added section 22(1.1) to the *Code* to confirm the Board's standing on judicial review:

> (1.1) The Board has standing to appear in proceedings referred to in subsection (1) for the purpose of making submissions regarding the standard of review to be used with respect to decisions of the Board and the Board's jurisdiction, policies and procedures.

The FCA has noted the importance of section 22(1.1) for judicial reviews of CIRB decisions[123].

The CLRB's long-time Chair, Marc Lapointe, an experienced private sector labour lawyer, always found it obvious that a tribunal should appear on judicial review. Issues which can have a vital impact on an administrative tribunal's daily functioning, such as the currently hotly-disputed issue about the standard of review for procedural fairness[124], require participation.

If a court has an important question about the tribunal's practices and procedures, but the tribunal has not appeared, the court will have less context on which to decide the case. This could lead to a court proceeding on an assumption which a tribunal could have easily clarified, such as why a union's membership support numbers are important.

At a minimum, a tribunal should ensure a reviewing court has the full record before it. As the SCC has noted, a reviewing court may consider the overall record when determining the reasonableness of a decision[125].

The SCC recently revisited the issue of tribunals' standing on judicial review in *Ontario (Energy Board) v. Ontario Power Generation Inc.*[126]. The SCC favoured a discretionary approach for tribunal submissions. One factor of many when considering this exercise of discretion would be whether the tribunal was regulatory or instead adjudicated adversarial disputes between parties. But the SCC did not discount the valuable information which any tribunal could provide to a reviewing court:

> [52] **The considerations set forth by this Court in Northwestern Utilities reflect fundamental concerns with regard to tribunal participation on appeal from the tribunal's own decision. However, these concerns should not be**

[123] Genex Communications Inc. v. Canada (Attorney General), 2005 FCA 283 at paragraph 65
[124] El-Helou v. Courts Administration Service, 2016 FCA 273 at paragraph 43.
[125] Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), [2011] 3 SCR 708; 2011 SCC 62
[126] [2015] 3 SCR 147; [2015] 3 SCR 147

read to establish a categorical ban on tribunal participation on appeal. A discretionary approach, as discussed by the courts in Goodis, Leon's Furniture, and Quadrini, provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis: see N. Semple, "The Case for Tribunal Standing in Canada" (2007), 20 C.J.A.L.P. 305; L. A. Jacobs and T. S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing Before the Courts" (2002), 81 Can. Bar Rev. 616; F. A. V. Falzon, "Tribunal Standing on Judicial Review" (2008), 21 C.J.A.L.P. 21.

[53] **Several considerations argue in favour of a discretionary approach. Notably, because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome**. For example, a tribunal may be able to explain how one interpretation of a statutory provision might impact other provisions within the regulatory scheme, or the factual and legal realities of the specialized field in which they work. Submissions of this type may be harder for other parties to present.

[54] **Some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. Our judicial review processes are designed to function best when both sides of a dispute are argued vigorously before the reviewing court**. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute.

[55] Canadian tribunals occupy many different roles in the various contexts in which they operate. This variation means that concerns regarding tribunal partiality may be more or less salient depending on the case at issue and the tribunal's structure and statutory mandate. As such, statutory provisions addressing the structure, processes and role of the particular tribunal are key aspects of the analysis.

[56] **The mandate of the Board, and similarly situated regulatory tribunals, sets them apart from those tribunals whose function it is to adjudicate individual conflicts between two or more parties. For tribunals tasked with this latter responsibility, "the importance of fairness, real and perceived, weighs more heavily" against tribunal standing**: Henthorne v. British Columbia Ferry Services Inc., 2011 BCCA 476 (CanLII), 344 D.L.R. (4th) 292, at para. 42.

[57] **I am thus of the opinion that tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.**

(Emphasis added)

The SCC also commented on the notion of "bootstrapping" and demonstrated a decidedly practical bent by noting that tribunals are not expected to write a treatise explaining concepts with which experienced parties will already be well familiar:

> [68] I am not persuaded that the introduction of arguments by a tribunal on appeal that interpret or were implicit but not expressly articulated in its original decision offends the principle of finality. **Similarly, it does not offend finality to permit a tribunal to explain its established policies and practices to the reviewing court, even if those were not described in the reasons under review. Tribunals need not repeat explanations of such practices in every decision merely to guard against charges of bootstrapping should they be called upon to explain them on appeal or review. A tribunal may also respond to arguments raised by a counterparty. A tribunal raising arguments of these types on review of its decision does so in order to uphold the initial decision; it is not reopening the case and issuing a new or modified decision.** The result of the original decision remains the same even if a tribunal seeks to uphold that effect by providing an interpretation of it or on grounds implicit in the original decision.
>
> [69] I am not, however, of the opinion that tribunals should have the unfettered ability to raise entirely new arguments on judicial review. To do so may raise concerns about the appearance of unfairness and the need for tribunal decisions to be well reasoned in the first instance. I would find that the proper balancing of these interests against the reviewing courts' interests in hearing the strongest possible arguments in favour of each side of a dispute is struck when tribunals do retain the ability to offer interpretations of their reasons or conclusions and to make arguments implicit within their original reasons: see Leon's Furniture, at para. 29; Goodis, at para. 55.
>
> [70] In this case, I do not find that the Board impermissibly stepped beyond the bounds of its original decision in its arguments before this Court. In its reply factum, the Board pointed out — correctly, in my view — that its submissions before this Court simply highlight what is apparent on the face of the record, or respond to arguments raised by the respondents.
>
> (Emphasis added)

To summarize, tribunals have a role to play on judicial review for several reasons, including:

- *The Record*: The entire record the tribunal had before it is an essential component of every judicial review[127]. A tribunal, besides explaining the record, has a significant interest

[127] Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), [2011] 3 SCR 708, 2011 SCC 62

about various matters related to the record, including, to name just two examples, new information being added to the record before a reviewing court[128] and the issue of transcripts[129].

- *The Merits*: The SCC noted the concerns about a tribunal taking too active a role in an adversarial matter, since that might compromise its impartiality if the court ordered a rehearing. But not all tribunal comments necessarily impact its impartiality.

The SCC in *Paccar*[130] accepted that a tribunal could comment on the reasonableness of its approach without arguing its decision was correct. In *Ontario Power*[131], the SCC noted the usefulness of tribunals' "expertise and familiarity with the relevant administrative scheme".

In the federal sphere, some tribunals deal frequently with whether federal jurisdiction applies to a matter. Tribunal comments on their constitutional jurisdiction, an area in which the courts are often divided, does not seem to impact impartiality. A tribunal does not get a chance to comment on such issues after a court has undone decades of its jurisprudence[132], only before.

- *Tribunal Practice and Procedure*: The SCC accepted that tribunals can comment on their practices without being accused of bootstrapping. This should result in more succinct and timely decisions. Labour tribunals may need to explain their specific practices in many areas, including confidential evidence of a trade union's support; panel mediation, active adjudication, hearing rules and expedited processes, particularly when they deviate from civil litigation norms.

- *Administrative Law Debates*: Tribunals have a clear interest in cutting edge administrative law issues, especially if decisions on the standard of review may force them to act more like civil courts[133].

Ultimately, against a backdrop of continuing concerns about access to justice, judges will decide the extent to which tribunals should act like courts. A full understanding of the reasons why labour tribunals act the way they do can only assist this analysis.

An experienced labour board can provide this essential context for judicial review, in addition to commenting on current key administrative law issues. It can also describe how

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[128] Association of Professors v University of Ottawa, 2016 ONSC 2897
[129] Eastern Provincial Airways Limited v. Canada Labour Relations Board et al., [1984] 1 F.C. 732
[130] Caimaw v. Paccar of Canada Ltd., [1989] 2 SCR 983, 1989 CanLII 49
[131] Ontario (Energy Board) v. Ontario Power Generation Inc., [2015] 3 SCR 147, 2015 SCC 44
[132] Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters, [2009] 3 SCR 407, 2009 SCC 53
[133] See, as just one example, Maritime Broadcasting System Limited v. Canadian Media Guild, 2014 FCA 59 concerning the standard of review for procedural matters.

different statutory interpretations or the imposition of formal civil litigation requirements might impact its ability to serve the parties.

So how is this discussion about a tribunal's standing on judicial review relevant to busy labour lawyers' practices?

A tribunal's involvement, or lack thereof, on judicial review impacts advocacy. If a tribunal appears on judicial review, then counsel need to know the limits of a decision maker's role.

For applicants, the absence of the tribunal at a judicial review can only be favourable, though probably not in any quantifiable way. Context usually helps explain aspects of the decision under review.

For respondents, however, if a tribunal does not appear, then counsel may also have to do the tribunal's job. This can include ensuring the full record is before the reviewing court and explaining the tribunal's culture, practices and procedures. Admittedly, this can be challenging for those who do not regularly appear before the tribunal, especially in the federal jurisdiction. But, given the SCC's views in *Ontario Power,* which reiterated the value a tribunal can bring to judicial review, someone has to do it.

Summary

While some might suggest that process contributes to delay, in fact the opposite is true. Competent and experienced decision makers regularly conduct fair hearings and provide properly reasoned decisions on a timely basis. Unreasonable delay in rendering reasons goes to competence, not process.

What are the implications of this focus on process?

The challenge for parties is to document the process they follow when coming to a conclusion. An administrative tribunal, like a labour board, or a court, will want to know what process was followed and why. In the DFR realm, the CIRB may not agree with a trade union's conclusion, but if it followed a bona fide process, then intervention should rarely occur.

It is rather a party's problematic process, such as bargaining unit votes in DFR matters, or engaging investigators with closed minds, which can turn a routine matter into a major and expensive proceeding.

The CIRB, like other administrative tribunals, has the task of issuing reasoned decisions on a timely basis while respecting the dictates of procedural fairness. Procedural fairness varies significantly depending on the circumstances. For example, the Board may issue

an immediate order, with reasons to follow, as the only way to provide a party with an effective remedy.

But speed without substance raises issues. Bottom line decisions have their uses. But an overreliance on them, especially if they contain no reasoning, or if the actual reasons do not come out for many months or even years, raise legal issues a tribunal might prefer to avoid.

Evidence is also an issue for any administrative tribunal. It is not just the evidence the decision maker considers, but also his/her vigilance in refusing to consider inadmissible or improper evidence. Evidence coming from mediation discussions[134], or from the internet[135], are just two examples.

An administrative tribunal's participation in judicial reviews is well settled. While the reviewing court may often not call upon the respondent and the tribunal for comment, the case law shows that certain labour relations practices may make perfect sense to labour lawyers, but constitute total headscratchers for others. The Legislature grants the tribunal the authority to make these substantive labour relations calls.

While courts rightly have the discretion whether to hear a tribunal's submissions on judicial review, and arguing about the merits of an adversarial decision is problematic, there remain a host of other areas where a tribunal may provide context which the parties do not have and with which even an experienced court panel may not be familiar.

In a world of never-ending conclusions, it is this focus on process, whether for parties, tribunals or courts, which ensures the application of the rule of law to the resolution of disputes.

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[134] Mughal, 2008 CIRB 418
[135] R. v. C.D.H., 2015 ONCA 102 at paragraph 14