Procedural Fairness and the Drafting of Reasons

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INTRODUCTION[1]

A client asked his new lawyer to guess why he had chosen to send him legal work.

"Was it our firm's conferences or newsletters?", guessed the lawyer. Nope. "The hockey game invites, perhaps"? Nope.

"What was it?", asked the lawyer. "You counted all your strokes when we played golf", replied the client.

So how is this true marketing anecdote relevant to procedural fairness and the drafting of reasons?

In golf, players' ethics oblige them to call penalties on themselves[2], whether playing partners realize a rule breach has occurred or not.

Decision makers are no different. Just like golfers, they must know the rules they are bound to follow and disclose possible infractions to the parties. This is especially the case at administrative tribunals[3], since the parties are in no position to police the bureaucratic process themselves.

This paper will review recent procedural fairness cases. Many cases might have been avoided through proper disclosure to the parties. Occasionally, however, the decision maker's behaviour constituted the golfing equivalent of someone failing to count all his/her strokes or claiming to have found his/her ball when the real ball has been lost in the woods. Parties, like golfing partners, deserve better.

[1] This paper focuses on quasi-judicial tribunals which operate at arm's length from government. Procedural fairness is a flexible concept and changes for less independent tribunals and decision makers.
[2] The rules of golf, like those of procedural fairness, are not always simple. For example, golfers can usually remove loose impediments around their ball. But sand from a bunker is not considered a loose impediment if the player's ball is on the fringe rather than on the putting green itself.
[3] While one usually associates decision makers with a government appointment, certain public servants will make important legal decisions in the course of their duties: Chickoski v. Canada (Attorney General), 2017 FC 772. As the cases in this paper illustrate, the rules of procedural fairness can apply to both types of decision maker.

RECENT PROCEDURAL FAIRNESS CASES[4]

Bias: Appearances Matter

An administrative tribunal's reputation is only as good as the demonstrated expertise of its constituent members[5], as well as their conduct while holding office.

A decision maker's outside activities may raise legitimate concerns for a party. Parties expect decision makers not to engage in activities which may appear to favour one side in a current or future dispute.

Governments often address the importance of a decision maker's conduct. In Quebec, the Administrative Labour Tribunal must have an Ethics Code[6]. The Quebec government must pass and make public the required Ethics Code[7] to help guide decision makers' conduct.

The Canadian Judicial Council (CJC) recently decided[8] not to pursue allegations about judges who attended law firm sponsored cocktail parties at an international tax conference in Europe[9]. The CJC did not pursue the matter in part after one judge recused himself from a case, with a further indication he would no longer attend off-site sponsored receptions.

Similar issues can arise in the labour relations area. Decision makers might err on the side of attending events, like CLE conferences, which include representatives from both labour and management. Some additional leeway exists for tribunal Chairs whose duties include administrative meetings with the Minister, and publicly representing the Board at meetings with individual stakeholders.

While appearances matter, an important distinction exists between bias and time spent acquiring the expertise which merits a tribunal appointment. Courts acknowledge that administrative

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[4] For a more in-depth analysis of this area, see the paper presented at last year's conference: *Duties Administrative Tribunals Owe All Parties*, (2017) 30 Can. J. Admin. L. & Prac. 247. An earlier online version can be found here.

[5] Quebec has regulations to govern tribunal appointments, such as for its labour board. The process ensures that the tribunal's Chair, who was appointed under the process, a member of the legal community and a representative of the groups concerned will be involved in the recruitment and selection process: Regulation respecting the procedure for the recruiting and selection of persons qualified for appointment as members of the Administrative Labour Tribunal and for the renewal of their term of office, CQLR c T-15.1, r 1. Ontario has a similar process to avoid appointments based on connections, rather than experience and expertise: O. Reg. 88/11: APPOINTMENT TO ADJUDICATIVE TRIBUNALS

[6] An Act to establish the Administrative Labour Tribunal, CQLR c T-15.1 at article 67

[7] Code of ethics of the members of the Administrative Labour Tribunal, CQLR c T-15.1, r 0.1

[8] Canadian Judicial Council completes its review of three judges who were the subject of media reports

[9] Judicial watchdog finds no problem with judges attending sponsored cocktail parties, CBC website, July 21, 2017.

tribunals, if they are to have the expertise which justifies deference, need members with practical experience.

In *Bernard*[10], the Federal Court of Appeal (FCA) rejected an argument that a decision maker's past affiliation with a trade union raised a reasonable apprehension of bias. Practical experience and expertise is an important condition precedent for appointments to an expert tribunal:

> [20] The applicant also submitted that the Board's decision raised a reasonable apprehension of bias as the presiding Board Member had a prior affiliation with a federal public service union (not the respondent union) and appeared before a House of Commons Standing Committee to speak to the proposed PSLRA in 2003. The Board is composed of individuals with experience in public service labour relations, usually as a result of having worked within the federal public service or having dealt with one of the unions which represent federal public servants. The fact that in the course of those duties an individual expressed his or her organization's viewpoint does not mean that that individual is not capable of having an open mind on the same subject when sitting as a member of the Board. The applicant's evidence is insufficient to establish a reasonable apprehension of bias.

In another case, a decision maker's previous private practice work for a party did not, by that fact alone, disqualify him. The court's concern focused on whether the decision maker had given any legal advice on the precise issue being decided in the proceeding[11].

Conduct during a hearing may give rise to an appearance of bias. Decision makers who remove themselves temporarily from a hearing due to a family member testifying, but who nonetheless later participate in the decision, give the appearance of bias[12].

Evidence

A decision maker decides a case based on the evidence the parties submitted. A decision maker violates procedural fairness by receiving additional evidence, or seeking out new evidence, without proper disclosure to the parties[13].

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[10] Bernard v. Canada (National Revenue), 2017 FCA 40
[11] PowerServe Inc. v. Ontario College of Trades, 2015 ONSC 857
[12] Johnny v. Adams Lake Indian Band, 2017 FCA 146
[13] Rare exceptions exist including judicial notice of notorious facts and, in labour law, cases involving certifications, raids and revocations where the evidence of employee wishes remains confidential.

In *Canada v. Akisq'nuk First Nation*[14], the Specific Claims Tribunal (SCT) advised the parties' counsel of an evidentiary gap and the judicial notice it proposed to take of three historical treatises. The SCT noted the pages it had consulted and indicated that it might also consult any documents mentioned in the footnotes. This proactive disclosure to counsel is encouraging, since it demonstrated that the SCT was alive to the potential problems of relying on information not submitted by the parties.

However, the FCA overturned the SCT's decision on procedural fairness grounds for two reasons. First, while notice is important, the FCA found that any meaningful opportunity to respond required more detailed particulars about the proposed use of the additional and extremely broad material. The FCA noted the SCT's decision seemingly had relied on pages from the treatises beyond those identified in its notice.

Second, for proper judicial notice, the FCA found that "(t)he nature and scope of the additional material was such that Canada required notice of what facts the Tribunal proposed to judicially note and notice of what issue each fact pertained to"[15]. In short, if a tribunal believes an evidentiary gap exists, it should ask the parties for evidence. If necessary, a tribunal may also request the parties' submissions on its ability to take judicial notice of missing facts.

In a recent Ottawa criminal case, a judge asked to review evidence during his deliberations[16]. Unbeknownst to him, a police officer who had testified in the case personally brought that evidence and remained in the judge's chambers while he examined the evidence. The judge declared a mistrial, since his examination of that evidence ought to have occurred in the presence of the accused and his lawyer.

The Saskatchewan Court of Appeal found a labour board's internet search for additional evidence during its deliberations similarly breached procedural fairness[17]. Parties need a fair opportunity to comment on evidence which may be prejudicial to their position. The Ontario Court of Appeal overturned a judge's decision due to his internet-based investigation during deliberations[18].

It does not matter that the breach of procedural fairness arising from the use of extraneous material might have been immaterial to the ultimate decision[19]. The tribunal's failure to allow a party to comment on such information vitiates the process.

Sometimes parties may discover these evidentiary anomalies when reading the decision maker's reasons. The more troubling situation arises if a decision maker received, or sought out,

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[14] 2017 FCA 175
[15] Paragraph 57
[16] Judge declares mistrial in drug case after questioning cop in office, Ottawa Citizen, July 21, 2017.
[17] Saskatoon Co-operative Association Limited v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, 2016 SKCA 94. The SCC denied leave to appeal: Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatoon Co-operative Association Limited, et al., 2017 CanLII 23873
[18] R. v. C.D.H., 2015 ONCA 102
[19] Nova Scotia Public Service Long Term Disability Plan Trust Fund v Hyson, 2017 NSCA 46

undisclosed evidence, but the later decision did not inadvertently alert the parties to this fact. Parties cannot police what they do not know. And what they do not know can certainly hurt their interests, as the above cases illustrate.

Raising and deciding novel issues during the drafting process

A decision maker may spot a potential new issue during a case, or during deliberations[20]. A transparent decision maker provides the parties with an opportunity to address the issue. The parties, who almost always know the case better than the decision maker, remain best positioned to explain the relevance, if any at all, of that issue.

Problems arise when a decision maker raises a new issue, but the parties only learn of it in the written decision. The Federal Court overturned an adjudicator in Mcguffin[21], because the written decision raised an issue never addressed by the parties:

> [83] To summarize, the Level II Adjudicator raised a new issue, which he acknowledged to be new, without providing notice to the parties or inviting submissions on the new issue. Neither the grievance, the Outcome Document, the Level I decision, nor the parties' submissions addressed the issue of formal designation or the interpretation of the RCMP policies. This is a breach of procedural fairness.

A party is prejudiced when it does not receive an opportunity to comment on an issue a decision maker first raised in the decision[22].

A decision maker must also explain the calculations behind a remedial order, such as in an unjust dismissal case[23]. A decision maker cannot, behind the parties' backs, rely on a "secret guideline" when determining the appropriate penalty[24]:

> [44] **As part of procedural fairness, a party potentially liable for an administrative monetary penalty, such as the respondent, needs to know about any formula, guideline or supporting analysis the Director will rely upon in his assessment of penalties**. In response, that party is entitled to suggest that any formula, guideline or supporting analysis is wrong, inappropriate, unacceptable or indefensible on the facts, or inconsistent with legislative provisions supplying decision-

[20] A tribunal's failure to deal with an issue clearly placed before it is discussed, *infra*.
[21] Mcguffin v Canada (Attorney General), 2017 FC 97
[22] First Nation Sipekne'katik v. Paul, 2016 FC 769
[23] Ibid. at paragraphs 97-102
[24] Canada v. Kabul Farms Inc., 2016 FCA 143

> making criteria, such as section 73.11 of the Act. A formula, guideline or supporting analysis might also show that the Director is adopting a particular interpretation of the legislation, and the affected party is entitled to make submissions on that too. **Here, the unpublished formula and perhaps more was withheld from the respondent, leaving him in the dark.**
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> (emphasis added)

Quorum Matters: how much assistance can a decision maker receive?

The concept of quorum emphasizes that only the appointed decision makers can decide the matter assigned to them. Decision making and drafting cannot be contracted out to others.

Quorum demands that all panel members attend the hearing, even if only a majority is needed to render a decision. Panel members cannot come and go as they please during a hearing, especially when witnesses are providing contradictory evidence[25].

Assistance to a decision maker varies depending on the nature of the tribunal. Labour and other types of private arbitrators are essentially sole practitioners who decide cases based on their experience and expertise. They have no legal department.

Assistance is more nuanced for courts and administrative tribunals. Certain courts of appeal may circulate judgments for comment by the other judges[26]. Administrative tribunal members, subject to certain conditions to ensure panel independence, may discuss a pending decision's policy implications[27].

Discussions among the appointed decision makers, whether at courts or tribunals, differ from staff involvement in the decision-making and drafting process. Staff are not tribunal members, despite, in some or even many cases, having greater subject matter expertise.

Recent dueling judgments from the Alberta Court of Appeal raised a related concern whether the power to assign panels, if not done on a random basis, undermined different schools of thought on an issue and the utility of *stare decisis*[28]. Berger J. A. expressed his concerns about panel assignments this way:

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[25] Johnny v. Adams Lake Indian Band, 2017 FCA 146 at paragraphs 30-32.
[26] R. v. Gashikanyi, 2017 ABCA 194. A similar process may occur at the Quebec Court of appeal as discussed during Me Pierre Moreau's Fireside Chat with Mr. Justice Clement Gascon during the CBA's November 2017 Administrative Law, Labour and Employment Law Conference in Ottawa.
[27] See the SCC trilogy of IWA v. Consolidated-Bathurst Packaging Ltd., [1990] 1 SCR 282, 1990 CanLII 132; Tremblay v. Quebec (Commission des affaires sociales), [1992] 1 SCR 952, 1992 CanLII 1135 and Ellis-Don Ltd. v. Ontario (Labour Relations Board), [2001] 1 SCR 221, 2001 SCC 4.
[28] R. v. Gashikanyi, 2017 ABCA 194

> [75] The inherent risk flowing from such non-random assignments is the perception, whether accurate or not, that the jurisprudence of the Court over time may be skewed by doctrinal considerations. The risk is that diversity of opinion, so vital to the healthy development of the law, may be relegated to the occasional murmur, particularly so if the very same judges who sit on a majority of sentence appeals insist on inflexible adherence to horizontal stare decisis and maintain that their judgments, being "first at bat", must be followed by their colleagues.

Madame Justice Rowbotham fundamentally disagreed with that proposition, but without commenting on the possible consequences if panels are formed of members from only one school of thought:

> [117] The suggestion that judicial assignments may not be impartial or that any member of this court (whether assigned to a sentence panel, a five member panel, or any panel), does not approach an appeal with an open mind is completely baseless. I reject any such suggestion in the strongest possible terms.

The Canada Labour Relations Board[29] used a plenary process to ensure all appointed members had a say in deciding important policy questions. Experts can have legitimate differences of opinion on such things as defining a sale of business or determining how to apply a statutory freeze. Labour law is not uniform across Canada[30].

The CLRB's resulting plenary decision bound future panels and provided greater certainty to the labour relations community. The Supreme Court of Canada has commented positively on the deference owed to tribunals which come to "consensus positions" on important issues[31].

A tribunal's legal staff fulfill a vital role. Their important duties may include an organized approach to decision makers' continuing legal education. Education initiatives can only help decision makers fulfill their primary duty of deciding cases and drafting decisions. Legal staff may also

[29] The Canada Industrial Relations Board replaced the CLRB in 1999 and decided not to use a plenary process: Telus Communications Inc. v. Telecommunications Workers Union, 2005 FCA 262
[30] For further discussion on this point, see The Importance of Process for Parties, Tribunals and Courts, The Six-Minute Labour Lawyer 2017, Law Society of Upper Canada, June 20, 2017.
[31] Ivanhoe inc. v. UFCW, Local 500, [2001] 2 SCR 565, 2001 SCC 47

want to provide a similar service to the community the tribunal serves by publishing a monthly newsletter about recent tribunal cases[32].

Evidently, legal staff cannot do the appointed decision makers' job. The panel must decide the case and draft the reasons[33]. The drafting process is a fundamental and essential analytical exercise for any decision maker. An experienced decision maker knows that the drafting process will occasionally change an initial, but preliminary, instinct about a case.

Legal staff can provide privileged opinions to decision makers[34]. Tribunal counsel must however balance procedural fairness with solicitor-client privilege. Both concepts must co-exist.

The British Columbia Supreme Court in its *Lee* and *Bui* decisions recently considered the issue of staff counsel involvement[35]. The decision in *Lee* had involved the disclosure of legal documents under a Freedom of Information request. The tribunal later claimed privilege for the documents. The documents led to a party's concerns about the extent of legal counsel's involvement in the drafting of the decision.

In *Bui,* the Court was not convinced that there had been any overstepping of bounds by legal counsel, though it did note the conundrum for an applicant which has the burden of proof on judicial review:

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

The B.C. Court of Appeal overturned the *Lee* decision on the basis that all the documents were privileged[36]. The Court noted that solicitor-client privilege does not trump procedural fairness. The decision in *Bui* is also under appeal.

Ultimately, decision makers and tribunal staff have the fundamental duty to police themselves to ensure they respect procedural fairness. They must know the rules and follow them. Where legitimate legal and procedural issues arise, they must involve the parties in the process.

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[32] For example, the Ontario Labour Relations Board publishes a monthly bulletin called Highlights to inform its community of recent developments involving decisions, pending court proceedings, legislative amendments and staff changes.
[33] For a fuller discussion of this issue, see: *Duties Administrative Tribunals Owe All Parties*, (2017) 30 Can. J. Admin. L. & Prac. 247, *supra*.
[34] Pritchard v. Ontario (Human Rights Commission), [2004] 1 SCR 809, 2004 SCC 31
[35] British Columbia (Attorney General) v. Lee, 2016 BCSC 707 and Bui v. British Columbia (Superintendent of Motor Vehicles), 2016 BCSC 1572.
[36] British Columbia (Attorney General) v. Lee, 2017 BCCA 219

A conclusion is not a decision

Decision makers should learn, if it is not obvious already, that parties are not interested in bald "because I say so" conclusions[37]. Parties need to evaluate the reasonableness of the decision maker's conclusion, both procedurally and intellectually.

The Supreme Court in *Dunsmuir* noted that "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process"[38]. Inadequacy of reasons is not an independent head of relief, but is instead a part of the overall reasonableness analysis[39]. Procedural fairness may not always require reasons, especially if the parties have not contested a specific legal point. But, when procedural fairness requires reasons, as it will for most substantive decisions impacting parties' rights, a tribunal's failure to provide them will amount to an error of law[40].

Administrative decision makers are not alone in having to explain, in their own written words, how they arrived at a decision. Judges have similar obligations.

The Ontario Court of Appeal recently expressed its displeasure in *Sliwka*[41] when a judge repeatedly failed to explain the reasons for her acquittals, with the result that the Court had to order a new criminal trial. Judges need to explain how they arrived at their decisions:

> [24] **Trial judges must give reasons for their verdicts. Reasons that explain to the parties and the public the result arrived at by the trial judge are crucial to maintaining the proper level of transparency and accountability essential to the maintenance of the integrity of the trial process and public confidence in that process**. Reasons for judgment allow the parties to know that their claims have been heard, understood and adjudicated upon in an objective and reasonable fashion that accords with the applicable legal principles: see R. v. Sheppard, 2002 SCC 26 (CanLII), [2002] 1 S.C.R. 869, at paras. 15, 22, 24.

The OCA noted that the judge in *Sliwka* had previously failed to explain the reasoning behind her decisions:

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[37] This differs from a situation where experienced parties themselves request a bottom line decision.
[38] Dunsmuir v. New Brunswick, [2008] 1 SCR 190, 2008 SCC 9 at para 47
[39] Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), [2011] 3 SCR 708, 2011 SCC 62
[40] Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd., [2016] 2 SCR 293, 2016 SCC 47
[41] R. v. Sliwka, 2017 ONCA 426

> [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 Federal Court of Appeal had similar concerns in *Rogers Communications*[42] when a tribunal summarized a party's argument, but then failed to address it. The record provided no assistance to the court in its attempt to understand the Board's reasoning:

> [22] **To be sure, the Board acknowledged Rogers' submission in summarizing the positions of the parties, but gave no reason in its analysis as to why it failed to deal with the issue**. The Board discussed at length the reasons why it thought that the resulting unit would be at least as appropriate as the existing bargaining unit, thereby justifying its decision to reject Rogers' submission that the Union was required to use the certification procedures under section 24 of the Code, but never explained why the secret ballot requirement introduced in Division III of the Code should not be read into section 18.
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> [23] Following Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62 (CanLII), [2011] 3 S.C.R. 708, the inadequacy of an administrative decision-maker's reasons ought not to be treated as an independent ground for relief, but must be addressed under the "justification, transparency and intelligibility" requirement of Dunsmuir v. New Brunswick, 2008 SCC 9 (CanLII) at paragraph 47, [2008] 1 S.C.R. 190. While courts are invited to look at the record for the purpose of filling in the blanks, a decision that is silent on a critical issue will hardly be reasonable. In the case at bar, it is impossible to determine whether the Board turned its mind to Rogers' argument, and if so on what basis it came to its (implicit) conclusion that the secret ballot requirements introduced by Parliament in 2014 in the context of a certification process are not to be imported into a section 18 application. **To borrow the analogy used by my colleague Justice Rennie (as he then was) in Komolafe v. Canada (Minister of Citizenship and Immigration), 2013 FC 431 (CanLII) at paragraph 11, [2013] F.C.J. No. 449, this is not a case where a reviewing court is allowed to connect the dots on the page; there are simply no dots on the page. This is all the more inexcusable considering that the issue**

[42] Rogers Communications Canada Inc. v. Maintenance and Service Employees' Association, 2017 FCA 127

> **raised by Rogers had apparently not yet been squarely put to, or decided by, the Board in any other proceeding**.

A tribunal cannot ignore an issue merely because it has already sent the parties its decision. It retains jurisdiction over some issues, including whether there had been an agreement to redact certain witness' names[43].

In *Canada (Transport)*[44], the FCA overturned an inspector's decision which had concluded that an amendment to a flight attendant manual did not compromise safety. Not only did the inspector provide no reasons, but the record further failed to disclose how or why the decision maker had come to that conclusion.

The Federal Court overturned a Regional Director's health and safety decision, issued on behalf of the Minister, since it failed to explain the rejection of a staff recommendation that danger existed[45].

A tribunal needs to explain how it resolved evidentiary conflicts. Simply ignoring the issue prevents a court from carrying out its reasonableness review and invalidates the decision[46].

It is every decision maker's obligation to understand the case thoroughly, identify the issues and then explain his/her conclusion on each issue. A decision maker must explain "why".

If a decision maker struggles to explain "why", it probably means they first need to deepen their understanding of either the facts, the law, or both. Drafting a decision before mastering the case always provides these warning signs. Simply ignoring the issue in the decision does not make the problem go away. It will not only add unnecessary costs for the parties, but will undermine the decision maker's reputation.

CONCLUSION

A failure to respect procedural fairness may be inadvertent. Someone, despite receiving an appointment, may simply not know the rules, just as a novice golfer may not know that he/she cannot take practice swings in a sand trap. But ignorance of procedural fairness remains no excuse. Every administrative tribunal requires a culture which demands that decision makers and staff learn, and apply, the rules of procedural fairness.

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[43] Canada (Attorney General) v. Philps, 2017 FCA 178
[44] Canada (Transport) v. Canadian Union of Public Employees, 2017 FCA 164
[45] Karn v. Canada (Attorney General), 2017 FC 123
[46] Johnny v. Adams Lake Indian Band, 2017 FCA 146 at paragraphs 51-53.

While astute parties will rarely retain private arbitrators who fail to understand these fundamental concepts, they have little control when government appointees or other decision makers determine their fates.

A greater concern arises if a decision maker knows the rules of procedural fairness, but simply ignores them. Occasionally, the parties might learn of the situation and bring a judicial review application. More likely, the parties will remain completely in the dark about the lack of procedural fairness, a result anyone who cares about the rule of law and administrative law should find deeply troubling[47].

A competent decision maker, just like an ethical golfer, calls penalties on him or herself. Ethical tribunals encourage the disclosure of realistic procedural fairness issues to the parties. While a cheating golfer harms only himself/herself, comparable behaviour by a decision maker has far broader consequences, especially for those parties who have no ability to choose their "judge".

Procedural fairness simply requires that the means justify the end. And never the other way around.

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[47] For various reasons, the torts of negligence and misfeasance in public office, the elements of which the Ontario Court of Appeal recently examined in Castrillo v. Workplace Safety and Insurance Board, 2017 ONCA 121, constitute unlikely remedies.