Procedurally Fair Administrative Tribunals: The Law Firm Model

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INTRODUCTION[1]

As history buffs[2] might remember, Neville Chamberlain's flapping signed piece of paper did not mean much, including his representation that it ensured "peace for our time"[3]. An administrative tribunal's written decision could similarly be devoid of value, if it failed to result from a procedurally fair process.

This paper will examine how a procedurally fair administrative tribunal shares many of the attributes of an ethical law firm. This paper focuses on quasi-judicial tribunals, though other types of decisions makers, such as an Assistant Deputy Minister, could similarly violate procedural fairness, such as by failing to provide an explanation for a decision[4].

Evidently, the administrative tribunal – law firm analogy is not perfect. For example, a client's solicitor-client privilege binds the entire law firm regardless of who may work on the legal file.

For an administrative tribunal, the assigned panel has quorum and effectively acts as "the Board". The panel, and only the panel, must hear and decide the case. Non-panel tribunal members and staff might contribute to a panel's decision in legally permissible ways, *infra*. But, unlike a government department issuing passports, a panel's decision is not a bureaucratic group project.

Mr. Marc Lapointe, Q.C.[5], the long-time chair of the Canada Labour Relations Board (CLRB), applied his extensive private practice experience to implement transparent procedures which respected the parties' legitimate expectations[6]. Those procedures ensured Mr. Lapointe's tribunal treated the parties as he himself would have wanted to be treated during his long career pleading labour cases.

This paper will examine generally some law firm traits that administrative tribunals might adopt. It will further reflect on some of the specific processes Mr. Lapointe implemented

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[1] The comments in this paper represent a labour lawyer's musings and are not attributable to any administrative tribunal, whether past, present or future. This paper has been optimized for reading on a device.

[2] For a quick history refresher, see this lesson from Norm Macdonald.

[3] Sometimes misquoted as "Peace in our time".

[4] Gareau v. Canada (Attorney General), 2018 FC 157

[5] Kaplan, William, *"A Profile of Marc Lapointe, Q.C."*, Labour Arbitration Yearbook (1991) Volume 2, Lancaster House.

[6] Disclosure: the author served as Mr. Lapointe's legal advisor in the late 1980's.

to distinguish the CLRB, which the Executive Branch created to operate as an independent, arm's length administrative tribunal, from standard government departments.

THE DECISION MAKER MUST DECIDE

What is the duty?

A lawyer conducting a cross-examination must fully understand the case to determine the key points needed for the already-prepared final argument[7]. To represent a client properly, the cross-examiner must personally do this crucial preparatory work.

Similarly, since most labour arbitrators are essentially sole practitioners, they personally draft their decisions[8] as the parties retaining them would expect[9].

But most administrative tribunals, given their workloads, benefit from significant government bureaucracies and resources. Nonetheless, a crucial distinction remains between acceptable administrative support and usurping the appointed decision maker's responsibility.

What must decision makers do[10]?

In *Cojocaru v. British Columbia Women's Hospital and Health Centre*[11], the Supreme Court of Canada (SCC) ("*Cojocaru*") examined a decision's validity after a trial judge's reasons for judgment had incorporated large portions of the plaintiffs' written submissions. The SCC noted in part that:

[7] As experienced pleaders know, the analysis of any new case starts with final argument.
[8] And their conference papers.
[9] Most labour arbitrators in Ontario are consensually appointed as opposed to the less frequent situation where the Ontario Minister of Labour appoints an arbitrator. For obvious reasons, Courts may defer more readily to the decisions of arbitrators the parties have consensually chosen: Teal Cedar Products Ltd. v. British Columbia, [2017] 1 SCR 688, 2017 SCC 32 at paragraphs 81-83.
[10] For a more detailed examination of this topic, see last year's conference paper: *"Procedural Fairness and the Drafting of Reasons"*, 17th Advanced Administrative Law & Practice, The Canadian Institute, October 24-25, 2017
[11] [2013] 2 SCR 357, 2013 SCC 30

> [36] To sum up, extensive copying and failure to attribute outside sources are in most situations practices to be discouraged. But lack of originality and failure to attribute sources do not in themselves rebut the presumption of judicial impartiality and integrity. **This occurs only if the copying is of such a character that a reasonable person apprised of the circumstances would conclude that the judge did not put her mind to the evidence and the issues and did not render an impartial, independent decision**.
>
> (emphasis added)

The trial judge in *Cojocaru* did provide a type of transparency, since the plaintiff could compare the written decision with its own written submissions. But the challenge of the SCC's application of the presumption of judicial integrity comes from the fact that, in other situations, the parties may have no clue what goes on behind the scenes. The rare cases which examine a tribunal's inner processes often result from anonymous notes or inadvertent information leaks, *infra*.

In *Cojocaru,* the SCC applied the presumption of judicial integrity and concluded, unlike the British Columbia Court of Appeal, that the judge had performed the analytical job required of him:

> [76] The majority of the Court of Appeal acknowledged the need to displace the presumption of judicial integrity and impartiality before setting aside the judgment. It stated that "[t]he form of the reasons, substantially a recitation of the [plaintiffs'] submissions, is in itself 'cogent evidence' displacing the presumption of judicial integrity, which encompasses impartiality" (para. 127). In effect, the Court of Appeal held that the extensive copying in itself rebutted the presumption. The reasons of the trial judge, while imperfect, deal with all the salient aspects of the case. **The fact that large portions were copied from the plaintiffs' submissions does not displace the presumption that the trial judge engaged with the issues and decided them in accordance with the law**. I conclude that the judgment should not be set aside on the ground that the trial judge incorporated large parts of the plaintiffs' submissions in his reasons.
>
> (emphasis added)

The same scenario, but in the private world of consensual arbitration, would probably result in one or both parties never using that arbitrator again. Withholding work probably

corrects questionable behaviour far more effectively than judicial review. Clients do not appoint someone to cut and paste from their written submissions. They pay for a decision maker to draft a sufficiently-reasoned decision.

The performance of that crucial work is the only way the parties can determine whether to pursue judicial review. The courts have similar expectations of decision makers lest they become "a reviewing court that cannot review"[12].

Cojocaru holds that a decision maker must put his/her mind to the evidence and analyse the issues[13]. A decision maker's obligation to do the analysis cannot be contracted out to others. If someone other than the decision maker performs that required analysis, a court could intervene[14]. In this area, a party's challenge is more evidentiary than legal.

The Federal Court of Appeal, albeit in a dissenting judgment, lamented a related problem with decision makers, including Ministers who have a legal obligation to issue a decision, who fail to explain how they reached their conclusion[15]. In the dissent's view, a reviewing court should not write the decision the Minister ought to have drafted:

> [93] But faced with a silence whose meaning cannot be understood through legitimate interpretation, who am I to grab the Minister's pen and "supplement" her reasons? Why should I, as a neutral judge, be conscripted into the service of the Minister and discharge her responsibility to write reasons? Even if I am forced to serve the Minister in that way, who am I to guess what the Minister's reasoning was, fanaticize about what might have entered the Minister's head or, worse, make my thoughts the Minister's thoughts? And why should I be forced to cooper up the Minister's position, one that, for all I know, might have been prompted by inadequate, faulty or non-existent information and analysis?

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[12] Canada v. Kabul Farms Inc., 2016 FCA 143

[13] Other SCC cases concerning the importance of reasons in the judicial realm include R. v. Sheppard, [2002] 1 SCR 869, 2002 SCC 26 and R. v. Teskey, [2007] 2 SCR 267, 2007 SCC 25. The SCC explored the need for reasons in the administrative law context in Law Society of British Columbia v. Trinity Western University, 2018 SCC 32 (paragraphs 51-56) and Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, 1999 CanLII 699.

[14] See generally, DeMaria v Law Society of Saskatchewan, 2015 SKCA 106; Khan v. College of Physicians & Surgeons of Ontario, 1992 CanLII 2784 (ON CA) and Wolfrom v. Assn. of Professional Engineers and Geoscientists of the Province of Manitoba, 2001 MBCA 152.

[15] Bonnybrook Industrial Park Development Co. Ltd. v. Canada (National Revenue), 2018 FCA 136

To paraphrase Oliver Twist, "Please, Sir/Madam, I want some explanation".

"These reasons for decision were written by…"

To emphasize the importance of a decision maker doing his/her analysis, Mr. Lapointe established the practice at the CLRB of employing this phrase at the start of virtually all decisions: "These reasons for decision were written by…"[16]. At the end of the decision, to further emphasize the point, the panel members would all physically sign the original decision.

Mr. Lapointe's procedural steps mirror the signing of law firm opinions. Law firms do not take lightly the signing and issuing of a legal opinion, given the possible consequences if it proves to be inaccurate. Indeed, just as with decision makers, the writer may well verify the facts and the case law principles multiple times before affixing his/her signature as the final procedural step.

In *Guindon v. Canada*[17], the SCC explored just some of the serious consequences for a family and estate law lawyer who signed a legal opinion about income tax, an area in which she had no expertise, and for which she had not reviewed the documents she said she had relied on. The SCC described the investment scheme for which the opinion was issued as a "sham"[18].

At Mr. Lapointe's tribunal, the signing of a decision and writing "These reasons were written by" in the case of 3-person panels, were not just formalities. Reasons differ from Executive Orders. Physically signing a decision represented to the parties that the panel respected procedural fairness by personally reviewing all the evidence in detail, analyzing the issues and then explaining their conclusions in their own words.

The problem with ghost writing

Recent Ontario cases about specialist doctors employing ghostwriters to draft their expert opinions serve as a helpful reminder to decision makers about their duty to issue procedurally-fair decisions.

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[16] The tradition continues to this day at the CIRB, the CLRB's successor: see, for example, Gagné, 2016 CIRB 834.
[17] [2015] 3 SCR 3, 2015 SCC 41
[18] Ibid. at paragraphs 6-8.

One can speculate why someone might not draft his/her own opinions. An expert witness may provide a greater number of opinions to interested clients if they are not burdened with the minutiae of actually writing them. To some, ghostwriting might appear simply as an efficient business decision designed to increase profits.

But it is not an ethical decision. The whole point of the expert's work, just as it is for decision makers, is for them to review the facts and conduct their own analysis to arrive at an opinion. Only the expert, or the decision maker, can do this work. If a decision maker is unable to do this fundamental aspect of the job, or can only perform at a substandard level, then the parties are entitled to know that.

In *Kushnir v Macari*[19], a defendant asked the court to order an expert medical report with explicit instructions prohibiting ghost writing. Plaintiff counsel objected to that restriction. The Court had genuine concerns with ghost writing, especially since counsel may settle cases early, without knowing the report had been drafted by someone other than the expert:

> [31] The issue of who actually wrote the report is of particular concern to the litigation bar as many cases are resolved prior to trial on the basis of the expert reports received which form the basis of counsel's assessment of the case and subsequent offers to settle. **The parties pay substantial fees to experts for their reports and they have a right to expect those reports to be written by the author of the report. If the parties cannot rely on the reports being actually written by the author of the report, it attacks the very foundation and purpose of the expert report in the first place, and frankly wreaks havoc with the litigation process. If reports cannot be relied upon, unnecessary litigation is promoted.**
>
> [32] **The parties, counsel and the court rely on the expertise of the stated author and the opinion stated in an expert's report**. Many cases resolve after the delivery and exchange of expert reports, without the test of the opinion in court through examination-in-chief and cross-examination. **If the parties cannot rely on the fact that the report is the sole work of its author, then the benefit and cost of expert reports is dubious**.
>
> [33] **There are now examples of cases that have gone to trial where ghost writing has occurred, and the expert has testified that part of their report was in fact written by someone else, which fact was never previously disclosed.** See Lavecchia v. McGinn at paras. 12-13 referring to

[19] 2017 ONSC 307. See also Lavecchia v McGinn, 2016 ONSC 2193.

> El-Khodr v. Lackie; and Children's Aid Society of London and Middlesex v. B. (C.D.) [2013] ONSC 2858 (S.C.J.) at para 40.
>
> (emphasis added)

Not surprisingly, what legal counsel do ***not*** know undermines their ability to protect their client's interests. The Court in *Kushnir v Macari* ordered that no ghost writing take place:

> [36] I do not agree with the defendant that the condition that the plaintiff seeks is completely unnecessary. **I find the plaintiff's position has merit to ensure trial fairness and maintain faith in the administration of justice. The plaintiff has met the onus to show compelling reasons why the court should impose a condition to ensure that expert reports are written solely by their author.** I have carefully considered the interests of the parties, counsel and the health practitioners involved and I find that there is sufficient reason to set some basic conditions to address the issues raised, but not in the form that the plaintiff has requested.
>
> …
>
> [39] I find however, that the wording of the condition sought by the plaintiff that the expert not engage in ghost writing is strident and overreaching. I agree with the defendant that it does suggest some form of improper conduct by an expert and/or counsel when none may exist. Counsel and experts alike may take offense and feel their integrity is impugned which was the case here. **I find the term that the research and medical record review leading to the report will be conducted solely and entirely by the examining doctor to be redundant and is covered in the term that the report shall be written solely by its author. It is important that the plaintiff's records not be shared with any third parties in the interests of privacy, and to further discourage ghost writing of any portion of the report.**
>
> (emphasis added)

An administrative tribunal decision maker and an expert medical witness share similar attributes. The parties rely on them to apply their special expertise to the case at hand. In fact, the mischief of ghost writing would be even greater at an administrative tribunal since appointees, unlike expert witnesses, do not have to prove their expertise. It is instead,

like the presumption of judicial impartiality and integrity applied in *Cojocaru*, presumed in most cases[20].

Mr. Lapointe knew of this potential difficulty and required decision makers to go formally on the record and represent to the parties who had personally written the decision.

PROTECTING DECISION MAKER INDEPENDENCE

The potential problem of ghost writing leads to a related point concerning whether a tribunal imposes processes on decision makers which could undermine their independence. Do such processes create an Orwellian situation where every administrative tribunal decision maker is equal, but some are more equal than others[21]?

Independence includes diverse viewpoints

For many years, the SCC has demonstrated that legal scholars can have legitimate though differing legal perspectives. Unanimous SCC decisions are the exception rather than the rule. Competing viewpoints are probably a sign of a dynamic organization.

Justices Scalia and Ginsburg at the US Supreme Court had diametrically opposed views on many legal issues yet remained the closest of friends[22]. As Justice Scalia described the situation, "If you can't disagree ardently with your colleagues about some issues of law and yet personally still be friends, get another job, for Pete's sake"[23].

In a rare concurring opinion, Justice Ginsburg agreed[24]:

> If our friendship encourages others to appreciate that some very good people have ideas with which we disagree, and that, despite differences, people of goodwill can pull together for the wellbeing of the institutions we serve and our country, I will be overjoyed, as I am confident Justice Scalia would be.

[20] In C.U.P.E. v. Ontario (Minister of Labour), [2003] 1 SCR 539, 2003 SCC 2, the SCC did conclude that Ministerial appointments of arbitrators, which excluded from consideration labour relations expertise and general acceptability in the labour relations community, were patently unreasonable.
[21] Animal Farm by George Orwell
[22] What made the friendship between Scalia and Ginsburg work, The Washington Post, February 13, 2016.
[23] Ibid.
[24] Ginsburg, R Bader. "Foreword." Scalia Speaks, Crown Publishing, 2017, p. 11.

At many law firms, lawyers regularly debate, sometimes heatedly, arguments both for and against various legal propositions. And then go for lunch together.

Arguments about different points of view constitute a fundamental part of learning; even Canadian universities occasionally promote the idea[25].

But concerns have been raised recently that the power to appoint panels could be used to favour one school of thought and to prevent those with different viewpoints from participating in the process.

For example, in *R. v. Gashikanyi*[26], Justice Berger of the Alberta Court of Appeal expressed concern that the non-random assignment of panels could negatively impact its jurisprudence:

> [73] Differing perspectives and insights on complex and difficult legal issues find expression when all members of an appellate court are afforded an equal opportunity to contribute to its jurisprudence. Failure to do so suppresses meaningful debate and, in so doing, impedes the healthy development of the law. On the other hand, the articulation of competing viewpoints contributes to the wisdom and richness of a court's opinions which, in turn, provide justification and respect for the binding nature of its judgments. **The adoption of and adherence to a protocol of random assignments sends a clear message of a court's commitment to diversity of opinion and its determination to safeguard and enhance the integrity of its jurisprudence.**
>
> [74] Publicly accessible records of this Court demonstrate that the failure to implement and adhere to an objective protocol for the random assignment of judges has resulted in significant discrepancies in both the number of sentencing panels on which some judges of the Court sit and a marked difference in the number of sentence appeals heard by certain justices of the Court as compared with their colleagues. The result is a disproportionate opportunity afforded to certain judges to shape the jurisprudence of the Court.
>
> [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**

[25] Why we invited Jordan Peterson to discuss compelled speech, The Globe and Mail, March 12, 2018.
[26] 2017 ABCA 194 (Alta C.A.)

> **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.**
>
> (Emphasis added)

A similar concern arises where a tribunal's internal processes, applied without the involvement of the parties, may influence a panel's decision. The SCC's Consolidated Bathurst trilogy has already set out certain limits on such processes[27].

In *Mary Shuttleworth v. Licence Appeal Tribunal*[28] *(Shuttleworth)*, a party's lawyer received an anonymous note alleging that the adjudicator assigned the case had found in his client's favour, but that the Executive Chair later changed that decision:

> [3] Several months after the adjudicator rendered her decision, the Applicant's legal counsel received an anonymous note. The author of the note said that after the adjudicator wrote her decision, the decision was reviewed by the executive chair of the umbrella organization, the Safety, Licensing Appeals and Standards Ontario ("SLASTO") who "changed the decision to make the applicant not catastrophically impaired." The note contains indicia including the file number and the name of counsel that would suggest the author was familiar with some of the circumstances of this case.

Production requests made as part of the judicial review process demonstrated that a decision went through various steps prior to going out[29]. The LAT had not produced all requested materials, such as earlier drafts of the decision or affidavits from the decision makers themselves.

The LAT did produce an affidavit from its Legal Service department which described the decision review process:

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[27] 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] 2018 ONSC 3790 (Ont. Div. Crt)

[29] See Alexander Voudouris and Laura Emmett, "*For Licence Appeals Tribunals, transparency and fairness are key"*, Lawyers Daily, April 17, 2018 (Paywall)

> [24] **In-house counsel for the LAT swore an affidavit explaining that the executive chair implemented a decision review process at the LAT**. The stated reason was to maximize the quality of the tribunal's decisions. **The peer review process has not been adopted formally**. No written policy was provided but counsel swore that, "generally, the LAT decision review process for final decisions is, and at all material times in this case was" as follows:
>
> **First, there is peer review: After drafting a decision, an adjudicator is expected to send the decision for peer review by the Duty Vice-Chair**. The Duty Chair offers suggestions to improve clarity, reasoning and readability and might also evaluate, for example, whether the correct legal test has been applied and whether any related case law that was not mentioned might be helpful.
>
> **Second, there is legal review**: The SLASTO Legal Services Unit reviews the decision to ensure that the correct legal test has been applied and to identify any related case law that was not mentioned that might be helpful.
>
> **Third, there is a second peer review by the executive chair**: "In some rare instances – such as when a decision involves a novel, contentious, precedent-setting, or high profile issue – the Legal Services Unit will send the decision to the Executive chair for her review. In these instances, the Executive chair serves, in essence, as a second peer reviewer and accordingly will order the same kinds of comments that the author would typically receive during the initial peer review."
>
> **Fourth, there is a review by the file's case management officer**: The case management officer acts as an intake officer and primary point of contact for the parties. This review involves examining the decision's format, correcting grammatical and spelling errors, and ensuring that the template and parties' names are correct.
>
> (Emphasis added)

The Divisional Court, while confirming the presumption of regularity for an administrative tribunal's process, concluded that the LAT's mandatory process undermined the decision maker's independence:

> [60] Therefore, on the evidence before us and given the presumption of regularity of an administrative process, we are unable to conclude that the adjudicator did not make her decision independently.
>
> [61] **However, an important rule of consultation set out in Ellis-Don was contravened. Review was imposed by the executive chair; a person**

> **at a supervisory level of authority within the administrative hierarchy. Consultation was not requested by the Adjudicator. There was no formal or written policy protecting the adjudicator's right to decline to participate in review by the executive chair or to decline to make changes proposed by the executive chair.** In their emails, the adjudicator and executive chair discussed the fact that the changes proposed would take time to draft but the executive chair indicated that the changes were important enough to justify further delay in the finalization of the decision.
>
> [62] **This failure to comply with the rules for consultation laid out in Consolidated Bathurst and applied in Ellis-Don, creates a reasonable apprehension of lack of independence.**
>
> (Emphasis added)

Shuttleworth is the most recent illustration that only on rare occasions, in this case due to an anonymous note, will the courts be able to examine and develop certain fundamentally important administrative law principles.

The CLRB's Plenary Process

How might an administrative tribunal increase transparency and simultaneously respect all decision makers' viewpoints?

At the CLRB, Mr. Lapointe recognized that in the decision-making realm, a tribunal cannot follow a hierarchy like that found in government departments. The Chair, the Vice-Chairs and Members all had their perspectives. Part of Mr. Lapointe's recognition of decision maker independence included giving the assigned panels the discretion whether they wanted any research from the Board's lawyers. The same applied for any proofreading of decisions[30]. In short, after Mr. Lapointe assigned a file to the panel, that panel remained king throughout the entire adjudicative process.

A panel's quarterbacking of a file from beginning to end resembles a lawyer's workload at a law firm. Competent decision makers and lawyers can establish priorities and ensure that matters are progressed efficiently. Having one panel in charge also avoids repetitive readings of the same file, as happens at some boards when different decision makers make procedural decisions before the formal hearing starts.

[30] Expert proofreaders, found frequently at federal tribunals, provide valuable assistance, especially for decision makers who draft decisions in both official languages.

This respect of panel independence could lead, however, to differing opinions and contradictory decisions. Is this a problem or a strength?

The SCC has noted that the existence of contradictory decisions is not necessarily a ground requiring court intervention on judicial review[31]:

> This process has led to the development of the patently unreasonable error test. If Canadian administrative law has been able to evolve to the point of recognizing that administrative tribunals have the authority to err within their area of expertise, I think that, by the same token, a lack of unanimity is the price to pay for the decision-making freedom and independence given to the members of these tribunals. **Recognizing the existence of a conflict in decisions as an independent basis for judicial review would, in my opinion, constitute a serious undermining of those principles. This appears to me to be especially true as the administrative tribunals, like the legislature, have the power to resolve such conflicts themselves.** The solution required by conflicting decisions among administrative tribunals thus remains a policy choice which, in the final analysis, should not be made by the courts.
>
> (Emphasis added)

The SCC in *Ivanhoe inc. v. UFCW, Local 500*[32] encouraged tribunals to resolve jurisprudential conflicts by noting that a tribunal's "settled consensus" on an issue would attract greater deference.

Long before circumstances forced the SCC to deal with these issues, Mr. Lapointe had already implemented at the CLRB a plenary process designed both to respect panel independence, but also to resolve conflicts in the Board's jurisprudence[33]. The parties initiated the plenary process by way of application; the CLRB did not review a decision on its own motion behind closed doors.

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[31] Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles), [1993] 2 SCR 756, 1993 CanLII 106. See also Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2018 SCC 31 at paragraph 52.

[32] [2001] 2 SCR 565, 2001 SCC 47 (at paragraph 60).

[33] For a more in-depth exploration of the CLRB's plenary process, see this updated version of *"Duties Administrative Tribunals Owe All Parties"*, Advanced Administrative Law and Practice, The Canadian Institute, October 25-26, 2016.

The Canada Labour Code[34] (*Code*) did not create this plenary process. Rather Mr. Lapointe, no doubt due to his years of experience pleading cases, created it as just one subset of the Board's limited review power over its decisions[35]. The Board's power to review previous decisions comes from these few words in section 18 of the *Code*:

> 18. 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.

Mr. Lapointe explicitly refused to adopt a policy whereby one three-person panel might overrule an earlier three-person panel. Instead, the only role for his three-person "Summit" or "Reconsideration" panel considering a party's application for reconsideration would be to decide which cases the Board would hear sitting in plenary session.

The CLRB's plenary process resolved jurisprudential disputes and established binding precedent for future panels until another plenary decision changed that precedent. The process respected panels' independence when deciding their cases, but explicitly involved the parties in the review process, particularly for disputed policy issues. Eventually, and with the parties themselves initiating the process, a binding position might emerge.

A plenary process is not the only model. It might be more appropriate for smaller tribunals like the CLRB. The SCC has already established how a far larger tribunal, like the Ontario Labour Relations Board, can balance panel independence with an important policy review process during that panel's deliberations[36].

In *Telus Communications Inc. v. Telecommunications Workers Union*[37] *(Telus)*, a party argued that tribunal staff, allegedly on the Chair's specific instructions, had advised the losing party that if they applied for reconsideration then the original decision would be overturned[38]. In *Telus*, the Canada Industrial Relations Board, the CLRB's successor, advised that it no longer used Mr. Lapointe's plenary process. During the judicial review, the CIRB advised the Court that it had replaced that plenary process with three-person

[34] RSC 1985, c L-2
[35] Buckmire, 2013 CIRB 700
[36] *Consolidated Bathurst, supra*, and *Ellis Don, supra*.
[37] 2005 FCA 262
[38] Ibid. at paragraphs 20 and 21.

reconsideration panels[39]. The FCA did not dispute that a tribunal is free to change these types of internal policies.

PROFESSIONALISM AND AVOIDING CONFLICTS OF INTEREST

The above examples demonstrate procedurally fair practices which tribunals might want to consider. A greater challenge exists on how to create, and maintain, a culture of integrity. Given the frequent turnover of appointees, permanent staff have an important obligation to ensure their tribunal treats the parties fairly. Law firms have far greater control over retaining those lawyers who help perpetuate its culture of integrity.

Establishing expectations of proper conduct

A law firm's reputation rarely comes from a "won-loss record". Rather, that reputation comes from many factors including ability, work ethic and professionalism. Good law firms establish a culture of integrity and avoid acting in ways which undermine their reputation. Proper process matters.

One current area of focus is civility in the practice of law. This goal must be balanced, however, with an advocate's duty to represent a client[40].

Many law firms dedicate significant resources to managing potential conflicts of interest. Despite these efforts, expensive damages awards extending into the millions could still follow if a firm fails to avoid a significant client conflict[41]. In terms of the quality of service provided to clients, the FCA recently examined when a conflict of interest might support a ground of appeal for "ineffective assistance of counsel"[42].

In the defamation case launched by Arthur Kent against journalist Don Martin, the respondent's delay during the discovery process in disclosing relevant documents lead to a $200,000 increase in the original costs award[43].

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[39] Ibid. at paragraph 71.
[40] Groia v. Law Society of Upper Canada, 2018 SCC 27
[41] Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP, 2017 ONCA 544, leave to appeal refused, Cassels Brock & Blackwell LLP v. Trillium Motor World Ltd., 2018 CanLII 26072.
[42] Mediatube Corp. v. Bell Canada, 2018 FCA 127
[43] Kent v Martin, 2018 ABCA 202

The Rules of Professional Conduct[44] help lawyers and law firms regulate their actions. Similarly, the Law Society of Ontario requires mandatory legal education and includes "Professionalism" topics in most CPD courses. Courts have similar tools to assist them in the performance of their duties[45].

Administrative tribunals often approach the issue of professionalism on a more *ad hoc* basis. Skeletal codes of conduct, if they exist at all, may list various principles. One notable exception, however, is the Law Society Tribunal's "Adjudicator Code of Conduct" which goes beyond some of the platitudes found in other attempts at codifying proper behaviour for decision makers[46].

Recent challenges for decision makers

Recent examples involving troublesome conduct provide teachable moments for all decision makers. They illustrate the need for tribunals and decision makers to avoid situations which could impact their ability to decide cases. A continuing focus on professionalism is just as important for administrative tribunals as it is for lawyers and law firms.

For example, while lawyers can market potential clients in one on one meetings, neutral decision makers might want to exercise caution when meeting anyone who could be on one side of a current or potential dispute. In one case, a recently retired judge had become counsel to a firm and was also available for arbitrations. The former judge thought he was meeting a potential new client. Unbeknownst to him, he was instead the target of a sting operation designed to discredit him and assist a pending appeal of one his decisions from when he was on the bench[47].

Indeed, surreptitious recordings on smartphones[48] constitute a new challenge for administrative law hearings which generally do not record their proceedings given the need for informality and expediency[49].

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[44] Rules of Professional Conduct, Law Society of Ontario
[45] Ethical Principles for Judges, Canadian Judicial Council
[46] Adjudicator Code of Conduct, Law Society Tribunal
[47] Blatchford, Christie "The Judge, The Sting, Blackcube and Me", National Post, November 24, 2017.
[48] Anthony Hicks v PETM Canada Corporation o/a PetSmart, 2018 CanLII 13592 (ON LRB)
[49] Ms. Z, 2015 CIRB 752

Neutral decision makers may also have to put on ice certain personal relationships and friendships. The question to pose is how would one party react if it knew the opposing party had special access to the decision maker[50]?

In one recent case, a judge had post-trial dinner/drinks with the police officer in charge and the Crown, but not defence counsel. The social event invited serious questions about the judge's neutrality and impartiality[51]. According to reports, an articling student present at the event recognized the seriousness of the situation and reported it.

In *Keast*[52], the Ontario Judicial Council suspended a judge for inappropriate text messages to an individual working at the Children's Aid Society, which was a party appearing before him in a current case. The suspension resulted in part from the judge communicating "confidential information to a party" and using "his friendship with the recipient of the text messages to gain access to confidential information"[53].

In the *Foulds*[54] matter, a Justice of the Peace's second incident of conflict of interest led to his termination. The first incident from 2013, which involved interference in the health inspection of a friend's restaurant, had resulted in a 7-day suspension[55]. The second incident arose from his continuing involvement in a criminal matter, including by laying an information against a person who was accused of assaulting the JP's partner[56]. In the panel's conclusion, "His Worship's repeated acts of misconduct resulted in the administration of justice being brought into disrepute"[57].

A related issue arises when a decision maker, in this case a judge, simply refused to do the job for which he was being paid. In *Re Bradley*[58], the Quebec Court of Appeal recommended a judge be reprimanded for several reasons, including forcing an

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[50] For example, a fair amount of scrambling took place after judges attended law firm sponsored cocktail parties at an international tax conference: Judicial watchdog finds no problem with judges attending sponsored cocktail parties

[51] Blatchford: Friendship between judge and prosecutor casts shadow over murder conviction, Ottawa Citizen, December 12, 2017 and Complaint filed against judge and Crown, Law Times, December 17, 2017.

[52] Reasons for Decision (December 15, 2017)

[53] See also "Sudbury judge suspended after 'highly classified' text messages about children's aid society come to light", Toronto Star, December 22, 2017.

[54] Reasons for Decision (February 1, 2018)

[55] Reasons for Decision (July 24, 2013)

[56] See also Gallant, Jacques "Toronto justice of the peace fired over conflict of interest in court case", Toronto Star, May 9, 2018

[57] Reasons, *supra*, paragraph 173.

[58] 2018 QCCA 1145

adjournment on the parties, ostensibly so that they could settle the case, when it was clear that they required a decision[59].

Decision makers who search for additional evidence without involving the parties continue to be a problem, especially in the internet/social media era. A tribunal playing Columbo behind the parties' backs clearly undermined its decision[60]. The Federal Court similarly had trouble with this decision maker's comment:

> I have read and carefully considered all of the documentary material presented in association with and in support of this application **in addition to conducting my own independent research** into country conditions in Guatemala as they relate to the applicant[61].
>
> (Emphasis added)

The same problem may arise if jurors ignore a judge's instructions and conduct their own online investigation into the "facts"[62].

Subject to taking judicial notice of notorious facts, a decision maker must decide a case based on the parties' evidence. If a decision maker believes he/she requires more facts, the proper course is to raise the issue with the parties[63].

These diverse examples lead to a simple question for anyone working at an administrative tribunal: what steps are you taking to ensure that you know of, and respect, the parties' rights during the entire adjudicative and decision-making process?

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[59] The Quebec Court of Appeal noted that the Courts of Justice Act provided it with only two discipline options: reprimand or dismissal.

[60] Saskatoon Co-operative Association Limited v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, 2016 SKCA 94, leave to appeal denied, Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatoon Co-operative Association Limited, et al., 2017 CanLII 23873.

[61] Rosales v. Canada (Citizenship and Immigration), 2017 FC 928

[62] Patterson v. Peladeau, 2018 ONSC 2625

[63] Saskatoon (City) v Amalgamated Transit Union, Local 615, 2017 SKCA 96. This case found that a tribunal had raised an issue *proprio motu*, and decided it, without advising the parties (para 48). See also Toronto (City) v. Canadian Union of Public Employees, Local 79, 2018 ONSC 4314.

CONCLUSION

Tribunals benefit from a presumption of regularity[64]. There may be no other way for an administrative tribunal to operate.

Tribunal members benefit from a presumption of expertise and experience. Unlike the process followed to test the expertise of expert witnesses, a court hearing a judicial review application does not usually examine the actual experience and ability of duly appointed tribunal members.

But those presumptions can lead to a strange paradox. The rare cases which examine tribunals' internal workings, and whether they respected their procedural fairness obligations, often arise from anonymous notes (*Shuttleworth*, *supra*), ill-advised comments from staff (*Telus*, *supra*) or other "leaks" to counsel (*Consolidated Bathurst* and *Ellis Don, supra*).

The SCC decision in *Cojocaru* represented an unusual situation where it was obvious that a judge had copied extensively from the plaintiff's written submissions and, without attribution, had used them as his own reasons. Perhaps some "transparency" is better than none.

But anonymous notes and leaks remain a curious way to advance administrative law jurisprudence in an age of transparency.

As noted in a previous paper originally prepared for this conference[65], proper governance practices, including third party audits, might bridge the gap between the presumption of regularity and verifying that internal tribunal processes, conducted in the absence of the parties, still respect their right to procedural fairness.

Perhaps an even more *avant garde* solution would be to examine how 45 years ago Mr. Lapointe, an experienced labour lawyer, established certain CLRB customs to ensure his tribunal respected the parties' legitimate expectations for a fair hearing.

[64] *Cojocaru, supra.*
[65] "*Duties Administrative Tribunals Owe All Parties*", (2017) 30 Can. J. Admin. L. & Prac. 247

Some of the potentially troubling issues raised in this paper would not have occurred under Mr. Lapointe's watch. Ghost writing like that involving medical experts would not arise at his tribunal. Mr. Lapointe established the requirement at the CLRB that the drafter of the reasons had to represent publicly to the parties that he/she had respected their right to a procedurally-fair process. A decision maker's word constituted their bond.

Mr. Lapointe further respected the need for decision maker independence by ensuring the assigned panel called all the shots on a file. If this led to competing schools of thought on an issue, then his plenary process would resolve it. That process also ensured the parties' involvement and consideration of all decision makers' points of view[66].

In short, long before the *Consolidated Bathurst* trilogy and the current emphasis on transparency, Mr. Lapointe was already applying some of the key elements required to lead a procedurally fair administrative tribunal.

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[66] The CLRB, unlike the CIRB, was not a "representative" board so all appointed members could participate. For representative tribunals, such as labour boards requiring panels to be composed of equal numbers representing employers and employees, a plenary process would have to respect that representational requirement.