Even where a decision maker's conduct does not amount to bias, it can still undermine a tribunal's professionalism[22]:

> [6] As the Board stated, although member Ménard's conduct during the hearing was regrettable, we are also of the opinion that the conduct complained of in this case does not support a finding of reasonable apprehension of bias, for substantially the same reasons. That being said, we must add that member Ménard's conduct, which included constantly whispering and leaning on his chair while disinterestedly staring out the window, is unacceptable. This conduct in no way sets an example of decorum and professionalism for a Board hearing.

One judge has coined the term "Judgitis" to describe colleagues who equate an appointment to the bench with the end of any obligation to respect civility and/or professionalism principles. A similar affliction can infect other appointees who forget that legislation, rather than a consensual invitation, has imposed them on the parties.

Fortunately, for labour and some other areas, the parties' ability to appoint their arbitrators ensures some measure of accountability and humility.

Principle: Politicians are not above the law when carrying out their adjudicative role

Administrative law requires that elected politicians, such as at school boards and at municipalities, act in an unbiased manner when exercising their quasi-judicial functions[23]. In *Chiarelli v. Ottawa (City of)*[24], the City of Ottawa's elected counsellors had to decide the relatively simple issue of sanctions following receipt of the Integrity Commissioner's report finding "overt sexist harassment" by a fellow counsellor.

The Divisional Court concluded that all counsellors, save one perhaps, failed to meet their adjudicative obligations, including by refusing to sit at the Council table with the counsellor and by calling for him to resign:

> [150] **We see the refusal of the majority of Council (supported by the Mayor "in spirit") to sit at the Council table with Councillor Chiarelli and the calls for him to resign in a different light. One of the Councillors who remained seated on December 11, 2019 recognized that Council's conduct could give the impression that Council had prejudged the outcome**. Given

[22] Maritime Employers Association v. Longshoremen's Union, Local 375 (Canadian Union of Public Employees), 2020 FCA 29
[23] Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC)
[24] 2021 ONSC 8256

that the penalties that Council may impose are limited to a reprimand or a suspension of remuneration for a period of up to 90 days, demands that Councillor Chiarelli resign – a penalty not even available to Council – before the Commissioner had completed his investigation, give the appearance of prejudgment on the issue of sanction. **When it is recalled that the issue of sanction was the point of decision for Council – not the veracity of the complainants (which was in the domain of the Commissioner), evidence of predetermination of sanction impugns the adjudication that Council was obliged to perform.**

[151] **As political actors, Councillors are expected to express their views and preconceptions, particularly on a matter such as this that has engendered significant public interest. When, however, the matter comes before them in their capacity as decisionmakers, it is important that the Councillors remind themselves of their responsibility to adjudicate fairly and with an open mind on the matter before them. With the one exception, members of Council did not do so.** In our view, the combined effect of the statements by Councillors demanding Councillor Chiarelli's resignation, their refusal to sit with him at the Council table, and the absence of their commitment to set aside their preconceptions and to decide the issue of sanctions based on the Commissioner's Report and findings, the applicable principles, and their consideration of these matters (including anything Councillor Chiarelli might say to Council), is to taint Council's decision on penalty.

[152] The *Municipal Act, 2001* does not require a City Council to swear, affirm or otherwise indicate that they will discharge their adjudicative function with an open mind, on the basis of the record before them and the applicable principles. Such a formality may not be necessary where no allegation of bias has been made respecting City Council or a member of Council. **However, in this case an allegation of bias was made by Councillor Chiarelli, by way of his counsel's letter to City Council on February 11, 2020. That letter was never answered by or on behalf of Council. In this circumstance, given the nature of the conduct engaged in by some members of Council, we conclude that an objective person, viewing the matter dispassionately, with a full appreciation of the circumstances, would doubt whether members of Council were approaching their task with an open mind. That concern would be assuaged, in respect to some Councillors, by the proceedings before Council on July 15, 2020. However, in our view, the failure of all members of Council to address the allegation of bias and the conduct suggesting predetermination of the issue of sanction, given all that was said and done, taints the result. We find there is a reasonable apprehension of bias**.

(Emphasis added)

Ideally, an adjudicative body will learn from a Court's direction and avoid repeating the same mistake in the future. Surprisingly, at least according to media reports[25], one of the politician decision makers suggested they would act the same way again. Another thought that difficult decisions involving colleagues' discipline should be taken out of their hands. Perhaps the passage of time has changed these surprising reactions to the important legal duties the governing legislation requires counsellors to carry out without bias.

Another media report noted that the lone politician who tried to respect her legal duties was "vilified" for doing so[26]. How many tribunal decision makers, whether appointed or elected, would have the strength of character to put up with vilification, which seems akin to bullying or harassment, to protect the integrity of the adjudicative process?

Regrettably, in difficult circumstances when it mattered the most, these elected leaders failed to promote civility and professionalism. For some reason, politicians continue to believe they remain above the law, as further recently demonstrated when Alberta's Minister of Justice received a traffic ticket[27].

Principle: Decision makers may occasionally have to ask the parties for additional legal submissions

When must a decision maker give notice to the parties about the need for additional legal submissions? A decision maker is not bound to consider only the parties' authorities. But what if deliberations suggest to the decision maker that a new issue may require resolution?

In reviewing a case which had imposed substantial indemnity costs on a party due to its lawyer's alleged failure to disclose a leading case, the Divisional Court in *Blake v. Blake*[28] considered the general principles:

> [51] **The key issue in this case is whether it was open to the motion judge to base his Costs Decision on his own legal research and internet searches without giving the parties an opportunity to make submissions**.
>
> [52] **As trial judges we are expected to dispose of matters before us, solely on the basis of the evidence presented to us by counsel. However,**

[25] Ottawa Citizen, *Court dismisses Rick Chiarelli's legal challenge, calls into question council's 'open mind' on penalty*.
[26] Ottawa Citizen, Coun. Theresa Kavanagh, liaison for women's issues, recalls being 'vilified' after not joining Chiarelli protest.
[27] Former justice minister gets new role in Alberta cabinet after investigation into phone call to police chief
[28] 2021 ONSC 7189

> **it is open to judges to consider all relevant authorities, whether cited by the parties or not**: *McCunn Estate v. Canadian Imperial Bank of Commerce* (2001), 53 O.R. (3d) 304, 2001 CanLII 24162 (C.A.), at paras. 42f. **However, when judges consider authorities not cited by the parties, the issue of whether counsel should be invited to make further submissions arises. McCunn provides an example of when such an invitation should be extended; specifically the court refers to a situation where the law has undergone a significant change and the court intends to base its decision on that change**.

The Court concluded that "it was a fundamental breach of procedural fairness for the motion judge to base his Costs Decision on Mr. Sidlofsky's failure to bring the Wall decision to the court's attention, without giving counsel an opportunity to address the issue"[29].

The Court in *Blake* also commented on a decision maker's challenge if the parties fail to provide all the tools needed to issue a decision:

> [54] **In coming to the decision that the motion judge should, as a matter of fairness, have invited submissions from counsel, we want to make clear that we understand the crushing workload the judiciary has to address on a daily basis**. Judges are human and can fall into error. The error in this case unfortunately had a very negative impact on Mr. Sidlofsky's professional reputation.
>
> [55] **It is clear from a review of the motion judge's Costs Decision that he was of the view that he had not been provided the necessary tools to determine the issue before him**. This is made self-evident by paragraph 20 of his Costs Decision where he states:
>
> > In the course of considering my decision, while under reserve, given the lack of helpful authorities on the application of a limitation period to the Notice of Objection, I reviewed the law by considering the jurisprudence and the applicable statutory language.
>
> [56] **It is made further evident from his Costs Decision that the motion judge undertook his own review of the law and as a result of that review discovered the Wall decision. Having discovered Wall, the motion judge concluded that it was determinative of the summary judgment motion. It is clear from paragraph 21 of his Costs Decision that the motion judge was frustrated by counsel not having brought to his attention a decision that was directly on point and determinative of the motion**:

[29] See also R. v. J.M., 2021 ONCA 150 at paragraphs 79-85.

> During my review of the law, and without any ingenious or in-depth research on my part, the first instance and appeal decisions in Wall v. Shaw 2019 ONSC 4062 (CanLII) came to my attention. These decisions were directly on point with the limitation issue as raised by the respondents and immediately disposed of their submissions on the limitation period.

(Emphasis added)

In *Shaw Communications Canada Inc. v. Amer*[30], a *Code* unjust dismissal adjudicator added key determinative issues to her decision without providing notice to the parties:

> [44] **The parties must have a reasonable opportunity to respond to any new ground on which they have not made representations**. In this respect, I agree the parties should have been made aware that the scope of the core duties of the TSR role and the statistical evidentiary basis relied upon by the Applicant to demonstrate the Respondent had consistently failed to meet her targets was in issue. **These concerns were not put in issue by the parties, but nevertheless formed the basis upon which the Adjudicator found there was no culminating incident, owing to the lack of a complete and accurate representation of the Respondent's performance, thereby allowing her to conclude the dismissal of the Respondent was unjust**.
>
> …
>
> [48] The parties did not dispute the core duties involved in the TSR role, nor the sufficiency of the statistical evidence led. In this respect, the Adjudicator "shifted the focus" in this case. **The parties were not given adequate notice, nor were they provided with an opportunity to be heard on what turned out to be determinative issues.**
>
> (Emphasis added)

In *Canada (Attorney General) v. Hanna*[31], *both parties* contested the reasonableness of the tribunal's remedial decision given the lack of evidence and submissions[32] about mitigation:

> [7] **Despite this broad consensus, and without any explanation, the Board ordered back pay from the time of termination to the time of reinstatement without deducting or otherwise accounting for any income earned from comparable sources from February 10, 2017, onward. The parties agree**

[30] 2020 FC 1026
[31] 2021 FCA 219
[32] See also *Air Canada v. Robinson*, 2021 FCA 204 where an agency denied a party a meaningful opportunity to make submissions about remedy.

> **that such a decision is unreasonable**. As the Supreme Court explained in Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, 441 D.L.R. (4th) 1 at para. 131 [Vavilov], consistency with an administrative body's past decisions is a constraint that a reviewing court should consider when determining whether an administrative decision is reasonable. That is not to say that administrative decision makers are bound by institutional precedent; however, if they choose to depart from a long-established line of cases, they must justify that departure.
>
> [8] **In the case at bar, the parties agree that there was no evidentiary basis that would allow the Board to conclude that the respondent was without income from comparable sources between February 10, 2017 (the date following closing submissions) and December 17, 2020 (the date of the decision), or that she took reasonable steps to avoid the loss for which the award of damages is made.** As a result, the remedial decision for this period cannot be considered reasonable under Vavilov.
>
> (Emphasis added)

Similar issues may result if a judge makes erroneous use of judicial notice based on his previous experience as counsel[33].

What can labour lawyers do to help arbitrators avoid such issues?

A fully reasoned final argument should provide all the tools needed to decide the case. Counsel might consider including these elements in their final argument:

1. Explain the facts, sometimes extensively, given that labour arbitrators may regularly decide cases involving various industries whereas the parties' counsel might specialize mostly in one;

2. List the issues, in question format, which the parties require the arbitrator to answer;

3. Summarize the relevant case law, including key cases[34], and argue, if necessary, why the arbitrator should distinguish any cases; and

4. Apply the suggested law to the facts to illustrate why the arbitrator should adopt the party's suggested conclusions.

[33] R. v. J.M., 2021 ONCA 150
[34] Rule 5.1-2, Rules of Professional Conduct.

When a party delivers a thorough final argument, an arbitrator should have little need to ponder other issues or to conduct the type of independent research which occurred in *Blake*.

The British Columbia labour bar has a helpful informal practice of preparing written summaries of their final arguments. The exercise does not involve the huge expense of preparing formal written argument, but it provides everyone with a concise outline of the issues, the law, and the application of the law to the facts.

As a courtesy, and to avoid potentially expensive judicial review applications[35], counsel should advise other parties in advance if they plan to submit a written outline of their argument.

Principle: A conclusion is not a decision; decisions must have reasons.

Prior to *Vavilov*[36], a strange situation existed where courts on judicial review had to determine whether they could fix quasi-judicial decisions which contained insufficient reasons. Stratus, J. A. described that bizarre situation and noted the improvement post-*Vavilov*[37]:

> [10] **Had we considered this appeal before Vavilov, we would have had to consider whether we should cooper up the Board's decision. But no longer. Vavilov recognizes the shortcomings in the former law and fixes them. It now requires us to ask if there is a sufficient reasoned explanation in support of the Board's decision**. If there is not, the decision is unreasonable and must be quashed. Here, the Board's decision falls significantly short of the mark.
>
> …
>
> [30] **As a practical matter, imposing a requirement on an administrator to ensure that a reasoned explanation is discernable forces it to think through the problem, grapple with it, and decide it on its merits**. This, after all, is the task the legislature has given it to do.
>
> (Emphasis added)

[35] *Ma v. Bank of Canada*, 2020 FC 1125 starting at paragraph 64.
[36] Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65
[37] Alexion Pharmaceuticals Inc. v. Canada (Attorney General), 2021 FCA 157

Evidently, every tribunal must ensure that the appointed decision makers themselves prepare their reasons and explain their conclusions. It is rare that a party will obtain evidence which suggests someone other than the appointed decision maker made the decision[38]. There may be no greater violation of civility and professionalism principles than a tribunal which allows individuals unknown to the parties to draft and effectively make the decision[39].

Courts will no longer accept conclusions posing as decisions

Not surprisingly, the Courts post-*Vavilov* have been sending inadequate decisions back to tribunals. For example, the Federal Court of Appeal returned a decision to the CIRB due to its failure to explain how it arrived at its description of the appropriate bargaining unit[40]:

> [10] **Without the benefit of any of its reasoning on the issue of appropriateness of the bargaining unit, it is impossible to assess whether its conclusion is reasonable**. This does not mean that separate, detailed formal reasons were required. It simply means that the Board was required to set out its reasoning on the issue of appropriateness, just as it did regarding the question of the union's representative character. The respondent union in its submissions sought to fill this void but it is the responsibility of the Board to set out the rationale for its decision and failure to do so in this case makes the decision unreasonable.
>
> [11] **Given that the Board provided no explanation as to its reasoning on the appropriateness issue, I cannot conclude that the Board's order granting expansion was reasonable**. I would therefore set the order aside and remit the matter to the Board for redetermination.
>
> (Emphasis added)

Conversely, in *Grant v. Unifor*[41], the FCA described why the CIRB's reasons met the new standard:

> 9. …The Board's reasons need not be encyclopedic. Here, the Board's reasons, read in light of the record before it, show that it grappled with the request for an

[38] See, for example, Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals), 2019 ONCA 518

[39] For more on this topic see Procedurally Fair Administrative Tribunals: The Law Firm Model, 18th Advanced Administrative Law & Practice, The Canadian Institute, October 23-24, 2018; Procedural Fairness and the Drafting of Reasons, 17th Advanced Administrative Law & Practice, The Canadian Institute, October 24-25, 2017 and Duties Administrative Tribunals Owe All Parties, Advanced Administrative Law and Practice, The Canadian Institute, October 25-26, 2016.

[40] Bragg Communications Inc. v. Unifor, 2021 FCA 59

[41] 2022 FCA 6

> extension of time, especially the submissions and evidence on key points concerning it and, thus, satisfied the requirement of justification for its decision…

To be fair to administrative decision makers, not every error a court identifies involves civility and professionalism, particularly if the debate concerns what is "reasonable"[42]. But the further the process or decision deviate from the norm, the greater the concern about civility and professionalism.

It is not only administrative tribunals which occasionally have difficulty drafting proper reasons. Judges face similar challenges. For example, the Ontario Court of Appeal (OCA) felt it necessary to advise judges that a "factual data dump" is not a decision[43]:

> [62] **Many overly long decisions, including this one, contain what I would call a "factual data dump." Pages 5-79 consist of a witness-by-witness account of examination in-chief, cross-examination, and re-examination. The analysis of the evidence starts at para. 394 on p. 79 and it repeats some of the evidence previously reviewed, adding to the length.**
>
> [63] Perhaps this emerging style is artifact of electronic note-taking by judges, but it is not helpful and can be confusing. A blizzard of words can obscure. **Digesting unduly lengthy reasons consumes far too much time because every word must be read by the parties, by their counsel at great expense, and by appellate courts. A data dump does not constitute fact-finding. It is an extended 'note to self' best kept to oneself because it hinders the efficient and economical communication of judicial reasoning.**
>
> (Emphasis added)

[42] A reviewing court applying the *Vavilov* reasonableness test must satisfy itself that a tribunal "engaged in a meaningful analysis of the parties' submissions": *Canada (Attorney General) v. International Brotherhood of Electrical Workers, Local 2228*, 2022 FCA 69 at paragraph 15.
[43] Welton v. United Lands Corporation Limited, 2020 ONCA 322

In another case, the OCA overturned a decision after a judge extensively reviewed the evidence but then ended his reasons with an unhelpful conclusory analysis[44]:

> [21] **The trial judge spent much of his reasons summarizing the evidence of the witnesses who testified at trial. This approach to writing reasons is often problematic**. There is nothing impermissible in writing reasons this way, and it is important to capture the evidence adduced at trial. However, it is worth emphasizing that a detailed factual recitation is not a substitute for a considered analysis of the issues. **What frequently happens when reasons begin with a very detailed recitation of the evidence is that when it comes time to grapple with the issues in the case, the analysis is largely conclusory**. This was what happened in the case at bar.
>
> (Emphasis added)

It is disappointing that the OCA had to explain to some judges[45] how to draft what is essentially a legal opinion. Practising lawyers learn this basic skill from the very start of their careers and continuously hone it through pleading cases.

In *Royal Bank of Canada v. 1643937 Ontario Inc.*[46], the OCA partially overturned a summary judgment decision when the judge failed to explain why she rejected certain evidence:

> 39. …Her conclusory statements were insufficient. While she recited the evidence, she did not weigh it, evaluate it, or make findings of credibility as she was required to do in this case. She could not simply prefer one position over another without providing an explanation that is sufficient for appellate review…

The Newfoundland Court of Appeal similarly found fault with a judge who failed to explain why he decided as he did[47]:

> [59] The Employers' Association's submission in this regard might best be characterized as speculative because the judgment does not indicate why a review of the JAC decision was deemed unnecessary. **There is inadequate information provided to enable the parties to ascertain why the judge decided as he did, which is central to the requirement to provide sufficient reasons. It is not possible to discern from the reasons why it was**

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[44] Champoux v. Jefremova, 2021 ONCA 92
[45] Schmitz, C., "Judges' half-million-dollar pay package 'adequate' to attract outstanding jurists: pay commission", *The Lawyers Weekly* (December 24, 2021) (Paywall)
[46] 2021 ONCA 98
[47] Resource Development Trades Council of Newfoundland and Labrador v Muskrat Falls Employers' Association Inc., 2020 NLCA 32

> **unnecessary to review the JAC decision or why the JAC application should be dismissed as a consequence of the other application having been dismissed**. As such, the requirements outlined by the Supreme Court regarding the sufficiency of reasons were not satisfied in this regard, and this constituted an error.
>
> (Emphasis added)

Inadequate reasons are one thing. The failure to provide any reasons at all reaches a different level entirely. In *R. v. M.V.*[48], the OCA overturned a conviction for sexual assault and sexual interference due to a judge publicly concluding the accused was guilty but without ever providing written reasons:

> [4] The Crown has filed fresh evidence outlining the inquiries that have been made to determine whether the trial judge had delivered written reasons. We have reviewed the fresh evidence and would admit it. **The Crown is satisfied, after making several inquiries of the trial judge's office, the Criminal Intake Office, the Recording Management Office, and trial counsel that no reasons have been delivered and concedes that the appeal should be allowed**.
>
> [5] The evidence at trial involved some "tricky" issues, as the trial judge noted on December 7, 2018. The defence had argued that inconsistencies in the complainant's testimony undermined his credibility and reliability. **The trial judge expressly recognized she needed to explain how she dealt with these inconsistencies. Her remark that she was confident of the appellant's guilt does not explain to the appellant why he was convicted and does not permit appellate review**: R. v. Sheppard, 2002 SCC 26; R. v. R.E.M., 2008 SCC 51, at paras. 15-17; R. v. Vuradin, 2013 SCC 38, at paras. 10-15; R. v. Dinardo, 2008 SCC 24.
>
> (Emphasis added)

From a slightly different perspective, the Quebec Court of Appeal (QCA) refused to consider a judge's expanded decision which, originally, had consisted of just a short oral ruling[49]. After learning a party had launched an appeal, the judge added 177 paragraphs! The QCA concluded that the judge was trying to craft an "after the fact" justification for the original oral decision, conduct which rebutted the presumption of integrity and impartiality that judges enjoy:

> [44] En l'espèce, la facture des motifs du jugement oral, lorsque comparé aux ajouts substantiels relatés précédemment, permet de douter de l'intérêt de la

[48] 2020 ONCA 797
[49] Directeur des poursuites criminelles et pénales c. 3095-2899 Québec inc., 2021 QCCA 1222

> justice de procéder de la sorte et surtout du caractère équitable d'une telle démarche. **Ces ajouts, combinés aux éléments extrinsèques relevés par l'appelant, mènent à conclure qu'il y a ici une crainte raisonnable de partialité et un renversement de la présomption d'intégrité de la juge**.
>
> [45] C'est d'autant plus le cas que la juge s'avère dans l'impossibilité de donner suite à la demande de transcription écrite formulée par une partie pour lui permettre de faire appel dans les délais avec le bénéfice de cette transcription alors que cette impossibilité peut paraître en partie liée à la nécessité de bonifier ou retravailler le raisonnement pour le solidifier en vue de l'appel.
>
> [46] **De l'avis de la Cour et à l'instar des principes et facteurs énoncés dans l'arrêt *Teskey* et dans la jurisprudence subséquente citée précédemment, y incluant l'arrêt de cette Cour dans *Dufour c. R*., la situation soulève, en l'espèce, une crainte chez une personne raisonnable et bien informée que les motifs constituent une justification *a posteriori*. Cette crainte justifie d'écarter la Transcription révisée pour les fins de l'examen des moyens d'appel pour ne considérer à cet égard que le Jugement du 27 novembre 2020**.
>
> (Emphasis added)

The addition of reasons after learning of an appeal raises an issue comparable to delayed reasons, *infra*. Does the addition to, or late arrival of, reasons demonstrate those "reasons" reflect an after the fact justification to support the original "off the cuff" conclusion?

Only in Ontario: The special case of interest arbitration awards

Ontario labour arbitration practices differ in several respects from those found in other provinces. For example, Ontario labour arbitrators mediate their cases far more often than elsewhere.

Similarly, Ontario arbitrators generally charge a block fee per arbitration day which includes the award, if any. Conversely, labour arbitrators in other provinces not only charge a *per diem*, but, like lawyers with their clients, apply an hourly rate for drafting an award.

The interest arbitration custom in Ontario also differs significantly from that in other Canadian jurisdictions. Elsewhere, arbitrators provide full reasons explaining their interest

arbitration awards, just as they would for any other decision[50]. In Ontario, the labour community has for decades accepted a format of short interest arbitration awards containing just the panel's conclusions (and ubiquitous dissents).

The Divisional Court's decision in *Scarborough Health Network v. Canadian Union of Public Employees, Local 5852*[51] (*Scarborough*) has potentially impacted that practice. In that case, the Court overturned an interest arbitration case which had followed the traditional Ontario model:

> 28. In an interest arbitration, reasons should be given for decisions that reflect the arguments made by the parties, the interests at stake, and the significance of the issues decided. Reasons may not need to be elaborate or lengthy. Sometimes they may be "very brief". But they must meet the minimum standards of justification, intelligibility and transparency. The impugned reasons in this case do not meet this standard…

The implications are not earth shattering given that experienced parties can consent to almost any process. If Ontario parties want the traditional fixed fee and corresponding short interest arbitration award, then they can confirm their consent to that arrangement in advance. Most employers and trade unions prefer this longstanding practice.

However, if one or both parties want a fully reasoned award as the Court in *Scarborough* required, then they need to accept the corresponding increased costs. Ontario arbitrators, like those in other provinces, might have to charge an hourly rate to review frequently thick interest arbitration Briefs and then draft a *Vavilov* compliant award.

Ultimately, the parties choose the process.

Principle: Excessive delay undermines a decision maker's reasons

How many clients with the freedom to choose the law firm of their choice would accept a labour lawyer taking three or four years to provide them with a legal opinion?

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[50] See, for example, Board of Governors of the University of Calgary v Academic Staff Association of the University of Calgary, 2020 CanLII 67214; Vancouver Police Board v Vancouver Police Union, 2021 CanLII 138036 and Syndicat des métallos, section locale TC1976 c Sécuritas transport aviation sécurité ltée, 2018 CanLII 121516 (French). Nonetheless, the parties may agree they do not want reasons provided in their interest arbitration awards: Simon Fraser Administrative and Professional Staff Association v Simon Fraser University, 2021 CanLII 138035.

[51] 2020 ONSC 4577

The parties in labour arbitrations have some recourse when faced with an arbitrator's excessive delay; they can simply retain different arbitrators in the future. In some instances, parties may accept some level of delay as the cost for receiving an award from their preferred but busy arbitrator.

While consensual arbitration appointments provide the parties with some control over delays, no similar accountability exists for appointees, including judges. Several recent cases illustrate the magnitude of some of those delays.

In *R. v. Artis*[52], the OCA examined a 4-year delay between a person's conviction for heroin trafficking and the judge's written reasons[53]. To highlight the implication of this failure, the Crown advised the Court it would not re-prosecute the accused due to the judge's delay in issuing reasons. The OCA concluded the long delay to provide reasons rebutted the presumption of judges' integrity and impartiality:

> [15] Reasons are not meant to be after-the-fact justifications for verdicts reached, but explanations for how those verdicts were actually arrived upon. **When reasons are delivered long after verdicts are announced, it can cause reasonable people to question whether the judge has "engaged in result-driven reasoning", the very antithesis of the trial judge's duty to consider the matter with an open mind and an indifference to the result**: *Teskey*, at para. 18.
>
> [16] While a decision is "presumed to reflect the reasoning that led [the trial judge] to [their] decision", it is a rebuttable presumption: *Teskey*, at paras. 19, 21. **Where a reasonable person would find that the written reasons for verdict reflect "an after-the-fact justification for the verdicts rather than an articulation of the reasoning that led to the decision", the reasons must be disregarded on appeal because the presumption of integrity and impartiality will have been rebutted**: *R. v. Cunningham*, 2011 ONCA 543, 106 O.R. (3d) 641, at para. 14, citing Teskey, at para. 23.
>
> [17] We agree with the parties that the presumption of integrity and impartiality has been rebutted in this case.
>
> [18] Standing on its own, delay in the delivery of reasons will not give rise to the rebuttable presumption: *Teskey*, at para. 23. Even so, the longer the reasons take from the time of verdict, the heavier that delay will factor into the reasonable person test. **In other words, the longer the delay, the more likely it is that a reasonable person would find that the written reasons for**

[52] 2021 ONCA 862
[53] R. v. Teskey, 2007 SCC 25

judgment reflect an after-the-fact justification for the verdicts reached. The delay of 11 months between verdict and reasons in *Teskey* combined with other factors to rebut the presumption of integrity and impartiality such that the appeal was allowed, the convictions were set aside, and a new trial was ordered.

[19] **This case involves a delay that is almost five times as long as the delay in *Teskey*. Notably, the reasons were delivered about 31 months after the Notice of Appeal had been filed. In our view, this factors very heavily into the assessment of what a reasonable person would think about the integrity of the reasons and whether they could possibly represent anything other than an after-the-fact justification for the verdicts reached**.

[20] **The extraordinary length of time to produce the reasons combines with the fact that there were complex, triable issues in this strictly circumstantial case. The trial judge did engage with those issues in his 27 pages of written reasons. However, like the respondent who concedes this appeal, we have no confidence that the reasoning on those issues and the inferences drawn reflect the actual path to the verdicts, rather than justification of the verdicts in the face of an appeal.**

[21] In these circumstances, we cannot consider the written reasons for purposes of upholding the verdicts.

[22] The respondent has taken the very clear and responsible position that it will not re-prosecute the appellant. Therefore, we are asked by the respondent to acquit the appellant. In light of the evidentiary backdrop involved in this case, though, we decline to enter acquittals. Rather, the proper course is for the matter to return to the trial court and for the Crown to exercise its discretion accordingly.

(Emphasis added)

In *R. v. Eheler*[54], the British Columbia Court of Appeal examined a situation where a judge took three years to give reasons for a decision. The BCCA considered the *Teskey* principles and found the 3-year delay obliged it to quash the convictions:

[114] **In my view, these factors, when taken together, rebut the presumption that the reasons truly reflected the reasoning process that led to the judge's decision to deny the appellants standing to challenge the admissibility of evidence obtained in the warranted search of Suite 401**. In the result, I would disregard the reasons offered in support of the

[54] 2021 BCCA 316

> standing ruling. In the absence of reasons, there is no meaningful opportunity for appellate review of the correctness of that ruling.
>
> (Emphasis added)

These criminal cases raise the troubling question whether some judges decide and then deliberate. This process would mirror the dubious practice, unless the parties expressly request it, of some administrative tribunals issuing "bottom line" decisions with reasons to follow. If a lengthy delay then follows, are the later reasons merely an after-the-fact justification for a hastily provided and perhaps incorrect initial conclusion?

One must always remain sensitive to the possibility that illness has contributed to excessive delays, including for drafting reasons. That factor, if present, is usually noted and considered in a reviewing court's decision[55].

In a civil case involving a 2-year delay, and only after a party had contacted the media, a judge finally awarded her $15,000 in legal costs[56]. Other recent cases have considered labour arbitrators' delays in providing reasons and highlight the parties' obligation to take positive steps[57].

Hope for combatting some administrative tribunals' excessive delays?

The courts have long tolerated excessive procedural delays at administrative tribunals, but this may be changing.

In *Abrametz v Law Society of Saskatchewan*[58], the Saskatchewan Court of Appeal (SCA) reviewed the leading case on delay in administrative proceedings (*Blencoe*[59]) and asked

[55] See, for example, R. v. J.D., 2022 SCC 15. In this case, the SCC issued its decision from the bench and provided full reasons roughly 4.5 months later. A significant difference evidently exists between appeal decisions and those rendered at first instance.
[56] Toronto Star, Judge rules mom can collect $15,000 in legal costs one day after Star writes about nearly two-year delay
[57] *Menezes*, 2019 CIRB 910 (trade union did not breach its duty of fair representation despite waiting 4.5 years before replacing the original arbitrator who had failed to issue an award) and Canadian Union of Postal Workers v. Canada Post Corporation, 2019 ONSC 5240 (5 year delay for award did not cause "substantial prejudice" due in part to a misunderstanding whether the case was in abeyance and the parties' failure to follow up for 4 years)
[58] 2020 SKCA 81
[59] Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44

the obvious question “why should less be required of administrative decision-makers than courts?”:

> [10] **With these things in mind, I have concluded there was inordinate delay in the LSS proceedings against Mr. Abrametz that constituted an abuse of process and that those proceedings should have been stayed. In my view, this outcome is consistent with *Blencoe***. If it does represent a step forward from *Blencoe*, I would characterize it as an incremental step that is necessary to enable *Blencoe* to better serve its remedial purpose for the benefit of both those caught up in the machinery of the administrative state and, ultimately, administrative decision-makers themselves. As such, it is consistent with stare decisis: *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 44, [2015] 1 SCR 331; *R v Comeau*, 2018 SCC 15, [2018] 1 SCR 342.
>
> (Emphasis added)

In *Abrametz,* the SCA concluded that a 6-year delay in a lawyer’s discipline proceeding constituted an abuse of process. The Law Society’s Hearing Committee ought to have stayed the proceedings:

> [212] With that, I would again return to my comments in the Introduction to these reasons. As is there noted, Mr. Abrametz submitted that ordering a stay based on an abuse of process required a change in approach, and that such a change was justified by the decisions in *Jordan* and *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395. **I would reiterate my view that a decision to impose a stay is consistent with *Blencoe* and, at most, might be characterized as invigorating the principles which animated that decision, taking account of the circumstances of this case. It bears repeating that, as Bastarache J. said in *Blencoe*, at paragraph 115, “[w]here inordinate delay has … attached a stigma to a person’s reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process”.**
>
> [213] The same is true of the system for regulating the conduct of lawyers. Mr. Abrametz, like the appellant in *Wachtler*, was entitled to have his alleged misconduct investigated and the hearing held within a reasonable time. Allegations of serious professional conduct generally weigh heavily, raising as they do the prospect of damage to livelihood, reputation, and mental and physical health as a result of delay and regardless of outcome. Where charges are unfounded or are not made out, an unwarranted cloud of suspicion may have descended and never dissipate. A rush to judgment may occur. These dangers have become ever more pressing at a time when notices of disciplinary measures are published on law society websites for all to see, and information is so often shared quickly, widely, and in small and misleading bites. Delay has taken on a new meaning in the online age.

> [214] **Here, the Hearing Committee found that Mr. Abrametz suffered stress and stigma from the time these proceedings were initiated. His family and staff were impacted. By any reasonable measure, and in the eyes of a reasonable observer, the delay that occurred was unacceptable. With respect, the contrary conclusion could only be reached by those who have become inured to delay**. The public was protected by the swift action taken by the CIC, and the imposition of conditions which effectively operated as an interim sanction. Mr. Abrametz faithfully abided by those conditions. By the time this application was heard by the Hearing Committee, Mr. Abrametz had paid a heavy price for the serious misconduct he was found to have committed by the Hearing Committee – including by having been convicted of the charges specified in the Formal Complaint – and the public's interest in enforcement had been well served.
>
> [215] **It is my view, taking account of all of these contextual factors, that the undue delay in this case was inordinate, and caused actual prejudice of such a magnitude that the public's sense of decency and fairness would be offended**. In these circumstances, the delay would bring the LSS disciplinary process into disrepute. This was the clearest of cases.
>
> [216] **For these reasons, there was an abuse of process. The Hearing Committee erred by failing to find that the damage to the public interest in the fairness of the LSS regulatory system if these proceedings continued would exceed the harm to the public interest in the enforcement of the LPA, Rules and Code if the proceedings were halted. A stay was the appropriate remedy**, and Mr. Abrametz's application for that remedy should have been granted by the Hearing Committee in the Stay Decision.
>
> (Emphasis added)

A recent Quebec case suggests some administrative tribunals, depending on their statutory powers, may combat unreasonable delay by taking cases away from inefficient decision makers. In the short term, this remedial step merely penalizes the competent who end up doing other appointees' work but without any corresponding increase in remuneration. However, if combined with a competence-based appointment process for future appointments and reappointments, then these interventions could eventually benefit the parties.

In *Perreault c. Corriveau*[60], a decision maker, for some unknown reason, decided to contest a Chair's power to take away 5 of her cases. The decision maker's delay to provide her reasons came close to, and exceeded, one year in the 5 cases. She further

[60] 2019 QCCS 4853 (French); Leave to appeal dismissed: Perreault c. Corriveau, 2020 QCCA 51

had numerous other pending decisions which had already exceeded the statutory 60-day time limit.

Despite the importance of judicial independence, the Court agreed that the legislation and natural justice principles implicitly allowed a Chair to intervene when a decision maker failed to issue timely decisions:

> [143] Au regard des termes de l'ensemble des dispositions du *Code des professions*, de son objet premier qui est d'assurer la protection du public alors que la célérité du processus décisionnel est l'un des moyens d'atteindre cet objectif, de l'intention de législateur qui est d'assurer que les décisions soient rendues rapidement notamment par la création du poste de présidente en chef ainsi que du contexte global selon lequel le prolongement des délais mine la confiance du public envers le système judiciaire, **le Tribunal arrive à la conclusion que la présidente en chef a le pouvoir de dessaisir un président de conseil dans le but d'assurer la célérité du processus décisionnel**.
>
> [144] **Ce pouvoir doit être exercé dans le respect de l'indépendance des décideurs administratifs. Il doit être utilisé avec beaucoup de circonspection, de façon raisonnable en considérant l'intérêt des parties et de l'administration de la justice**.
>
> [145] Le Tribunal conclut que la Décision de Corriveau se base sur une interprétation de l'art. 115.7 (1) 2° C. prof. qui est non seulement raisonnable, mais également correcte. En effet, l'analyse faite dans un esprit de déférence, révèle qu'il n'y a pas d'autre issue possible.
>
> (Emphasis added)

The Quebec Court of Appeal refused to grant leave and found somewhat ironic the decision maker's proposal on how the Court could issue its decision quickly:

> [15] **Sans même parler des autres dossiers dans lesquels les décisions n'ont toujours pas été rendues, les justiciables dans les cinq dossiers touchés par la procédure judiciaire sont en attente de leur sanction depuis jusqu'à plus de 600 jours, alors que la loi prévoit qu'elle doit être rendue dans les 60 jours qui suivent la déclaration de culpabilité**. Or, accorder la permission d'appeler ne ferait qu'accroître le préjudice à l'égard de ces personnes, parmi lesquelles aucune ne s'était objectée au dessaisissement de la requérante et à la nomination d'un nouveau président du conseil de discipline.
>
> [16] **La requérante propose qu'afin d'éviter, une fois la permission d'appeler accordée, que ces délais ne se prolongent indûment, que**

> **l'appel soit entendu par une formation de la Cour dès le mois prochain, et que cette dernière rende son arrêt dès le mois suivant. Voilà certainement une proposition des plus ironiques, lorsqu'on considère l'origine du litige**.
>
> (Emphasis added)

Just as with the courts, administrative tribunals are only as good as the pre-existing competence and experience their appointees bring with them.

CONCLUSION

Why should busy labour lawyers care about these recent professionalism and civility cases? Two primary practical reasons, among many, come to mind.

First, all the hard work and late hours that labour lawyers put into pleading a case may go for naught if the decision maker or tribunal lacks civility or professionalism.

For example, if a decision maker contacts the other party behind your back to get additional evidence, then what are your odds of succeeding *(Gardaworld)*? Similarly, what are your chances if a decision maker arrogantly takes personal affront because you advocate strongly for your client's right to fair process?

How might you ultimately fare if a decision maker made prejudicial comments to your expert witness while you were out of the room (*Sky Regional*)? Or a gang of decision makers had no intention of respecting their legal obligations and further verbally attacked a colleague for following the advice she received about conducting a fair hearing (*Chiarelli*)?

And how confident might counsel feel when a tribunal's reasons arrive many months or even years (*R. v. Artis*) after a bottom-line decision? Criminal cases obviously differ from labour arbitrations. But for the individuals involved, an administrative hearing regarding their livelihood may represent one of the most important events of their lives.

Fortunately, counsel may notice or find out about these actions. This allows them to pursue judicial review, but evidently at significant extra cost for their clients.

But what if a labour lawyer remained completely unaware of a tribunal's backroom machinations which changed the appointed decision maker's decision? Counsel cannot always count on receiving a brown envelope in the mail with the procedural fairness evidence needed to rebut the courts' presumption of regularity for administrative proceedings (*Shuttleworth)*.

Second, lawyers' civility and professionalism impacts their clients' interests.

As noted at the start of this paper, effective advocacy includes civility and professionalism. Decision makers admire top counsel who work collaboratively together when advocating for their clients. This professionalism includes agreeing on hearing dates, exchanging documents in certain cases, using each hearing day fully and providing a detailed final argument.

In short, counsel should jointly try to settle the case or get on with it.

Unfortunately, not all counsel act this way, as one Ontario judge recently lamented[61]:

> [47] It's all just so embarrassing – if not to counsel, then to the court and to the profession. **Counsels' inability to agree on a motion date; the debate over whether trial management can be discussed at a case conference and what my endorsement meant; and the inability to agree on how to deal with the trivial costs of moving a few piece of flooring to Toronto is just unworthy**.
>
> [48] **Instead of reasonable people agreeing on procedural issues to move the matter forward toward resolution on its merits, it's motion, motion, motion. Delay, delay delay. Costs, costs, costs. Is this what the clients should expect when they litigate their civil disputes in Toronto**? (sic)
>
> (Emphasis added)

Would labour counsel lacking civility or acting unprofessionally lose a case they should have won? No consensually appointed arbitrator would compromise their integrity that

[61] Innocon Inc. v. Daro Flooring Constructions Inc., 2021 ONSC 7558

way. They would instead complete the unpleasant hearing as best they could and provide a timely and properly reasoned decision.

But if that same counsel later asked for arbitration dates, they might discover that the arbitrator had no dates available until 2087. Or later.

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