



# CIAJ | ICAJ

**2017 National Roundtable on Administrative Law  
Table ronde nationale 2017 en droit administratif**

**Saturday, May 27<sup>th</sup>, 2017 | Vancouver**

## **Procedural Fairness & Right to Be Heard Recent Practical Cases**

**M<sup>e</sup> Simon Turmel, commissioners**



## Standard of Review for Procedural Fairness

*“[...] the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be “**correctness**”.”*

- *Mission Institution v. Khela*, 2014 SCC 24, par. 79.

When a party alleges a breach of the rules of procedural fairness, the court does not need to engage in a detailed assessment of the appropriate standard of review. **Failure to provide appropriate procedural fairness will result in the decision being set aside.**

- *Moreau Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 SCR 249; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4.



## Relevant Factors to Determine the Content of Procedural Fairness

The Supreme Court of Canada set out **five factors**:

- 1) The **nature of the decision** being made and the process followed in making it.
- 2) The **nature of the statutory scheme** and the terms of the statute pursuant to which the body operates.
- 3) The **importance of the decision** to the individual or individuals affected.
- 4) The **legitimate expectations** of the person challenging the decision.
- 5) The **respect for the agency's choice of procedure**.

– *Baker v. Canada*, [1999] 2 SCR 817.



## *Duty to Give Formal Notice*

*“Holding a trial without one’s adversary holds a clear advantage: the tribunal hears only one point of view, without contradiction. [...] . But holding a trial without the adversary has at least one clear drawback: **leeway for altering allegations and conclusion of pleadings is considerably restricted.** [...].”*

- *VX5 Technologies inc. c. Ambassade Bitcoin*, 2016 QCCS 5765.



## Duty to Give Formal Notice

*“In my view, it is arguable that there may be a significant natural justice flaw in a procedure that would grant the licence, and deny an appeal of same, **without notice or affording a full hearing** on either issue, particularly considering this applicant lives in very close proximity to the Ferus Facility. [...]. For these reasons, leave to appeal is granted on the issue of procedural fairness and natural justice”.*

- *Coulas v. Ferus Natural Gas Fuels Inc*, 2016 ABCA 332.



## Duty to Disclose Relevant Information

*“[...] Respondent communicated with five individuals, including [...] the Chief Administrative Officer of the hospital in Hornepayne, Ontario where Dr. Young had previously been employed [...]. **Some of the information obtained during these communications was highly prejudicial and was relied upon by the Second Respondent in rejecting Dr. Young’s application. In the current context, with a mid-point duty of procedural fairness, the decision-maker was obliged to share this prejudicial evidence with Dr. Young and afford him the opportunity to be respond (either in writing or in person) before making a final decision.**”*

– *Young v. Central Health*, 2016 NLTD(G) 145.



## **Duty to Disclose Relevant Information**

*“[10] While the duty of procedural fairness owed in this case may be at the low end of the spectrum, this is not to say that the duty is non-existent. **There is a duty to disclose extrinsic evidence if it may impact the outcome of a decision.** [...].*

*[13] [...] it was unfair that the information the Officer obtained from speaking with Mr. Stuart was not conveyed or disclosed to the Applicants before she issued the negative LIMA opinion. **This information directly challenged the Applicants’ view as to the existence of a labour shortage for experienced copper sheet metal workers. Denying the Applicants an opportunity to comment upon or offer evidence to contradict the undisclosed information from Mr. Stuart was unfair.**”*

- *Kozul v. Canada (Employment and Social Development)*, 2016 FC 1316.



## ***Duty to Consider all Relevant Evidence***

***“[68] [...] While the Panel may have been justifiably exasperated by Dr. Hefnawi’s failure to attend the hearing, by tactics designed to delay, [...] the effect of the Panel’s refusal to entertain Dr. Hefnawi’s explanation was a decision on the merits without the benefit of any evidence whatsoever from Dr. Hefnawi himself.***

***[69] The stakes at play in the hearing before the Panel were very significant; the sums sought by the Committee, including surcharges and interest, exceeded \$1 million. Dr. Hefnawi was essentially being accused of fraud. His professional reputation was at stake, as was his ability to earn a living as a podiatrist entitled to remuneration payable under MSP. These stakes militated in favour of procedural patience rather than asperity in the circumstances”.***

- *Hefnawi v. Health Care Practitioners Special Committee for Audit Hearings*, 2016 BCSC 226.



## Duty of the Court & Self Represented Party

*“[31] The role of a trial judge can be especially challenging when one or both parties appearing before the judge is **self-represented**. [...].*

*[32] **There is a balance to be struck.** While affording self-represented litigants “leeway” in court, judges must never lose sight of the fact that **both sides are entitled to a fair trial.** Judges must guard against **descending into the arena** from the bench and advocating for the self-represented litigant [...].”*

– *Malton v. Attia*, 2016 ABCA 130.



## Duty of the Court & Self Represented Party

“[121] *the first administrative **judge did not provide adequate assistance** to the worker on a decisive aspect of the file, or even the main aspect, and that **the right to be heard by the latter was therefore not respected.***

*[127] Thus, **at no time** [...] **were any explanations given to the worker** [...] regarding the consequences of a favorable reception [...].*

*[135] It is only by reviewing the decision of the first administrative judge that the worker **becomes aware** that she could and should have demonstrated a reasonable cause for delay and that the administrative judge is of the opinion that she has not demonstrated such a motive.”*

- *Boulangerie Repentigny inc. et Goudime, 2016 QCTAT 792 (translation).*



# Duty to Hear Before Deciding

*“[47] Despite one telephone conversation following the Registrar’s decision, **Mr. Maxwell’s opportunity for participation was not meaningful.** [...]. **In failing to allow Mr. Maxwell to know the case against him and make representations,** the Registrar failed to respect the most minimal requirement of procedural fairness.*

*[48] The lack of an appeal provision indicates the courts are to be deferential to the decision-maker’s authority. **However, the absence of a right to an appeal requires the governing authority provide more procedural fairness than if a right of appeal existed.** [...].”*

- *O’Connell, as the registrar of Motor vehicles for the province of New Brunswick v. Maxwell, 2016 NBCA 37 (CanLII).*



## *Duty to Hear Before Deciding*

*“In deciding [...] that the remedy should, if necessary, be equivalent to the time "spent by one or more electrotechnicians" on the work carried out by the external firm, **without allowing the parties to really put forward their point of view on this issue, the Adjudicator violates the audi alteram partem rule.** [...]*

*If the Adjudicator intended not only to address a new question, [...] he **should have clearly informed the parties** before rendering his decision so that they could have made their position known.”*

- *Journal de Montréal c. Laplante*, 2016 QCCS 2602. (translation)



## *Duty to Hear Before Deciding*

*“[...] whether the Adjudicator had [...] a duty to apprise the parties that he was considering an interpretation of clause 17.03 of the collective agreement that neither party had contemplated? Was there a duty to afford the applicants an **opportunity to make submissions and adduce evidence to challenge his interpretation** of the collective agreement in view of **the fact that it was not raised at the hearing and ran counter to the parties’ mutual understanding** [...] ?*

*[...] the Adjudicator’s failure to give notice to the parties that he was contemplating an interpretation [...] that **negated their joint understanding** [...] constituted a breach of procedural fairness.”*

– *Arsenault v. Canada (Attorney General)*, 2016 FCA 179.



## *Duty to Hear the Motion to Dismiss Before Proceeding to the Merit*

*“[...] , the Tribunal is of the view that the Board's decision **seriously violates** both the audi alteram partem rule and the plaintiff's right to make full answer and defense. By its decision, the committee is **forcing the plaintiff to present his defense before his motion for dismissal is decided on the merits.** Now, the plaintiff is entitled to know if the complaint lodged against him is valid before he is required to present his defense against it.”*

– *Giroux c. Gauthier*, 2016 QCCS 724. (translation)



## *Duty to Hear the Motion to Dismiss Before Proceeding to the Merit*

*“I have reviewed the RPD Member’s reasons and the transcript of the RPD [Refugee Protection Division] hearings in its entirety. [...]. In my own assessment of the transcript of the oral hearings and the RPD Member’s final decision, I find the RPD Member did err in law **by not rendering a decision assessing evidence** that is central to the appellant’s refugee claim. In my view, natural justice and procedural fairness do **require that the RPD provide all parties a decision on the admissibility of crucial evidence in order to conduct a fair hearing.**”*

– X (Re), 2016 CanLII 49177 (CA CISR), par. 33.



# Duty to Give Reasons

*“[...] his enumeration of the relevant facts in the Arbitral award is **surprisingly brief and laconic**. [...] The Tribunal retains from the position of the CHSM that the **Adjudicator did not justify his decision** [...] comes to this conclusion without any explanation that allows the reader to understand his intellectual journey. [...] The Arbitral award is undoubtedly surprisingly **laconic** in view of the extent and nature of the evidence [...] thereby violating the principles of natural justice to such an extent that it leads to the nullity of the Arbitral award. Rather, it is a case of **insufficient motivation** which led the Tribunal to examine the Arbitral award in terms of its reasonableness.”*

- *Centre hospitalier de St. Mary c. Bolduc*, 2016 QCCS 3464. (translation)



## **Right of Representation by Counsel**

*“[135] [...], the Tribunal recognizes a limited **right of representation by counsel** before the CSST for a vulnerable person who faces significant linguistic difficulties, [...].*

*[136] The right includes the **possibility for the attorney to receive a copy of the decisions** rendered by the CSST concerning his client in order to allow him to advise him adequately and to request an administrative review, if required.*

*[139] Since he was represented by counsel, in the case of Mr. Torres, **fairness required the CSST to transmit a copy of his decision** [...] to his attorney who had appeared on the record.”*

- *Torres c. Commission des lésions professionnelles, 2016 QCCS 119.*



## Right of Representation by Counsel

*“The right to be heard is a fundamental right and one of the components of the rules of natural justice. **This rule also includes the right to be represented by counsel, but this right is not absolute.** A party may waive it, in particular by their actions or negligence. She was duly notified of the hearing dates [...] She was not able to benefit from the services of her lawyer **because of her own negligence.** [...]*

*Mrs. R [...] **was negligent** in refusing to work with her lawyer in the preparation of the file, knowing that the hearing had been scheduled peremptorily. [...] the Tribunal is of the view that the TAQ's refusal to postpone the hearing was justified and **does not constitute an infringement** of Mrs. R's right to be heard or to procedural fairness.”*

– *L.R. c. Tribunal administratif du Québec, 2016 QCCS 4423. (translation)*



CIAJ | ICAJ

2017 National Roundtable on Administrative Law  
Table ronde nationale 2017 en droit administratif

**Thank You All !**