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Challenges and solutions regarding self-represented litigants before the CLP

Pascale Gauthier
Administrative Judge
Commission des lésions professionnelles

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INTRODUCTION

The Commission des lesions professionnelles (hereinafter the “CLP”) regularly preside over hearings where at least one party is unrepresented. A wealth of information is made available by the CLP, including on its website[1]. This addresses a core value of the CLP, which is the service to all parties. Here are the main features of the CLP:

- It was constituted on April 1, 1998 by enactment of the Assemblée Nationale[2]. It replaced the Commission d’appel en matière de lésions professionnelles and is under the responsibility of the Minister of Labour;

- It exercises adjudicative functions;

- It has exclusive jurisdiction to decide applications against decisions of the Commission de la santé et de la sécurité du travail du Québec (hereinafter the CSST), for example the recognition of an occupational injury or the right to preventive withdrawal;

- It is intended for both employers and workers[3];

- It is currently composed of 128 administrative judges, which (with few exceptions) are members of the Barreau du Québec;

- It is headed by a president and two vice-presidents, and its activities are divided into 15 regional departments which each have at least one office;

- In one of its divisions, the CLP conducts hearings with a board composed of a member from employers' associations and another from unions. These members advise the administrative judge during deliberations. They have no decision making powers;

- In 2012-2013, 31,955 applications were filed with the CLP and 32,197 were resolved. Of this number, 16,735 were resolved after conciliation, 5,523 following a withdrawal, and 9,800 after a hearing or review of the file [4].

This text outlines various challenges that may be anticipated throughout the course of a dispute before the CLP when dealing with unrepresented parties, and the means at its disposal to respond to them.

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[1] www.clp.gouv.qc.ca

[2] *An act to establish the Commission des lésions professionnelles and amending various legislative provisions*, Bill. 79, (1997, chapter 27).

[3] The CSST may intervene, and the Société de l’assurance automobile du Québec appears in certain cases.

[4] Rapport annuel de gestion 2012-2013. *La Commission des lésions professionnelles*, Bibliothèque et Archives nationales du Québec, 2013.

1. Filing of a Proceeding

A proceeding at the CLP is initiated by means of an application filed in the office of the region in which the domicile of the worker is located. This application must contain a short statement of the grounds invoked in support of the proceedings accompanied by the decision which is contested[5].

The CLP provides litigants with standard applications forms and it is now possible to file applications online. The CSST will also redirect to the CLP any application which it receives by mistake.

2. Preparations for a hearing

Upon receipt of an appeal against one of its decisions, the CSST has a legal obligation to transmit a copy of the worker's file to the CLP[6]. This file contains all the medical documents sent by the worker, as well as a narrative of the communications between the parties and agents of the CSST which were involved in the initial decisions. For its part, the CLP forwards a copy of this file to each of the parties before the hearing. This facilitates the work of unrepresented parties, which consequently are not obliged to constitute they own files. If they wish to do so, they can provide additional documents for the hearing.

Also, like other tribunals, the CLP has made available on its website information regarding the conduct of the hearing, including a video showing the steps of a typical application. It should be noted that the *Fondation du Barreau du Québec* has recently published a brochure concerning applications to administrative tribunals[7].

3. The Hearing

The CLP must render its decisions in the context of a quasi-judicial process that respects the *Charter of human rights and freedoms*[8] which states at section 23 that :

[5] Section 429.23 of the *Act respecting industrial accidents and occupational diseases*, (hereinafter the "Act"), CQLR c A-3.001, and section 3 of the *Regulation respecting evidence and procedure of the Commission des lésions professionnelles*, CQLR c A-3.001, r 12.
[6] Section 429.26 of the Act.
[7] Fondation du Barreau du Québec, « *Representing yourself before an administrative tribunal* », Bibliothèque nationale du Québec, 2013.
[8] CQLR c C-12.

> **23.** Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.
>
> The tribunal may decide to sit in camera, however, in the interests of morality or public order.

In Quebec, the specificity of administrative justice is affirmed by the *Act respecting administrative justice*[9] (hereinafter the "AAJ"), which ensures respect for fundamental rights and establishes procedural rules applicable to bodies exercising judicial functions, such as the CLP:

> **1.** The purpose of this Act is to affirm the specific character of administrative justice, to ensure its quality, promptness and accessibility and to safeguard the fundamental rights of citizens.
>
> This Act establishes the general rules of procedure applicable to individual decisions made in respect of a citizen. Such rules of procedure differ according to whether a decision is made in the exercise of an administrative or adjudicative function, and are, if necessary, supplemented by special rules established by law or under its authority.
>
> This Act also institutes the Administrative Tribunal of Québec and the Conseil de la justice administrative.
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> […]
>
> **10.** The body is required to give the parties the opportunity to be heard.
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> The hearings shall be held in public. The body may, however, even of its own initiative, order hearings to be held in camera where necessary to maintain public order.
>
> […]
>
> **12.** The body is required to
>
> (1) take measures to circumscribe the issue and, where expedient, to promote reconciliation between the parties;
>
> (2) give the parties the opportunity to prove the facts in support of their allegations and to present arguments;
>
> (3) provide, if necessary, fair and impartial assistance to each party during the hearing;
>
> (4) allow each party to be assisted or represented by persons empowered by law to do so.

These fundamental principles are reflected by the *Act respecting industrial accidents and occupational diseases*[10] (hereinafter the "Act") which stipulates:

[9] CQLR c J-3 (hereinafter the « AAJ ».
[10] Op.cit, note 5.

> **429.13.** Before making a decision, the board shall give the parties an opportunity to be heard.

An administrative judge will have in mind these fundamental principles throughout the hearing he presides, especially when interacting with an unrepresented party. In this context, he could ensure that an unrepresented party is well aware to be represented and had thus decided on his own free will to forgo representation. In addition, it may be the opportune time to explain the different steps of a hearing.

3.1 The Administration of Evidence

An inquiry in the presence of an unrepresented party may be challenging, for instance due to a misunderstanding of certain legal concepts such as the rules of relevance or the probative value of evidence. In such cases, section 11 of the AAJ takes on its full meaning:

> **11.** The body has, within the scope of the law, full authority over the conduct of the hearing. It shall, in conducting the proceedings, be flexible and ensure that the substantive law is rendered effective and is carried out.
>
> It shall rule on the admissibility of evidence and means of proof and may, for that purpose, follow the ordinary rules of evidence applicable in civil matters. It shall, however, even of its own initiative, reject any evidence which was obtained under such circumstances that fundamental rights and freedoms are breached and the use of which could bring the administration of justice into disrepute. The use of evidence obtained in violation of the right to professional secrecy is deemed to bring the administration of justice into disrepute.

The Regulation respecting evidence and procedure of the Commission des lésions professionnelles[11] further provides that the tribunal is not bound by the ordinary rules of evidence and civil procedure.

The mission of the CLP is to render the decision that should have been rendered in the first place in accordance with the objectives of the Act, that is to provide compensation for employment and of the consequences they entail for beneficiaries[12]. The tribunal has the necessary for the exercise of its jurisdiction, and its administrative judges are vested with the powers of an inquiry commissioner[13].

An administrative judge of the CLP may accept evidence that had been previously undisclosed, ask questions to witnesses, or request additional evidence. All this

[11] Op. cit., note 5.
[12] Section 1 and 377 of the Act.
[13] Section 378 of the Act.

facilitates the admission of relevant evidence by an unrepresented party, and promotes the accessibility of administrative justice.

The objectives of flexibility and accessibility of administrative justice are set out in the Act in the context of the admissibility of proceedings:

> **353.** No proceedings brought pursuant to this Act may be dismissed for defect of form or irregularity.
>
> **429.18.** The board may accept a written proceeding despite a defect of form or an irregularity.

A procedure will not be summarily dismissed because of a procedural defect. An unrepresented party is not constrained by strict rules.

At the inquiry, the administrative judge may consider appropriate to give the opportunity to an unrepresented party to freely express the reasons for his appearance in front of the tribunal before he is cross-examined. He obviously has the right to examine his own witnesses and cross-examine the other party's witnesses. In this context, the administrative judge may consider appropriate to explain the distinction between direct and leading questions, or he may have to intervene to refocus the debate towards the matters at issue.

3.2 Fair and Impartial Assistance

The AAJ stipulates that the CLP must, if necessary, provide fair and impartial assistance during the hearing. However, this duty has its limits, in that the CLP cannot act as the representative of an unrepresented party[14] and it must preserve its impartiality towards all the parties. It will allow a party to respond to the arguments or address the evidence of another party, but will not go so far as to report its initial impressions in order to allow the parties to submit new arguments[15].

3.3- The Right to Choose a Representative

A party may be represented by a person of its choice before the CLP. It is expressly provided that even persons who are not members of the Barreau du Québec may act in this capacity. The *Act respecting the Barreau du Québec*[16] stipulates that pleading or acting before the CLP is not a function that is exclusively reserved for

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[14] *Gagné* et *Irrigation & Éclairage MS enr*., 2008 QCCLP 307.
[15] *Constructions E.D.B. inc. et Cloutier*, 2009 QCCLP 1630; *Beaulieu* et *Groupe Chartrand inc*., 2013 QCCLP 4442.
[16] CQLR c. B-1.

practising advocates. Regarding who may represent a party before the CLP, the Act stipulates that:

> **429.17.** The parties may be represented by the person of their choice except a professional who has been removed from the roll or declared disqualified to practise, or whose right to engage in professional activities has been restricted or suspended in accordance with the Professional Code (chapter C-26) or any legislation governing a profession.

The Act provides an exception to the right to be represented by any person before the CLP. However, this exception applies only to professionals who have been disbarred or otherwise suspended by a professional order.

Several decisions of the CLP highlight the actions of a former lawyer, disbarred in Quebec, who offered his services as a consultant. In some cases, the CLP decided that a party should not have to suffer the consequences of his choice for a representative. In such situations, either an application to set aside a decision was accepted[17], a postponement was granted[18], or a time period was extended[19].

4- Improper or dilatory proceeding

The Act provides the following regarding improper or dilatory proceedings:

> **429.27.** The board may, on an application, dismiss a proceeding it considers improper or dilatory or subject it to certain conditions.

An unrepresented party may not be aware of the limits of the CLP's powers and jurisdiction. An application could therefore be declared improper or dilatory. Given the legal obligation of the administrative tribunal to respect and observe principles of natural justice, section 429.27 must be applied with caution. An application will be declared improper or dilatory if it has no obvious chance of success, if its futile and dilatory character are obvious, if it is not likely to lead to a reasonable debate, or if it is done without any apparent right and only intended to delay the administrative or judicial process. For instance, this would be the case for repetitive motions to reconsider the same final decision[20]. The CLP could explain in a decision the limits of its powers and jurisdiction, for instance if the application of a different Act is requested.

[17] *Portuguais* et *Entreprises Clément Lavoie Inc*., 2013 QCCLP 1249.
[18] *Guilbault* et *Café Bistro Le Sélection*, 2013 QCCLP 2919.
[19] *Abrego* et *Vergers Lafrance inc*.. 2011 QCCLP 5255.
[20] Veilleux et Industries Blais inc., 2012 QCCLP 3047.

5- Extreme Stubbornness

The CLP has in the past received applications for orders to declare an individual as a vexatious litigant. In one such case, the CLP wrote that it was not vested with the inherent power of the courts to make all appropriate orders, and therefore cannot declare a party to be a vexatious litigant, even if, in reality, a person has such attributes[21].

The decisions of the CLP are final and without appeal[22], but section 429.56 of the Act states that it may review or revoke a decision, on request, for the following reasons: where a new fact is discovered which, had it been known in time, could have warranted a different decision, where a party, owing to reasons considered sufficient, could not be heard, or where a substantive or procedural defect is of a nature likely to invalidate the decision. However, a person who insist on filing multiple inefficient requests, including, in particular, motions for review or revoke, will likely see such motions summarily dismissed. He could try to obtain a judicial review at the Quebec Superior Court.

6- Unfit for the Hearing

In the presence of a party who is unfit to testify, incapable of understanding the debate at the hearing, or whose behavior does not allow the continuation of the hearing in a serene atmosphere, the CLP may propose a recess in the hearing or suggest its adjournment.

Unrepresented parties have successfully invoked their incapacity to fully understand what was said at a hearing in order to obtain the review or revoke of a decision. In these instances the CLP justified its decision either because the person was in a medicated state that caused confusion[23], or because of the person's psychological state[24]. In a specific instance, it was stated that in the context of determining the capacity of an individual at a hearing, « *le test de la capacité de se faire entendre, particulièrement lorsque la personne se représente seule, est plus exigeant que celui de la seule capacité de témoigner, puisque l'intérêt de la personne est alors en cause et qu'il implique que cette personne (la partie) soit en mesure non seulement de témoigner, mais également de comprendre minimalement les enjeux* […] »[25]

[21] *St-Gelais* et *Commission scolaire de l'Estuaire*, 2014 QCCLP 2715; *Kolliniatis* et *Bistro-Bar Toulon (I)*, 2011 QCCLP 5224.
[22] Section 429.49 of the Act.
[23] *Dufour* et *Traitements Villeneuve inc*., C.L.P. 199182-02-0301, 10 décembre 2003, J.-L. Rivard.
[24] *Marceau* et *Conseil du trésor du Québec,* C.L.P. 237518-62-0406, 22 novembre 2005, M. Zigby.
[25] *A* et *Ministère A*, 2013 QCCLP 4896.

CONCLUSION

The CLP while exercising its powers during an inquiry, may seek relevant evidence which is not already in the file. This facilitates the administration of evidence by an unrepresented party. However, that doesn't mean to suggest in what manner a person could complete his evidence. We must remember that the CLP must preserve its impartiality towards all the parties and cannot act as a representative.

It is therefore a challenge for the CLP to maintain the sometimes delicate balance between its duty to offer fair and impartial assistance and that of respecting the rights of all parties.

In practice, the presence of unrepresented parties at hearings poses only a few challenges. They are usually very respectful of the tribunal and they often quickly provide any additional information that may be requested. On a final note, it is always appreciated when the lawyer or representative acting for the opposing party demonstrates an awareness and an understanding of the duty of the board.