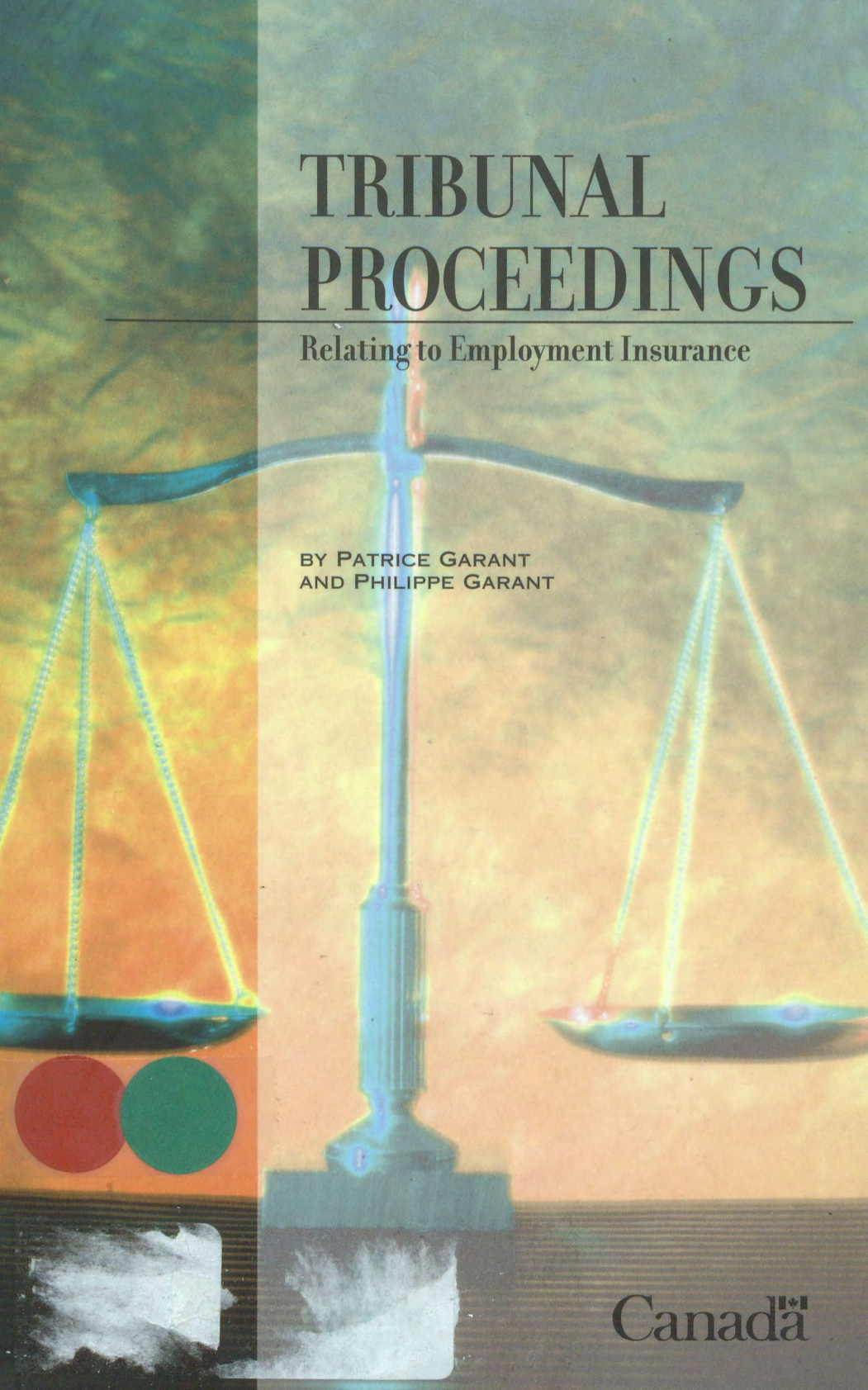
TRIBUNAL PROCEEDINGS

Relating to Employment Insurance

BY PATRICE GARANT
AND PHILIPPE GARANT



Canada

TRIBUNAL PROCEEDINGS

Relating to Employment Insurance

BY PATRICE GARANT
AND PHILIPPE GARANT

TABLE OF CONTENTS

FOREWORD

This work has been written to assist the initial and continuing training of chairpersons and members of boards of referees. Approximately one thousand citizens serve on these administrative tribunals, determining social and economic rights whose importance must not be underestimated. The administrative justice rendered by boards of referees must be of high quality and must reflect its particular characteristics.

This study of administrative law is intended for non-specialists, even though consulting it will require some effort. The aim of the work is to situate employment insurance procedure within the general framework of Canadian administrative law.

The study, like the case law bank, will be made available to claimants and their representatives. This access to broader information reflects the wishes expressed by a number of Federal Court judges. The work includes a table of contents, an index and, in an appendix, excerpts from case law covering the principal questions examined.

The authors act as independent experts with the Commission's Appeals Directorate, and the opinions they express are in no way binding upon the Commission or the Department.

Philippe Garant is a lawyer with a master's degree in political science. He has practised immigration law and administrative law, and currently works at the Régie de l'énergie du Québec in Montreal.

Professor Patrice Garant is a Doctor of Laws (Paris), holds a *licence ès lettres*, and is a member of the Royal Society of Canada. He has taught constitutional and administrative law at Laval University since 1966. He is the author of many books and articles, and has been a guest lecturer in Canada and abroad. From 1973 to 1983, he served as part-time member of the Public Service Staff Relations Board. Professor Garant has also been a consultant to many government departments and agencies.

The authors wish to thank Lionel Carrière, Director of the Appeals Directorate of Human Resources Development Canada, and his assistant Denis Bélanger for their technical support and warm welcome. They also thank all those who offered their comments, including Jean-Yves Brière, a Montreal lawyer, Jérôme Garant, a Quebec City lawyer, and many chairpersons and members of boards of referees.

CHAPTER 1

ADMINISTRATIVE JUSTICE AND TRIBUNAL PROCEEDINGS

Employment insurance law is one of the branches of Canadian administrative law whose development has been marked by the contribution of both legal cultures in Canada. It is federal law that is based on the legislation and case law of federal tribunals, but it is applied in a provincial context where there is the influence of both common law and codified civil law. In this study, we have tried to highlight this dual influence, which makes Canadian employment insurance law a good example of biculturalism.

Tribunal proceedings in the field of employment insurance constitute one of the most important branches of the "administration of justice" in the Canadian system of justice from a social and economic point of view. It is also one of the most accessible and most popular in the sense that tens of thousands of litigants take advantage of it every year.[1] It is a special branch of administrative proceedings because it involves disputes between a major public agency, the Commission, and various categories of individuals, in particular the unemployed or workers who lose their jobs.

As a rule, employment insurance litigation takes place on three levels, if we exclude the Supreme Court of Canada, which only very rarely becomes involved. At the first level, we find the tribunal proceedings that take place before boards of referees; this level of justice will form the principal subject of our document. At the second level, we find the Umpire, who is also a specialized statutory tribunal presided over by a judge of the Federal Court; as a result, this level of tribunal proceedings displays characteristics that differ from those of boards of referees. At the third level, the Federal Court of Appeal is involved and it deals with an impressive number of cases concerning employment insurance: it is this Court that truly sets the precedents, although these may have generally been developed earlier by the umpires.

1. Some data: claims to the board: in 1995-96: 3,155,104; in 1996-97: 2,673,436; in 1997-98: 2,767,067. Revised claims (new facts etc.) in 1995-96: 1,859,015; in 1996-97: 1,603,815; in 1997-98: 1,647,200. Appeals to the board: in 1995-96: 36,443; in 1996-97: 33,594; in 1997-98: 34,883. Appeals to the Umpire: in 1995-96: 4,233; in 1996-97: 3,675; in 1997-98: 3,387. Number of chairpersons: 255; members 713; total 968.

This study is a manual of administrative law intended primarily for boards of referees. It does not deal with employment insurance law as such, that is to say the body of substantive law rules developed under the *Employment Insurance Act* but rather with the decision-making process governed by the Act, the institutions and the procedure for resolving disputes. It sets out the rules of general administrative law applying to any administrative tribunal supplemented by details concerning the principles and rules that apply more specifically to boards of referees.

We shall set out the sources of general administrative law by referring to the main works on the subject and we shall also consider more general works on procedure and evidence. In addition, we shall comment on the *Canadian Charter of Rights and Freedoms*, the *Canadian Bill of Rights*, the main statutes and regulations as well as decisions of the Federal Court of Appeal and the Umpire (CUBs).[2] Furthermore, we shall refer to the common law applicable throughout Canada except, to a large extent, in the province of Quebec; we shall also refer to the *Civil Code of Quebec* and the *Code of Civil Procedure*, which set out the *jus commune* of Quebec.[3]

In the first chapter, we shall consider the general characteristics of tribunal proceedings at the institutional and procedural level. In the second chapter we shall examine the hearing before the Board of Referees and the manner in which it proceeds. The third chapter will consider evidence before the board while the fourth chapter will look at the issue of the board's interpretation of the statutes and regulations as a tribunal. Chapter five will deal with the board's deliberations and the decision as such, and it will also look briefly at the issue of review of the board's decision by the Umpire and the Federal Court of Appeal.

2. Case law is the body of principles and rules developed over the years by superior courts.

3. Common law is the general law of Anglo-Saxon countries by which the principles and rules defined by the courts is given precedence (judge-made law). Similarly, a codified legal system is characterized by the presence of "codes." Quebec has a codified legal system, even though precedents play an important role, particularly in public law.

1.1 GENERAL CHARACTERISTICS OF ADMINISTRATIVE PROCEEDINGS

1.1.1 THE BOARD IS A TRIBUNAL

Some authors have felt that the Board of Referees is not a tribunal, but rather an administrative law body of any kind or a complaints committee to which a dissatisfied claimant can protest. We believe, on the other hand, that the board is a true tribunal that is defined by its essential function.

1.1.1.1 A TRUE TRIBUNAL

Under the original 1940 Act, the board was known as the "court of referees."[4] In 1971 and 1996, Parliament dropped the expression "court" in favour of the term "board," which is well known in the world of labour. Be that as it may, in public law Parliament has not adopted a sacramental expression to identify what may conveniently be referred to as an administrative tribunal.[5]

In public law tradition, a tribunal is defined by its function. Thus, in such major statutes as the *Charter of Human Rights and Freedoms* and the *Act respecting the Barreau du Québec,* the Quebec legislature defines a tribunal as "any organisation sitting in Quebec and there exercising a judicial or quasi-judicial jurisdiction".[6] A substantial body of decisions has striven to define this expression.[7] In some provinces like Ontario, tribunal has a broader meaning and applies to persons having "a statutory power of decision".[8]

Since various groups of institutions are capable of performing such functions, the legislature and the case law have tended to target those that can be described as tribunals in the strongest sense of the term. In 1981, the

4. For a study of the development of the system see P. Issalys, *Unemployment Insurance Benefits: A Study,* Law Reform Commission, 1977, at 158.

5. Y. Ouellette, *Les tribunaux administratifs au Canada,* Ed. Themis, 1997, at 1-19; Macaulay and Sprague, *Practice and Procedure before Administrative Tribunals,* Carswell, 1988, vol. 1, c. 2.4.

6. R.S.Q. c. C-12, s. 58; R.S.Q. c. B-1, s. 1.

7. P. Garant, *Droit administratif,* vol. 2, at 84; D. Mullan, *Administrative Law,* Carswell, 3rd ed. 1996, nos. 50-69; Jones and DeVillars, *Principles of Administrative Law,* Carswell, 2nd ed. 1994, at 179-193.

8. Ontario *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22.

Supreme Court stated that it was not necessary to rely solely on the facades of procedure but rather to look to the nature of the question that the tribunal must decide:

> . . . the hallmark of a judicial power is a *lis* between parties in which a tribunal is called upon to apply a recognised body of rules in a manner consistent with fairness and impartiality. The adjudication deals primarily with the rights of the parties to the dispute, rather than considerations of the collective good of the community as a whole.[9]

In 1995, the same Court used the expression "adjudicative functions" to describe this function.[10] In 1996, the National Assembly officially enshrined this designation in the *Act respecting administrative justice,* in a chapter defining "the rules specific to decisions in the exercise of an adjudicative function", which speaks of "a . . . body of the administrative branch charged with settling disputes between a citizen and an administrative authority . . . "[11] The Quebec legislature thus adopted the statements in the 1994 *Rapport du groupe de travail* concerning the reform of administrative justice:

> [TRANSLATION]
> In effect, the case law and the authors identify the adjudicative function and the decision rendered in the exercise of this function as being those in which a decision maker:
>
> - decides a dispute between parties without being one of the parties to the dispute but is rather a third independent and impartial part;
>
> - decides a dispute that is referred to him and over which he does not assume jurisdiction on his own account;
>
> - decides a dispute on the basis of legal considerations and not solely on the basis of considerations of what is appropriate;

9. *Reference re Residential Tenancies Act, 1979,* [1981] 1 S.C.R. 714, 743.

10. *C.P. Ltd.* v. *Matsqui Indian Band,* [1995] 1 S.C.R. 3, 56.

11. S.Q. 1996 c. 54, s. 9; see Macaulay and Sprague, vol. 4, c. 38-161.

- decides a dispute by making certain findings of fact and by setting out the standard that was not adopted or submitted for adoption by him;

- decides a dispute on the basis of the facts proved before him by the parties without having sought out these facts himself;

- decides a dispute in accordance with a procedure that is adapted to the nature of the disputes referred to him.

  This procedure is so devised as to provide for adversarial proceedings, that is the hearing of witnesses, examination and cross-examination and the possibility of making objections or oppositions to evidence.[12]

The fact that the Board of Referees is not a permanent institution but a body created each time a claimant or an employer files an appeal (A. 111) does not deprive it of its status as an administrative tribunal that perfectly embodies the essential characteristics of the adjudicative function in the administrative branch.

The Act and the Regulations use a form of terminology that normally belongs to the adjudicative function; the terms used there include appeal, grounds of appeal, hearing, practice and procedure, testimony, parties, filing of the decision, *inter alia* (A. 111-114; R. 78-83). The Court of Appeal and the Umpire have regularly described the board as an "administrative tribunal" or even as a "judge";[13] it participates in the administration of justice.[14]

Some commentators have felt that the board is not a full tribunal in the sense that it has authority to make decisions concerning only the facts and not the law. The Supreme Court decision in *Tétreault-Gadoury* makes a distinction between the board and the Umpire for purposes of determining who may render a decision on the constitutional validity of

12. *Une Justice Administrative pour le Citoyen*, at 23.

13. A-3-96 (Gagnon): "since the role of the board is the same as that of a judge . . . "; CUB 12280 (Alarie: "the jurisdiction of the tribunal"); CUB 12452 (Hjorleifson: "administrative tribunal"); CUB 20783 (Crawford: "proceeding is appellate in nature and must never be . . . an inquisitorial process"); CUB 39716 (Batterham: "quasi-judicial tribunal").

14. CUB 12280 (Alarie).

the Act.[15] In our judgment, the Supreme Court wrongly suggested that only the Umpire may decide questions of law. This would be contrary to the Act itself, which authorizes the board to rule on the right to benefits, the imposition of penalties and other subjects. Section 115 lists the grounds of appeal to the Umpire, which presuppose that the board has already rendered a decision on questions of law: failure to observe a principle of natural justice, acting beyond its jurisdiction, an error of law in its decision and so on. To be sure, s. 117 indicates that the Umpire "may decide any question of law or fact that is necessary for the disposition of an appeal" whereas no such indication is given with respect to the board; s. 114, on the other hand, states that a decision of the board "shall include a statement of the findings of the board on questions of fact material to the decision". It would be incorrect to conclude from these provisions that only the Umpire may decide questions of law. In our view, s. 117 is not indispensable because it goes without saying that an appeal tribunal presided over by a Federal Court judge will rule on the law. Subsection 114(3) concerns the reasons for decision, which must at the very least deal with the "questions of fact material to the decision". If the board is a true tribunal, it has a statutory jurisdiction of a public nature.[16] How then can a board adequately exercise a jurisdiction that is conferred on it by law, decide a dispute concerning the right to benefits or the imposition of major penalties without having to interpret the Act and the Regulations and necessarily expressing opinions on questions of law? In *Cooper*, the Court had to consider a tribunal on which the Act did not expressly confer the power to examine questions of law and the role of which was "primarily and essentially a fact-finding inquiry"; it found that "in the course of such an inquiry a tribunal may indeed consider questions of law".[17] Finally, as Issalys has said, [TRANSLATION] "the board's decision must be based on legal reasoning".[18] A long line of authority shows that the board regularly has to interpret not only the Act and the Regulations but also other related legislation.[19] It has to examine and interpret the

15. *Tétreault-Gadoury* v. *Canada*, [1991] 2 S.C.R. 22, 31 *et seq.* "consider the constitutional validity of this Act".

16. *Ste-Angèle de Monnoir* v. *Bérubé*, [1986] R.D.J. 590 (C.A.Q.).

17. *Cooper* v. *Canada*, [1996] 3 S.C.R. 854, 896.

18. Issalys, at 163.

19. A-951-90 (Frenette); A-961-87 (Sepinwal); Xuan, [1994] 2 F.C. 348, (FCA); A-312-96 (Demers); A-106-96 (Tremblay); A-704-95 (Savarie); A-398-96 (Lalonde).

provisions of contracts of employment or collective agreements.[20] It has to render opinions on the legal classification of a transaction or an agreement.[21] It must also rule on "the legal nature of an agreement or a clause in a contract".[22] The board is a "tribunal of fact as well as of law".[23]

Since it has the jurisdiction of a true tribunal, the board may and even must exercise this jurisdiction conferred on it, even where another tribunal such as a labour arbitration tribunal, or a civil or criminal court, hears a case dealing with the same facts.[24] The rulings of these tribunals or the evidence before them are not binding on the board, even if the board can or must, as the case may be, take them into consideration.

A question of law may be defined as a question involving the interpretation and application of a statutory or regulatory provision, or a principle or judicial rule established in the case law.[25] A question of fact involves the statement of the occurrence of an event, the existence of a thing or a person, as well as the statement of an opinion about them.[26]

It could be argued by some that the Board of Referees is not a true tribunal because it does not have the power to summon witnesses, issue subpoenas or convict persons of contempt of court. This assumption would be wrong. These powers are part of the inherent jurisdiction of the superior courts but any other tribunal must have them conferred on it expressly by law.[27] Thus, a number of administrative or quasi-judicial tribunals are not

20. A-217-93 (Kinkead); A-212-89 (McCabe); A-493-87 (Kidd); A-869-87 (Thomson); A-1118-88 (Laporte); A-319-87 (Brooks).

21. A-1050-90 (Dawley: determining whether a loan was involved); A-721-95 (Pleau: "this is a question of legal classification"); A-258-90 (Prescod: the existence of a loan).

22. A-156-95 (Poitras); A-160-95 (Forget) A-184-95 (Borghi).

23. CUB 7887 (Korobchuk); CUB 23906 (Bouchie: "interpretor of law").

24. A-309-81 (Pérusse, 14/12/81); A-369-88 (Bartone); A-130-96 (Meunier); CUB 22672 (Khan); CUB 21942 (Hicks); CUB 10736 (Gravesande).

25. CUB 22097 (Martel: "meaning given to a provision or expression"); CUB 17910 (Prescod: legal characterization of a transaction such as a loan); CUB 23906 (Bouchie: "its own . . . interpretation of law"); A-434-82 (Delma: the Board, having based its conclusion on an irrelevant consideration, erred in law).

26. A-57-96 (Faucher: "a claimant's availability is a question of fact, which should normally be disposed of on the basis of an assessment of the evidence").

27. CUB 21911 (Lavigne-Lincourt), "The board of referees, that is to say an administrative tribunal, derives all its powers solely from the Act".

authorized to exercise this kind of power. However, the case law has recognized that such a tribunal may request the assistance of a superior court, which does have jurisdiction to summon a witness before the administrative tribunal.[28]

Since it is a tribunal, the board is in some regards subject to the rule of precedent or *stare decisis* with regard to the judgments of the superior courts, that is the Supreme Court, the Federal Court and the Umpire; however, this does not include the decisions of the other boards.[29] It is essential therefore that the board members be familiar with the decisions of the Federal Court and the Umpire.

The board is a true tribunal even though the majority of its members do not have legal training, which is common in many administrative tribunals where multidisciplinary backgrounds are the rule.[30]

1.1.1.2 AN APPEAL TRIBUNAL

The Act makes the Board of Referees an appeal tribunal from decisions of the Commission relating to employment insurance benefits (A. 114). The Act and the Regulations indicate how this appeal is to proceed; they do not set out the grounds of appeal or the role of the board, unlike the situation with respect to the Umpire, where s. 115(2) sets out the grounds of appeal and s. 117 defines the powers of the Umpire, stating that he or she may dismiss the appeal, give the decision that the Board of Referees should have given, refer the matter back to the Board of Referees for rehearing or redetermination in accordance with such directions as the Umpire considers appropriate and confirm, rescind or vary the decision of the Board of Referees in whole or in part.

Since the Act and the Regulations are silent on this point, reference must be made to administrative law.[31] An appeal is essentially a remedial approach in the sense that the appeal tribunal may not only quash a

28. Y. Ouellette, at 52; Macaulay and Sprague, *Practice and Procedure*, vol. 2, c. 12-10: "The superior court have the inherent jurisdiction to issue subpoenas in aid to inferior tribunals" (at 12-82.4); Mullan, no 409.

29. CUB 7338 (Ouellet); CUB 5912 (McGinn); CUB 8325 (Marcoux).

30. CUB 40182B (Forgie); CUB 18611 (McDonald: non-professional tribunal).

31. Garant, vol. 2, at 519-542; Mullan, nos. 812-831; Jones and DeVillars, at 445-472.

decision but also vary it to reflect the decision that the initial decision maker should have given. The Court of Appeal has admitted that "these powers are considerable".[32]

However, there is a difference between an appeal to a court of law and an appeal to an administrative tribunal, although there are elements common to both. While an appeal to a court of appeal is an appeal on the record created before the tribunal of first instance, the latter is more "a review at first instance of the rights of the parties", that is an initial trial that results in a decision and includes an inquiry and a hearing.[33] On the other hand, unless its jurisdiction is expressly limited or defined by the Act, an administrative appeal tribunal decides not only on the merits, that is on the correctness in fact and in law of the Commission's decision and its legality in terms of procedure and substance, but also on the very jurisdiction of the first decision maker, in this case the Commission official.[34]

As an appeal tribunal, the board is governed by the rules of jurisdiction, which in this case are expressly set out in the Act: depending on the case, the board will hear an appeal brought by a claimant, an employer or any other person who is the subject of a decision by the Commission. The board cannot therefore give itself jurisdiction in a case, which is not true of the review provided for in s. 120 of the Act, where a board may review its own decision, as we shall see later. If the appeal is not properly brought, the board must dismiss it.

Moreover, like any other tribunal, the board is subject to the *ultra petita* rule, that is the principle that a tribunal may not rule on questions that are not submitted to it or grant a remedy that is not requested of it: [TRANSLATION] "public order requires that the consideration be restricted to what is requested";[35] that is the principle of *ultra petita.* Consequently, the board does not have to rule on a question that is not subject of the

32. A-453-95 (Morin); A-1598-92 (Easson).

33. CUB 7887 (Korobchuk); CUB 7789 (Brown); CUB 23906 (Bouchie).

34. Garant, vol. 2, at 535; A-737-82 (Von Findenigg), [1984] 1 F.C. 65 (F.C.A.) T-1689-85 (Bacon).

35. *Boulais* v. *Hamel* [1968] B.R. 561, 567 (C.A.Q.); *Doyle* v. *Sparling* [1987] R.J.Q. 307 (C.A.Q.). CUB 7461 (Bourgeois: there is no question of *ultra petita* if the board does not uphold the arguments put forward by the Commission).

appeal,[36] that is not before the board[37] or that the Commission has not considered.[38]

Section 82 of the Regulations gives the chairperson of the board a power enjoyed by few appeal tribunals, which may not be used to circumvent the principle of *ultra petita*. Before the board has given its decision, the chairperson may "refer any question arising in relation to a claim for benefits to the Commission for investigation and report". This provision shows the inquisitorial nature of administrative justice, as we shall see later.

1.1.1.3 A STATUTORY TRIBUNAL

In the Canadian justice system, there are so-called common law courts and statutory courts or tribunals. The former have a general jurisdiction which they derive to some extent from the Constitution: this is true of the superior courts and, to some extent, the Federal Court. All the others are inferior courts or tribunals whose jurisdiction are expressly conferred on them by statutes. This is the case for the boards of referees and the Umpire.

The *Employment Insurance Act* defines the so-called material jurisdiction of the board, that is to say the subject matter concerning which it may render decisions: this is called its primary jurisdiction and s. 115(2) of the Act makes express reference to it. The board has jurisdiction to render decisions concerning eligibility for benefit but not concerning the insurability of employment.[39]

In principle, any decision of the Commission referred to in s. 114 of the Act may be appealed,[40] although there are exceptions. Thus, the notice sent to a person stating that he or she is not entitled to receive benefits because his or her employment was not insurable may not be appealed to the board.[41] Moreover, the Court of Appeal has ruled that neither the board nor the Umpire has jurisdiction to exercise, in the Commission's place, "the

36. A-1964 (Dyson); A-371-93; CUB 45742 (Grisé); CUB 46929 (Walker).

37. CUB 25402 (Phillips); CUB 14322 (Pouliot); CUB 23737 (Dyson).

38. CUB 25402 (Phillips); CUB 13328 (Hamilton); CUB 14322 (Pouliot).

39. A-999-96 (D'Astoli); A-247-96 (Thibault).

40. A-371-93 (Read: "any decision the Commission made or should have made").

41. A-487-93 (Kaur); CUB 43582 (Zarychta).

extraordinary power" conferred by s. 50(10) (formerly s. 55).[42] In principle, the board may not exercise, in the Commission's place, a discretionary power that belongs exclusively to the Commission;[43] this is true in the case of write-offs.[44] It is also true in the case of extensions of time.[45] However, once the Commission has made its decision, the board has jurisdiction to ascertain whether the Commission "exercised its jurisdiction judiciously", that is, in a manner that was not arbitrary.[46] The board must determine whether the Commission's power was in fact exercised.[47] There is no appeal when the Commission has made no decision.

The decision in which the Commission determines whether or not to impose a penalty is not as such subject to review by the board. However, once the decison has been taken, the board has the necessary jurisdiction to review the reasons for imposing a penalty and to vary the amount;[48] in that case it may only determine whether the Commission exercised its discretionary power judiciously.[49] The board does not have appeal jurisdiction over a decision by the Commission to refer or not to refer a claimant to a course or other training.[50] This is true of decisions concerning a work-sharing agreement (ss. 14(2) and 25(2) of the Act) or concerning assistance under prescribed employment benefits (s. 25 of the Act).

The board is an appeal tribunal; this suggests that it may rule only on errors of law or of fact made by the Commission, specifically the incorrect

42. A-168-80 (Desjardins) [1981] 1 F.C. 220.

43. A-1284-92 (Simard); A-694-94 (Purcell); A-694-93 (Friesen); A-0008-95 (Thompson); A-308-94 (Phung); CUB 47847 (S. Roy).

44. A-874-97 (Filiatrault); A-815-96 (Romero); A-676-96 (Gagnon).

45. A-42-90 (Chartier); A-80-90 (Plourde); T-390-95 (Carrier); A-432-96 (Cardamone).

46. A-346-93 (Knowler); A-308-94 (Phung: "unless it is vitiated by a fundamental error"); A-378-98 (Pyne); CUB 46625 (St-Amant); CUB 44167 (Labelle); CUB 45285 (Bilotta: "Discretion purportedly exercised rote . . . is an arbitrary decision.").

47. A-1124-92 (Archambault); A-1449-92 (Kolish).

48. A-708-95 (Dunham); A-701-96 (Stark: "in exceptional circumstances").

49. A-453-95 and A-681-96 (Morin); A-769-96 (Longsworth); A-9-98 (Idemudia); A-330-93 (Smith). The arbitrary action most often committed by the Commission is not taking into account mitigating factors in exercising its discretion: A-681-96 (Morin).

50. A-372-96 (D. Georges); CUB 45422 (Michaud: here "the Board of Referees ruled on the soundness of the decision, which was a flagrant excess of jurisdiction" (*ultra vires* act); CUB 44163 (Djoudi).

application of the Act, Regulations or case law. The permissible grounds of appeal are accordingly limited: while the fact that the claimant is disappointed or disagrees with the Commission is not a ground of appeal,[51] the same principle will apply when a claimant considers the decision unfair or believes that the law is too harsh.[52] The board does not have jurisdiction to render a decision in equity that is contrary to the clear provisions of the Act, which it may not refuse to apply.[53]

The board must fully exercise its jurisdiction. It cannot refuse or fail to rule on questions of fact essential to the case at hand.[54] As a statutory tribunal, it can only apply the remedies provided by the Act. Like the Umpire it may feel limited and unable to correct a situation the claimant believes is unfair.[55] As a tribunal, the board cannot rule against the Act, Regulations or jurisprudence applicable to it.[56] As a tribunal, however, the board is not subject to the Commission's directives, guides, administrative policies or forms, to the extent that the Act and Regulations must come first,[57] and the board must conduct its own interpretation of the law and the facts.[58]

Besides its primary jurisdiction, a statutory tribunal has been recognized in the case law as having accessory or auxiliary jurisdiction. First, any tribunal may render a decision concerning its own jurisdiction, whether the question is raised by a party that objects to this jurisdiction or is raised by the tribunal itself on its own motion.[59] Second, a tribunal may rule on

51. CUB 7052 (Van Toorn).

52. CUB 12752 (Henderson).

53. *C.E.I.C.* v. *Granger*, [1989] 1 S.C.R. 141 and [1986] 3 F.C. 70 (FCA); CUB 17884 (Sagutch); CUB 46747 (Pilon-Vaive); CUB 45834 (L'Archevêque); CUB 42458 (Wald); CUB 46195 (Piché); CUB 40964A (Bélanger: even if the claimant was misinformed by officers of the Commission, the board and the Umpire must comply with the Act . . . even with regret); CUB 45431 (Falinski: the Commission itself does not have the power to amend the Act for reasons of fairness); CUB 10338 (Boldt: "only Parliament can amend the Act"); CUB 23794 (Sharratt); CUB 23424 (Bosdet. without the benefit of interpretation, the board cannot change the Act).

54. CUB 42386 (Baillargeon); CUB 42772 (Desroches).

55. CUB 28736 (Robinson)

56. CUB 24461 (Yates: "decision of the Board of Referees goes against the jurisprudence").

57. A-100-89 (Fries); CUB 23828 (Cecconi); CUB 25241 (Magder); CUB 10602 (Ramirez).

58. CUB 29339 (Hann).

59. Garant, vol. 2, at 142; Mullan, no. 411

any question of procedure, especially one concerning the application of the rules of natural justice and the rules of evidence. In some cases the Act or the Regulations indicate that the chairperson must render certain decisions, as is true of ss. R. 80 to 83. Third, any tribunal is subject to the *Canadian Charter of Rights and Freedoms* and the applicable quasi-constitutional legislation; it must accordingly take these statutes into account in exercising its jurisdiction when the Charter is relied upon against a decision of the Commission[60] or when a discriminatory practice by the Commission or an employer is alleged.[61] Thus, these statutes may be relied upon before the Board of Referees, which has a duty to apply them. However, this does not authorize it to rule on the constitutionality of the Act and the Regulations itself, as we shall see later.

1.1.1.4 CHARTERS OF RIGHTS

As we have just seen, it is accepted that a litigant may rely on charters of rights before an administrative tribunal, which must take them into account in exercising its jurisdiction.[62] This is true of the *Canadian Charter of Rights and Freedoms*, s. 32 of which states that it applies to the Parliament and government of Canada. The same thing is true of the *Canadian Bill of Rights* and the *Canadian Human Rights Act* but not of the Quebec Charter or other provincial human rights codes, which do not apply to federal authorities. These provincial charters may sometimes apply to employer-employee relations.

The question as to whether any tribunal may also rule on the constitutional validity of the Act and the Regulations is altogether different. In *Tétreault-Gadoury*, the Supreme Court held that only administrative tribunals that were expressly or implicitly authorized to decide questions of law could refuse to apply an Act on the ground that it was unconstitutional. The Court concluded that in our particular context,

60. CUB 17884 (Sagutch: claim for reimbursement of overpayment); CUB 15036 (Tomlinson: Statistics Canada methodology); CUB 20125 (Tuppatsch).

61. CUB 8892 (Hartley: racial discrimination); CUB 23493 (Brady: religious convictions); CUB 11412 (Bendall: religious freedom); CUB 15186 (Boogaars: refusal to work on Saturday, s. 15 of Charter); CUB 15847B (Gauthier: national placement program not contrary to s. 15 of Charter); CUB 22405 (Cody: Commission's decision not to refer certain students to training courses complies with s. 15 of Charter); CUB 17462 (Timmons: *idem.*).

62. *Weber* v. *Ontario Hydro*, [1995] 2 S.C.R. 929; *Blenco* v. *British Columbia (Human Rights Com.)* [2000] S.C.C. 44. We then question the claim that "the Charter could not be invoked before the Board" expressed in CUB 40182 B (Forgie); CUB 45097 (Larochelle).

the intention of Parliament was that only the Umpire and not the board had the power to rule on the constitutionality of the Act.[63] In *Cooper*, the Supreme Court redefined the tests used to identify those administrative tribunals that had authority to rule on the constitutionality of the Act and the Regulations.[64] Furthermore, for the Umpire to rule on the constitutionality of a text, the appellant must specifically challenge its validity or inapplicability.[65]

The provisions of the Canadian Charter likely to be relied upon before a Board of Referees are primarily ss. 15 and 7; as a rule, Charter arguments are raised before the Umpire.[66]

Section 15 of the Canadian Charter sets out the right to equality in very broad terms:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Supreme Court has considered this provision on at least a dozen occasions and in May 1991, in its decision in *Swain*, it maintained that these cases provided "a basic framework with which particular . . . claims can be analysed . . . ".[67]

The Court must first determine whether the complainant has established that one of the four fundamental rights to equality has been violated (i.e., equality before the law, equality under the law, equal protection of the law and equal benefit of the law). This analysis will look above all at the question as to whether the law (intentionally or otherwise) makes a distinction between the complainant and other persons on the basis of personal characteristics. Then the Court must determine whether the violation of the right gives rise to "discrimination." This second analysis will to a large extent look at the question as to whether the different treatment has the effect of imposing burdens, obligations or disadvantages

63. *Tétreault-Gadoury*, at 34 *et seq*; A-216-96 (Nishri).

64. *Cooper*, at 887 *et seq*; CUB 45097 (Larochelle).

65. CUB 43062 (Francoeur).

66. A-207-97 (Constantineau); A-479-94 (Faltermeier); A-589-86 (Robinson); A-226-88 (Meredith); CUB 40182B (Forgie); CUB 42407A (Fromm).

67. *R.* v. *Swain*, [1991] 1 S.C.R. 933, 992 *et seq.*

that are not imposed on others or preventing or limiting access to the opportunities and benefits provided to others. Moreover, to determine whether the rights that s. 15(1) recognizes the complainant as having have been violated, the Court must determine whether the personal characteristic in question is covered by the grounds listed in this provision or a similar ground to ensure that the complaint corresponds to the general purpose of s. 15, that is to correct or prevent discrimination against groups that are stereotyped, were subject to disadvantages in the past or have suffered political and social prejudice in Canadian society.

What must be considered above all is "the effect of the law on the individual and the group concerned" while seeking the "ideal complete equality before the law and under the law", and

> [r]ecognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.[68]

However, it is not sufficient for persons placed in similar situations to be treated in a similar manner for equality to exist: that "cannot be a realistic test . . . consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies and also upon those whom it excludes from its application",[69] because there are distinctions and differences in treatment before the law that violate the guarantee of equality in s. 15 of the Canadian Charter and others that do not.

Since the decision in *Andrews*, the Court has repeated that not all distinctions and differences in treatment before the law violate s. 15; an element of discrimination is required. This discriminatory element may be found by determining the harmful effect of the impugned measure. It unanimously repeated this in its decision in *Tétreault-Gadoury* in June 1991:

68. *Andrews* v. *Law Society of B.C.*, [1989] 1 S.C.R. 143, 165.

69. *Ibid.* at 168.

> As in *McKinney, supra*, it was argued here that the policy is not motivated by stereotypical assumptions, but is based upon "administrative, institutional and socio-economic" considerations. In *McKinney*, however, I concluded (at p. 279) that this is all irrelevant, since as *Andrews* v. *Law Society of British Columbia* made clear .... not only does the Charter protect from direct or intentional discrimination; it also protects from adverse impact discrimination, which is what is in issue here.[70]

Section 15 does not contain a complete list of the grounds of discrimination. This is what led the Supreme Court to provide a broad definition of discrimination as being a distinction based on a personal characteristic of an individual or a group. It then hastened to add in *Andrews*:

> The enumerated grounds in s. 15(1) are not exclusive and the limits if any, on grounds for discrimination, which may be, established in future cases await definition. The enumerated grounds do, however, reflect the most common and probably the most socially destructive and historically practised cases of discrimination and must, in the words of s. 15(1), receive particular attention. Both the enumerated grounds themselves and other possible grounds of discrimination recognised under s. 15(1) must be interpreted in a broad and general manner, reflecting the fact that they are constitutional provisions not easily repealed or amended but intended to provide a "continuing framework for the legitimate exercise of governmental power" and, at the same time, for "the unremitting protection" of equal rights.[71]

Parliament may nevertheless enact legislation that makes distinctions that are reasonable and demonstrably justified in a free and democratic society. Under s. 1 of the Charter, Parliament and the government are justified in making distinctions in the general interest and to ensure that the community is not deprived of the benefits of social and economic laws and programs. A certain amount of flexibility is required in assessing legislative and administrative measures. The Court unanimously stated the following in *Tétreault-Gadoury*:

70. *Tétreault-Gadoury*, at 41.

71. *Andrews*, at 175.

> In *McKinney, supra*, this Court emphasized that, when evaluating legislative measures that attempt to strike a balance between the claims of legitimate but competing social values, considerable flexibility must be accorded to the government to choose between various alternatives. In such a situation, since the court cannot easily ascertain with certainty whether the least restrictive means have been chosen, it is appropriate to accord the government a measure of deference. Following *Irwin Toy Ltd.* v. *Quebec (Attorney General),* [1989] 1 S.C.R. 927, the Court found that in *McKinney*, at p. 286, that "the question is whether the government had a *reasonable basis* for concluding that it impaired the relevant right as little as possible given the government's pressing and substantial objectives".[72]

Nevertheless, the Court found that s. 31 of the Act, which prohibited the payment of unemployment insurance benefits to persons of 65 years and over, was not an acceptable means of attaining any of Parliament's objectives, since each of them could easily have been attained by less invasive means. The Court's main criticism of the government was that it had not established the importance of the two objectives, which it based on allegations that were not really substantiated. The third of these objectives, which was to avoid duplication in social benefits, could be attained by other means, namely by simply deducting pension income from the unemployment insurance benefits. Thus, the Court found that s. 31 was not carefully designed to attain this objective, which it felt was otherwise valid. The idea of harmonizing social policies and schemes by imposing age limits was accordingly a sufficiently important objective but the measure adopted must not be too radical or too invasive. In that case it was.

The case law on the subject of equality recognizes three kinds of discrimination: direct, indirect and systemic.

Direct discrimination, whether conscious or not, takes the obvious form of a distinction, exclusion or preference with respect to an individual or a group defined on the basis of its own characteristics and relating to prohibited grounds.

72. *Tétreault-Gadoury*, at 43.

Indirect discrimination or adverse effect discrimination is the result of measures that appear to be neutral and, in principle, apply to everyone but inevitably produce adverse effects in the form of distinctions, exclusions or preferences relating to prohibited grounds. The best known example of such measures relates to laws or policies of general application that do not take account of persons with disabilities who therefore find themselves in a disadvantageous and thus a discriminatory situation in comparison with the situation of people as a whole.

Section 15 of the Charter has been relied on several times to attack certain provisions of the Act or Regulations or certain purportedly discriminatory practices, albeit without success in most cases.[73]

The claimant or employer who claims to have been subject to a discriminatory measure on the part of the Commission could also rely on s. 1(*b*) of the *Canadian Bill of Rights*, which protects "the right of the individual to equality before the law and the protection of the law".

Section 7 of the Charter concerns the right to security, which may be infringed only "in accordance with the principles of fundamental justice". Although the case law is not completely settled on this issue, it would appear that professional rights and socio-economic rights, as with those involved in employment cases, are covered by s. 7.[74] As far as the principles of fundamental justice are concerned, in the field of administrative justice they are intermingled with the principles of natural justice. The individual may also rely on s. 2(*e*) of the *Canadian Bill of Rights* for the same purpose.

1.1.1.5 *THE ADVERSARIAL PRINCIPLE: THE RULES OF NATURAL JUSTICE*

It is the task of a tribunal to decide disputes by applying the law at the conclusion of an adversarial dispute in accordance with the principles and rules applying to the administration of justice and in accordance with a procedure designed for this purpose. This adversarial principle is enshrined in s. 7 of the Canadian Charter and also in s. 2(*e*) of the *Canadian Bill of Rights*, as follows: "no law of Canada shall be construed or

73. A-589-86 (Robinson: the difference between a group plan and a non-group plan complies with s. 15); CUB 22373 (Lemieux); CUB 19483 (Irving); CUB 20090 (Finkle); CUB 23942A (Allsopp).

74. *Ruffo* v. *Conseil de la Magistrature*, [1995] 4 S.C.R. 267, 293 (professional rights of judges); *Pearlman* v. *Manitoba Law Society*, [1991] 2 S.C.R. 869, 881 (professional rights of lawyers); *Wilson* v. *B.C. Medical Services Com.* (1989), 53 D.L.R. 4th 171 (B.C.C.A.) (rights of doctors). Statements in previous cases must be read with caution: CUB 15036 (Tomlinson); CUB 17884 (Sagutch).

applied so as to: (*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations; . . ."[75]

Section 115 of the Act indirectly imposes a duty on the Board of Referees to observe the principles of natural justice but it is s. 80 of the Regulations which expressly confers a right to request a hearing in proper form before the board. This right belongs to the claimant, the employer or any other person subject to a decision of the Commission.

The principles of natural justice, especially the *audi alteram partem* rule, require that an interested individual have an opportunity to be heard and to make his or her arguments but this does not necessarily mean that a hearing must be held unless the Act and the Regulations require it. Here the hearing is mandatory when the individual in question expressly requests one in writing beforehand, when the appeal is filed or within seven days of receipt of the notice of appeal, as appropriate. What happens when requests are made late? Section R. 85(5) provides that the chairperson of the board may at any time order that a hearing be held.

In our view, the claimant or the employer could rely on s. 7 of the Charter on the basis of a right to psychological security or a right to a reputation to demand a hearing, in which case the chairperson should not refuse it, especially "where a serious issue of credibility is involved".[76]

The claimant may chose a non-conventional form of hearing such as teleconference, videoconference or telephone call; but once the claimant has chosen the form and received the decision, he or she cannot then claim that there has been a breach of natural justice.[77]

It has recently been decided that when an issue of the credibility of the claimant or another person has been raised, natural justice requires a hearing "in person" and not by teleconference.[78]

If the individual in question has not made a timely request for a hearing, he or she may request a review under s. 120 of the Act for one of the

75. CUB 3805 (Lajoie); CUB 24370 (Louis).

76. *Singh* v. *M.E.I.* [1985] 1 S.C.R. 178, 213.

77. CUB 45431 (Falinski).

78. CUB 46071 (Lefebvre); CUB 12444 (Peterman) and A-532-86.

reasons set out in that provision. Where appropriate, he or she may appeal to the Umpire but may not allege that the Board of Referees failed to observe a principle of natural justice by not holding a hearing.

The hearing of which we are speaking here is a kind of quasi-judicial hearing that is similar but not identical to a hearing in a court of law. What does this mean? The case law has used the expressions "informal hearing" (*audition sans formalité*) in addition to "structured hearing," "appropriate hearing" and "true hearing."[79] In quasi-judicial proceedings, as opposed to proceedings of an administrative nature, the hearing is not merely a simple meeting or interview at which ideas are exchanged and a discussion takes place. It is not a meeting that offers an opportunity for people to vent their frustrations.[80] It must be a hearing that allows for an adversarial debate, where the parties can make their arguments, examine and cross-examine witnesses and plead before an impartial arbitrator or judge.[81] To this end, a structured or true hearing implies a procedure and not a free-for-all or an artistic mishmash that would be inconsistent with the concept of administration of justice. A long line of decisions by the Court of Appeal and the Umpire has defined the various components of natural justice that apply before the board.[82] However, the claimant or any other sufficiently notified party is free to attend and put forward arguments.[83]

Even though a structured hearing implies a simpler, more accessible and less formal procedure than that of the law courts, its characteristic features are as follows:

- the hearing is necessarily preceded by the giving of formal notice to the parties concerned;
- the parties are entitled to make their arguments and adduce testimonial and documentary evidence, to examine and cross-examine witnesses and to plead;

79. Garant, at 258, 267; Y. Ouellette, at 150; Jones and DeVillars, at 241-245; Macaulay and Sprague, vol. 2, c. 12.

80. The Federal Court of Appeal used the expression "public meeting at which members of the public are merely given an opportunity to blow off steam (l'occasion de dire sa façon de penser)", *re CRTC et London Cable*, [1976] 2 F.C. 621, 625 (C.A.); in another decision, the Superior Court spoke of a parody of a hearing rushed through in a few minutes: JE 91-807 (C.S.Q.).

81. CUB 11004 (Schiml): "The claimant indicated that at the hearing before the board of referees he was not authorized to be there when his former employer explained the reason for his dismissal. The employer, for his part, did not appear when his evidence was presented. These proceedings were highly irregular and, in the circumstances, this was a refusal to provide an impartial hearing." CUB 25210 (Lodlow: refusal to hear witnesses).

82. CUB 10147 (Carrier); A-357-81 (Ouellette); A-219-93 (M. Baillargeon: "full and complete hearing"); CUB 19057 (Annesty); CUB 11018 (Haight); CUB 21407 (Frappier); CUB 36309 (Kucyniak).

83. CUB 25490 (Buxton); CUB 25116 (Dumais).

- the parties are entitled to be represented by counsel;
- the tribunal observes certain rules of evidence; and
- the tribunal deliberates and renders a decision with reasons.

1.1.1.6 REHEARING OR SELF-REVIEW

In principle in our law, when a tribunal has rendered a decision, it no longer has responsibility for the case; it is *functus officio* and may accordingly no longer have anything to do with the decision, with a few exceptions. First, this may be explicitly permitted under the Act, as is the case in A. 120. On the other hand, the Supreme Court has ruled that although the Act does not permit this, an administrative tribunal may reopen a case in the interests of justice, hold a regular hearing if it realizes that it has made an error that has the effect of nullifying its decision, or if it failed to rule on a question.[84] However, this does not have to involve a kind of relief "which would otherwise be available on appeal".[85] Since the appeal to the Umpire provided for in s. 115 clearly covers these cases, A. 120 should be strictly followed in this regard.

The case law also recognizes that an administrative tribunal can always correct material errors or errors that are the result of a lapse or an accidental omission.[86]

Finally, s. A. 117 provides for a new hearing when this is requested by the Umpire, and the hearing shall be held in accordance with such directions as the Umpire considers appropriate. Strictly speaking, this is not a review or a rehearing but rather a new hearing that may be required before the same Board of Referees or a different board in accordance with the Umpire's directions.

In what cases will a rehearing be held under s. A. 120? These are situations where:

- new facts are presented;
- it is alleged that the decision was rendered before a material fact became known; or

84. Garant, vol. 2, at 156, 157; Mullan, nos. 436-448; Macaulay and Sprague, vol. 3, c. 27A.

85. *Chander* v. *Alberta Ass. of Architects*, [1989] 2 S.C.R. 848, 862; A-463-90 (Severud).

86. Garant, vol. 2, at 157.

– it is alleged that the decision was based on an error concerning a material fact.

We shall come back to this point later in Chapter 5.

1.1.2 INDEPENDENCE AND IMPARTIALITY

It is a tradition of public law that all tribunals must be independent and impartial. This is one of the principles of natural justice which the Canadian Charter incorporates into s. 7 with the words "principles of fundamental justice", and it is also included in s. 2(*e*) of the *Canadian Bill of Rights*, when it refers to a fair hearing "in accordance with the principles of fundamental justice". Many decisions have been rendered concerning these provisions and under s. 23 of the Quebec Charter, which is to the same effect. Other provisions such as s. 11(*d*) of the Canadian Charter and s. 2(*f*) of the *Canadian Bill of Rights* also contain this dual requirement. Whatever the source may be, the Supreme Court and the Federal Court in the final analysis feel that this dual requirement applying to all federal administrative tribunals has a genuine constitutional basis.[87]

Although the two concepts are closely related,[88] they differ in that they reflect "separate and distinct values or requirements".[89] However, they both aim at the attainment of a single objective: that justice be done in an objective and disinterested manner. Furthermore, public law has always required that not only is it of fundamental importance that justice be done "but should manifestly and undoubtedly be seen to be done".[90] In the case of both independence and impartiality, the reality is just as important as the appearance: it is also a question of impressions[91] and of perception.[92]

87. *Matsqui Indian Band.*

88. *McKeigan* v. *Hickman*, [1989] 2 S.C.R. 796, 826.

89. *Valente* v. *R* [1985] 2 S.C.R. 673, 685; *Ruffo* at 297.

90. This old statement by Lord Heward in *R.* v. *Sussex Justices*, [1924] 1 K.B. 256, 259, has been repeated hundreds of times in our case law; *Blanchette* v. *C.I.S.* [1973] S.C.R. 833, 843; *R.* v. *S. (R.D.)*, [1997] 3 S.C.R. 484, 530.

91. *Canada* v. *Tobiass*, [1997] 3 S.C.R. 391, 419: "it is especially important that the judiciary should be seen to be independent".

92. 2747-3174 *Québec Inc.* v. *Régie des permis d'alcool* [1996] 3 S.C.R. 919, 952: "The perception of impartiality remains essential to maintaining public confidence in the justice system".

93. *Valente*, at 685; *R.* v. *Lippé* [1991] 2 S.C.R. 114, 144, 152; A-100-95 (Paul).

94. The expression "reasonable observer" is also used; *Tobiass*, at 420; "fully informed observer"; *Idziak* v. *Canada*, [1992] 3 S.C.R. 631, 660.

95. *R.* v. *S. (R..D.)*, at 531; A-100-95 (Paul: reasonable person who is well informed of the situation).

To assess the degree or level of independence and impartiality required for justice to be done, the case law relies on the judgment "of a well informed person who has examined the question in detail realistically and practically".[93] This person must be reasonable,[94] and the fear raised with respect to partiality must itself be reasonable in the circumstances.[95]

Finally, the requirements of independence and impartiality are not applied uniformly and unequivocally to all tribunals regardless.[96] These requirements may vary. In the case of administrative tribunals what is necessary, according to the Supreme Court, is "more flexibility".[97] Thus, the level of institutional independence required "will depend on the nature of the tribunal, the interests involved and other indicia of independence".[98] The same is true of a reasonable apprehension of bias: "in the case of administrative tribunals much greater flexibility should be shown".[99] The Supreme Court feels that "it has long been admitted that the rules of natural justice do not have a fixed content without regard to the nature of the tribunal and the institutional constraints under which it operates".[100] Finally, the Court has stated that the conditions of this independence and impartiality "must take the operational context into account" as well as "knowledge of the operational reality . . . ".[101]

1.1.2.1 INDEPENDENCE

According to the Supreme Court, there are two aspects to judicial independence: an institutional aspect and an individual aspect.[102] One concerns the status of the tribunal and the other the state of mind or attitude of the tribunal in the known exercise of its judicial or quasi-judicial functions.

1.1.2.1.1 Individual Independence

Individual independence involves being free from all outside interference:

96. *Ruffo* at 299; *R.* v. *Bain* [1992] 1 S.C.R. 91.

97. *Matsqui Indian Band*, at 44, 69.

98. *Ibid.*

99. *Régie des permis d'alcool*, at 962.

100. *Consolidated Bathurst v. IWA* [1990] 1 S.C.R. 282, 324.

101. *Matsqui Indian Band*, at 71; *Régie des permis d'alcool*, at 952.

102. *Tobiass*, at 419; *Bell Canada* v. *CTEA*, [1998]. 3 F.C. 244, 280 ff. (F.C.).

> the core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider — be it government, pressure group, individual or even another judge — should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.[103]

A judge or arbitrator must be sheltered from all undue pressure, both internal and external, that would prevent him or her from making a conscientious decision. This might involve institutional or systemic pressure, as the Supreme Court noted in *Consolidated Bathurst* and *Tremblay*. In both those cases the Court considered the decision-making process of administrative tribunals of a collegial nature. The consultation mechanism, the intervention of a third party or of the tribunal's legal advisers must not "constitute undue influence such that it deprives them [the decision makers] of their intellectual independence and gives rise to a feeling in the parties that their case will be decided by someone other than the judges and for unknown reasons".[104] This does not mean that they are not subject to all kinds of influences like any other individual: "the test of independence is not a lack of influence, but rather the freedom to decide in accordance with their conscience and opinions".[105]

To maintain the impression of independence that a judge or arbitrator must convey, "professional principles must be observed".[106] These principles vary in accordance with whether law courts, administrative tribunals, arbitrators or others are involved.

In our system, the Regulations provide expressly that the chairperson of a board may, at any time prior to the decision of the board, "refer any question arising in relation to a claim for benefits to the Commission for investigation and report" (R. 82). In itself, this report must not have the effect of limiting the decision-making independence of the board members. Naturally, this report is different from the "representations" referred to in R. 83(1), which all the parties, including the Commission, are entitled to make.

103. *Beauregard* v. *Canada* [1986] 2 S.C.R. 56, 69; *Tobiass*, at 420.

104. *Commission des affaires sociales* v. *Tremblay*, [1989] R.J.Q. 2053, 2075 (C.A.) and [1992] 1 S.C.R. 952, 975; *IWA*, at 287.

105 *IWA*, at 334.

106. *Tobiass* at 420. Most tribunals are governed by a code of ethics, which is not the case for boards; however, ethical standards are set out in the Insurance Services Policy Manual under heading 16, "Policy and administration of boards of referees."

1.1.2.1.2 *Institutional Independence*

Institutional independence is "a question of status" based on "objective conditions or guarantees".[107] The case law has set out "three essential conditions of independence": these are security of tenure, financial security and institutional independence; however, these conditions "may be applied with flexibility and they are likely to be met by various legislative schemes and formulas".[108] These requirements will vary according to whether the tribunal is permanent and whether its members are professional judges.

In *Valente*, the Court defined security of tenure as follows: "the office is free from all discretionary or arbitrary interference by the Executive or the authority responsible for making appointments".[109] The office itself may be held for an indefinite term until the person reaches the age of retirement, for a fixed term or *ad hoc*. It seems necessary therefore for the judge to be appointed during good conduct, for a fixed term or for a specific task. In *Généreux*,[110] the Supreme Court held that military judges acting from time to time as court martial judges must enjoy security of tenure that protects them "from interference by the Executive for a fixed period of time".

As far as the renewal of terms is concerned, the Court has rarely mentioned it, with the exception of Justice Stevenson in *Généreux*. He noted the danger that judges in the process of having their terms renewed might seek to "please the Executive", but he sided with the majority which refused to institutionalize military judgeships.[111] Courts of appeal have not been very demanding on the issue of the length of the mandates, renewal and even the lack of a procedure governing removal for cause.[112]

Security of tenure means primarily and essentially "that a judge may be removed only for cause related to the capacity to perform judicial functions . . . for cause and that cause be subject to independent review and determination at which the judge affected is afforded a full opportunity to be heard".[113] The Supreme Court felt that tradition was not

107. *Valente*, at 685; *R.* v. *Généreux*, [1992] 1 S.C.R. 259, 283.

108. *Généreux*, at 283; *Régie des permis d'alcool*, at 961.

109. *Valente*, at 698.

110. *Généreux*, at 303.

111. *Généreux*, at 317.

112. *Katz* v. *Vancouver Stock Exchange* (1995), 128 D.L.R. (4th) 424, 439 (B.C.C.A.) aff'd [1996] 3 S.C.R. 405; *Montambault* v. *Brazeau*, [1996] C.A.L.P. 1995; see however the Federal Court (Trial Division) in *Bell Canada* v. *CTEA*, at 306; also, *Barreau de Montréal* v. *A.G.Q.*, Superior Court, 16/12/99, [2000] R.J.Q. 125 (in appeal).

113. *Valente*, at 697-698.

sufficient to guarantee such protection; it must be provided for by statute. In *Alex Couture*, the Quebec Court of Appeal confirmed that the law provided that reasons must be given for dismissal but did not expressly provide for the holding of a prior hearing in accordance with the requirements in *Valente*. Nevertheless, it maintained that the rules of natural justice and s. 69 of the *Judges Act* satisfactorily made up for this lack of specific provisions: [TRANSLATION] "the Governor in Council . . . would be required to adopt a fair procedure providing an opportunity for the interested party to obtain a hearing".[114] More recently the Court has stated that "the minimum conditions of independence do not require that all administrative judges, like the judges in courts of law, have security of tenure in the office they hold. Frequent mandates for a fixed term are acceptable . . . ", but it went on to say: "However, the removal of adjudicators must not simply be at the pleasure of the Executive."[115]

In the Act, which we are considering, the status of the chairpersons of the boards is set out in s. 111: a three-year renewable mandate and removal for cause. This seems to us to meet the constitutional requirements. The situation of the members is different. The Act does not give any guarantee in case of removal or refusal to renew a mandate. Recent cases have not been very demanding in this regard, noting that if a member of the tribunal is the subject of an arbitrary decision, he or she may always complain to the common law courts.[116] Up now, the system of appointing and paying the chairperson and the members has been found to be in accordance with the principles of natural justice.[117]

According to *Valente*, the essence of financial security "is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive".[118] The Supreme Court finds it theoretically preferable for salaries to be set by the legislative branch and to be paid out of the Consolidated Revenue Fund, but they may be left to the initiative of the Executive. The essential thing is that the right to remuneration is provided for in the Act and that "in no way may the Executive impinge upon this right in such a way as to affect the independence of a judge individually or collectively".[119] However, for the

114. *Canada* v. *Alex Couture* [1991] R.J.Q. 2534 (Que. C.A.).

115. *Régie des permis d'alcool*, at 964.

116. *Montambeault* v. *Brazeau* [1996] C.A.L.P. 1795, 1809 (Que. C.A.).

117. CUB 7965 (Davis); CUB 6209 (Hennessey).

118. *Valente*, at 704.

119. *Valente*, at 706.

judges of the ordinary courts the Court ruled that the law must provide for an independent commission to determine the remuneration of the judges, and its recommendations would for all intents and purposes be binding on Parliament.[120] Although there is nothing to indicate that this requirement applies to administrative tribunals, the Federal Court recently held that "the principles in the *Judges' Case*... may be applied and adapted to the circumstances of administrative tribunals".[121] Refusing to follow the opinion of Chief Justice Lawer in *Matsqui Indian Band* concerning the by-laws of the Indian Band fixing the remuneration for members of its administrative tribunal, the Court stated that the remuneration of members of the Human Rights Tribunal was controlled by the Human Rights Commission, even if the Commission's by-law has to be approved by Treasury Board.[122] That position is in contradiction with the attitude of the Quebec Court of Appeal which has validated an enactment analogous to s. III par. 4 of the Act providing that the remuneration of chairmen and members is such as "Treasury Board approves".[123] We believe that position to be in conformity with the real nature of administrative tribunals.

The question of performance appraisal or the performance of judges by the Executive has been considered in several cases. It is inadmissible because it is inconsistent with judicial independence in the case of judges to the extent that it directly influences the remuneration or renewals of mandates or removals.[124] However, it is permitted in the case of administrative tribunals.[125]

In *Valente*, the Court spoke of a third ingredient, namely institutional independence with respect to administrative questions which have a direct effect on the exercise of the judicial functions,[126] and the Court distinguished between what is desirable, namely the acquisition of greater administrative autonomy or independence, and what is essential. These essential aspects of institutional independence "must be limited to those referred to by Chief Justice Howland", according to the Court: "They may

120. *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3.

121. *Bell Canada* v. *CTEA*, at 309.

122. *Ibid.*, at 310.

123. *Alex Couture*, at 2599; *Montambeault*, at 1811.

124. *Généreux*, at 306.

125. *Alex Couture*, at 2600; *Montambeault*, at 1811.

126. *Valente*, at 703.

be summed up as potential control over the administrative decisions that bear *directly* and *immediately* on the exercise of the judicial function."[127] Chief Justice Howland described these questions as follows: "assignment of judges, sittings of the court and court lists as well as the related matters of allocation of courtrooms and direction of the administrative staff employed in carrying out these functions."[128] The Chief Justice was dealing with ordinary courts of justice, not with tribunals.

In *Généreux*, the Court noted that the principle of institutional independence "requires that the General Court Martial be free from external interference with respect to matters that relate directly to the tribunal's judicial functions". Military courts must be "as much as possible protected from interference by members of the military hierarchy", that is from the Executive and the Department of Defence. Thus, it is not consistent with institutional independence for one and the same representative of the Executive to summon the court and "to appoint both the prosecutor and the triers of fact".[129] Here again, it was a question of a court martial and not a tribunal.

In *Bisson*, the Superior Court of Quebec ruled in 1993 that the government must provide judges with [TRANSLATION] "all the human, financial and material resources necessary for them to perform their judicial functions". Besides courtrooms and the registry, the Court assumed "that a parking space at or near the law courts constitutes a security measure and an administrative support necessary for the performance of the judicial function".[130] Here again, it was a question of a court of justice.

In the case of administrative tribunals, the question of funding for their operations has been considered on two occasions. The Quebec Court of Appeal held that although the C.A.L.P. was funded by the C.S.S.T., the tribunal's budget was submitted to the government for approval so that the C.S.S.T. had no control over the sums paid: [TRANSLATION] "there is therefore no risk of conflict between the pecuniary interests of the commissioners (C.A.L.P.) and the parties appearing before them (C.S.S.T., etc.)".[131]

Section 111(4) of the Act states that there shall be paid "such other expenses

127. *Valente*, at 712 [emphasis added].

128. *Valente*, at 709.

129. *Généreux*, at 308-309.

130. *Bisson* v. Québec [1992] R.J.Q. 1942,1955, at 255.

131. *Montambeault*, at 1806.

in connection with the operation of a Board of Referees as the Treasury Board approves"; no other provision deals with the material and financial aspects of the boards' operations. In this context, we could give the same answer as the British Columbia Court of Appeal gave in *Katz*: there may be nothing in the Act or the Regulations concerning administrative control, "but the evidence does not suggest any interference in the process by the board . . . ".[132] The Federal Court touched briefly on this issue in the recent Human Rights Tribunal case.[133] The Court held that it was satisfied with the autonomy of the Tribunal, which since 1997 has been under the authority of the Tribunal Panel, an independent government agency separate from the Commission. The registry staff has no relationship with the Commission.[134]

1.1.2.2 IMPARTIALITY

Impartiality includes both an individual and an institutional aspect.[135]

1.1.2.2.1 Individual Aspect

From an individual point of view, "impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case".[136] It suggests "an absence of bias, actual or perceived". It is the "state of mind of an arbitrator who is disinterested in terms of the outcome and who is likely to be persuaded by the evidence and the arguments submitted".[137] Bias "may be deduced from both the state of mind and conduct".[138]

A reasonable apprehension of bias has given rise to rules governing removal and grounds for challenging the decisions rendered by tribunals whose members are placed or find themselves in the situations referred to in the case law. This apprehension must be reasonable and serious; it must not be based solely on suspicions that are more or less imaginary.[139] It is necessary to show that "the threshold for a finding of real or perceived bias

132. *Katz*, at 439.

133. *Bell Canada*, at 311

134. *Ibid.* at 276.

135. See generally Mullan, nos. 205-240; Jones and DeVillars, at 321-368; Garant, vol. 2, at 319-396.

136. *Valente*, at 685.

137. *R.* v. *S.*, at 52.

138. *R.* v. *Sparke* [1993], 15 O.R. (3d) 324 (Ont. C.A.).

139. *Committee for Justice and Liberty* v. *N.E.B.* [1978] 1 S.C.R. 369, 395.

is high".[140] The onus of establishing bias lies with the person alleging that it exists; thus, a party who is aware of a ground for removal but does not raise it at the appropriate time is deemed to have waived this ground.[141]

Parliament may have expressly or implicitly permitted or authorized a situation that, in another context, could have given rise to a reasonable apprehension of bias. This is the case with professional disciplinary tribunals where it is accepted that a professional should be tried by his or her peers.[142] It is also true of those tribunals in which particular groups or communities are equally represented.[143] Thus, s. 11 of our Act cannot be impugned in this regard to the extent that it provides that one of the members shall be chosen to represent the community of employers and the other the community of insured persons.

Four main categories of situations have been recognized as giving rise to a reasonable apprehension of bias and they can be linked to the concept of conflicts of interest.

The conflicts of interest involved here are situations in which a person is liable to prefer his or her personal interest (links of blood, friendship or business) to the detriment of the public interest, that is to the detriment of the superior interest of administrative justice.

Parliament often includes in the incorporating act of certain administrative tribunals provisions designed to prevent this kind of conflict of interest. Moreover, the common law has long since required any holder of a quasi-judicial power not to have any financial interest in a dispute he or she is required to decide.

It would appear that recent decisions have attempted to reintroduce the reasonable person test and to leave it to the courts of law to determine whether there is really any reason to fear that a given member of a tribunal is biased solely because he or she has minimal or remote financial or economic interests relating to the case he or she is required to decide.[144]

140. *R.* v. *S.*, at 532; CUB 20050 (Lannone): "must be supported by solid evidence"; CUB 40393 (Allain).

141. Garant, vol. 2, at 335; CUB 32283-A (Lomann).

142. *French* v. *Law Society of Upper Canada*, [1975] S.C.R. 767, *Pearlman*, at 869; *Ruffo*, at 300.

143. See below at 1.1.2.2.2.

144. *Pearlman*, at 869.

Conflicts of interest of a moral or psychological nature result from links of blood, friendship or membership in an association or organization whose objectives are not financial or professional. In *Ladies of the Sacred Heart*,[145] it was found that there was a reasonable apprehension of bias in a member of the tribunal whose wife was a member of the management of one of the parties to the dispute.

Conflicts of interest of a "professional nature" that have been punished by the courts are based on those conflicts resulting from the creation of links of a professional nature between one of the parties to the dispute and one of the members of the tribunal deciding a case. It should be noted that this can include business relationships in the broad sense. The case law has recognized that a business relationship between a member of a tribunal and a party appearing before it is sufficient to create a reasonable apprehension of bias.[146]

Any professional may have rendered professional services to one of the parties to a case that the professional is then responsible for hearing as a member of the tribunal: from this fact alone a reasonable apprehension of bias will not arise. The question or questions to which these services related must be substantially or at least partly the same as those later submitted to the tribunal.[147] Thus, a member of an administrative tribunal is not technically prevented from acting as the lawyer or representative of other individuals before the same tribunal if it involves a completely different docket. However, this question may be regarded from an institutional aspect, as will be discussed below.

On the other hand, the fact that a member of a tribunal is employed by one of the parties does not in itself constitute a situation that would create a reasonable apprehension of bias.[148] This last situation often causes problems, especially in labour relations organizations.[149] It has been held in those cases that the assessor or arbitrator would have to have taken part in the hearing and deliberations. The employer is deemed to know of the relationship between a union assessor and the union. The same is true in

145. *Ladies of the Sacred Heart* v. *Armstrong's Point Association and Bulgin* (1961), 29 D.L.R. (2d) 373 (Man. C.A.); see also *Spence* v. *Prince Albert (City)* (1987), 25 Admin. L.R. 90 (Alta. C.A.), where a board member was the father of a witness.

146. *Szilard* v. *Szasz*, [1955] S.C.R. 3; *Ghirardosi* v. *Min. of Highways of B.C.*, [1966] S.C.R. 367.

147. *Communauté urbaine de Montréal* v. *Bergevin*, [1982] C.A. 29; *St-Hilaire* v. *Bégin*, [1982] C.A. 25. *Committee for Justice and Liberty* v. *National Energy Board*, [1978] 1 S.C.R. 369.

148. *Fishman* v. *The Queen*, [1970] Ex. C.R. 784.

149. *R.* v. *Ontario Relations Board, ex parte Hall* [1963], 39 D.L.R. (2d) 113 (H.C.J.).

the reverse situation: this is, moreover, what was held by the Quebec Court of Appeal when it dismissed the application to disqualify a union arbitrator who had acted as chairperson of a union grievance committee.[150]

The situation where a person hears an appeal from his or her own decision is one that must be avoided. In fact, the case law has held that if an individual is entitled to a true appeal, this appeal involves a quasi-judicial process. A person sitting on appeal from his or her own decision may well be tempted to affirm the decision and this would lead a reasonable person to conclude that he or she was "biased".[151]

Administrative tribunals accordingly have a duty to respect the rule of impartiality and to ensure that a person or a group of persons is not required to review its own decision unless the law makes express or implicit provision for this, as is the case with our s. A. 120. However, the rehearing in that case is not an appeal since it involves different facts.

The case law has also held that another situation creating a reasonable apprehension of bias is the fact that a person sitting on a tribunal has himself or herself filed the complaint or made the allegation on which the tribunal must express an opinion or has even recommended that this complaint be laid or urged others to file it. Such a situation could occur if a board member gives advice to a claimant while filing the appeal.

Finally, an administrative judge may violate the principle of impartiality through his or her conduct prior to or during the hearing. The basic principle that should guide us in describing this situation is the following: the members of the tribunal are supposed to have the necessary maturity to set aside their own preconceived ideas or their earlier more or less biased conduct. However, certain situations are regarded as too important for the serious apprehension of bias to be dispelled from the mind of a reasonable person.[152]

150. *Ass. des Enseignants de l'Estrie* v. *Comm. d'écoles Munic. Scolaire de la Patrie*, [1973] C.A. 531.

151. *Brault* v. *Comité d'inspection professionnelle*, C.S., J.E. 85-207, *Équipement Mailloux* v. *C.P.T.A.*, [1983] C.S.26; *Entreprises Horticoles Sud-Ouest Inc.* v. *C.P.T.A.*, J.E. 85-176 (S.C.Q.); Garant, vol. 2, at 364-370.

152. *Re Anti-Dumping Tribunal*, [1976] F.C. 1078; *Re Batorski and Moody* (1983), 42 O.R. (2d) 647 (Div. Ct.).

We should first note that the earlier conduct must be clearly such as to permit a finding that there is a reasonable apprehension of bias.[153] Thus, it has been held that the fact that some members of a labour relations commission had previously helped the employees to organize a union gave rise to a reasonable apprehension of bias when these employees submitted an application for certification.[154] However, the case law is cautious and hesitant to recognize that such earlier conduct would give rise to a reasonable apprehension of bias.

If a tribunal member has made earlier statements on the actual subject of the dispute he or she is deciding, there will not necessarily be a reasonable apprehension of bias. Thus, a member of the Labour Relations Board who had stated earlier that the facts did not justify a strike by the employees in question was not disqualified from later hearing a case relating to the issuance of an order to cease an unlawful strike.[155] The earlier statements would have to constitute "the expression of a definite opinion on the question".[156] The expressions of opinion, especially if they are conveyed by the media, would have to be excessive and indicate a real prejudice.[157]

Current conduct is also likely to indicate bias. If a member of the tribunal adopts an attitude that is clearly hostile to one of the parties, there are grounds for a reasonable apprehension that this tribunal member is prejudiced and this will give rise to a possibility of removal, disqualification or quashing of the decision rendered. The Court of Appeal has recognized that if the presiding judge of an inferior court ejects a friend of the accused and announces that he was surrounded by swindlers, the judge creates an atmosphere that is not conducive to the administration of justice.[158] Similarly, violent verbal altercations with counsel for one of the parties are considered to show a hostile attitude. It has even been concluded that there was a reasonable apprehension of bias because of hostile conduct as a result of the way in which the questions were asked and the fact that one aspect rather than another was emphasized.[159]

153. *Blanchette* v. *C.I.S.*, [1973] S.C.R. 833.

154. *Diamond Construction* v. *Construction and Gen. Labourers* (1974), 39 D.L.R. (3d) 318 (N.B.C.A.).

155. *Tomko* v. *Nova Scotia Labour Relations Board* (1974), 9 N.S.R. (2d) 277 and [1977] 1 S.C.R. 112; *Re Winnipeg Free Press Ltd. and Newspaper Guild* (1974), 44 D.L.R. (3d) 274 (Man. C.A.).

156. *Old St-Boniface Residents Ass.* v. *Winnipeg*, [1990] 3 S.C.R. 1170.

157. *Newfoundland Telephone* v. *Newfoundland*, [1992] 1 S.C.R. 623.

158. *Anctil* v. *Pearson* [1974] C.A. 19, 23 (C.A.Q.).

159. *Re Gooliah* (1967), 63 D.L.R. (2d) 224 (Man. C.A.).

It must nevertheless be shown that the hostility displayed by this tribunal or tribunal member toward a party is clearly characterized. Thus it has been held that close questioning by the members of a tribunal was not sufficient to quash a decision if there was otherwise sufficient evidence to support it.[160] The existence of animosity on the part of a disciplinary board may be overcome by proven facts and by compliance with the *audi alteram partem* rule.[161] Finally, a Court of Appeal held that a [TRANSLATION] "fleeting lack of serenity" and "a moment of impatience" were also not sufficient to constitute a denial of natural justice.[162] Such is the state of general administrative law.

According to our case law, boards of referees must examine cases impartially, maintain a certain distance from the Commission and avoid being seen as siding ahead of time with the Commission's position.[163] The members and the chairperson must fully understand their role as being that of a judge who depends on none of the parties: "the board sits as an impartial and independent tribunal and not as a mere creature of the Commission".[164] The chairperson must not appear to be the "representative of the Commission" or refer to the other members as representing "claimants" or "employers".[165]

Some conflict of interest situations of a professional or psychological nature have been noted. In one case, a board had to decide a dispute involving an especially sensitive dismissal. One of the members was at the time acting as a notary for the employer on the record and this should have required him to recuse himself.[166] In another case, it was held that the fact that the chairperson clamed to have known the claimant for 20 years "leads to an apprehension of bias if he continues to sit".[167] However, the simple fact that a member calls the representative of the claimant by his first name was not considered sufficient to [TRANSLATION] "cloud his objectivity".[168] It was also held that the family links between an appellant

160. *College of Physicians and Surgeons (Ont.)* v. *Casullo*, [1977] 2 S.C.R. 2.

161. *Chèvrefils* v. *Conseil de discipline du coll. des médecins et chirurgiens*, [1978] C.A. 94 (C.A.Q.).

162. *Bisaillon* v. *Keable*, [1980] C.A. 316 (C.A.Q.); CUB 31523 (Morein: ". . . some impatience . . .").

163. CUB 13820 (Vanderhaeghe).

164. CUB 20783 (Crawford); CUB 21324 (Paquette: "role of advocate for the Commission's position").

165. CUB 15570 (Lowe).

166. A-830-95 (Marsan). The Court of Appeal applied the decisions of the Supreme Court.

167. CUB 20092 (Hearn)

168. CUB 45671 (Moreau); CUB 29288 (Bessey: knowing one of the members well).

and a member of the board "create an appearance of bias that constitutes a denial of natural justice";[169] the same was true where a board member was a friend of the employer,[170] as was the fact that a board member was a friend of the employer and a member of the same golf club.[171] However, the fact that a member had been on a panel hearing a case involving a relative of the applicant "does not constitute bias in law".[172]

The rule that a judge must not sit in appeal of his or her own decision has been upheld on many occasions. Where a board holds a second hearing on or inquiry into the same question and consists of the same members, there is a violation of natural justice.[173] However, the rule is not violated where the board hears a different dispute or question.[174] The mere fact that the Umpire refers a case back to the same board for a full hearing does not violate the rule.[175]

The chairperson and members must not, in their earlier conduct, lay themselves open to criticism with respect to their duty to be impartial. Thus, there must be no communication before the hearing between the claimant and a member of the board, especially if the latter assures the claimant that he or she will represent the claimant.[176] The chairperson must not receive information prior to the hearing unbeknownst to the claimant and his or her counsel.[177]

During or at the hearing the conduct or attitude of the chairperson and the members must be such that they give an impression of neutrality. Thus, decisions have held that there was a violation of natural justice when one member made injurious remarks about the claimants and their representative.[178] It is also reprehensible when a chairperson verbally hassles a claimant and threatens him or her with criminal prosecution.[179]

169. CUB 15666 (Vey: they were first cousins); CUB 21407 (Frappier: "is there any affiliation between one of the parties and one or more of the tribunal members").

170. CUB 24191 (Foreman); CUB 46757 (Lacroix: [TRANSLATION] "knew each other and fraternized during the hearing").

171. CUB 24204 (Murphy).

172. A-436-97 (Sgro).

173. CUB 19484 (Mills); CUB 18586 (Elias); CUB 19582 (McDonald) A-1716-83 (Bedell).

174. CUB 21407 (Frappier); CUB 12219 (Nowoselski).

175. A-100-95 (F. Paul).

176. CUB 892 (Yuil); see also CUB 14797 (Hum).

177. CUB 32283A (Lomann); CUB 44311 (Kulibabo: made aware of a criminal charge against . . .).

178. CUB 3805 (Lajoie); CUB 40831A (Cvitjetan: the chairperson's description of the claimant's wife as a "pretty sharp cookie" was an "unfortunate" comment even if it was "not deliberate").

179. CUB 12699 (Supruniuk).

It has been held that "the impatient, hair-splitting and aggressive attitude displayed by a member leads to the conclusion that the hearing was tainted by bias".[180] Any hostile attitude displayed by a member raises a reasonable apprehension of bias.[181] Nevertheless there is a difference between being hostile and having little sympathy for an appellant whose appeal has scarcely any basis.[182] Furthermore, some interventionism on the part of the chairperson or members does not breach natural justice.[183]

What is the case where other attitudes, for example impatience, are displayed? It seems that such displays must be fairly vehement or strained.[184] The board must not give the claimant's representative the clear impression "that he is talking to a wall".[185]

The parties must always be given equal treatment. During the hearing a chairperson happened to absent himself on two occasions "to check something with the Commission";[186] that is a display of bias. After the hearing, the board will breach its duty to be impartial if it hears the employer's representative in the absence of the claimant and his or her representative.[187] Similarly, after the hearing, there will be a violation of natural justice when a member conducts a long informal conversation with one of the parties.[188]

Section 78 of our Regulations sets out three types of situations in which the chairperson or a member may recuse himself or herself: where he or she was or is a representative of the claimant or the employer in the case in question, where he or she has taken any part in the proceedings either on behalf of an association or as a witness or otherwise and where he or she is or may be directly affected. These restrictions must be interpreted in light of administrative law. Although a prohibition must be announced, we feel that it must be requested, especially if it is known to the parties.

180. CUB 22082 (Stasiuk); CUB 21445 (Basi); CUB 21886 (Andersen: "appeared to be so anti-union and biased"); CUB 20785 (Crawford: biased).

181. CUB 14677 (Kaasgaard); CUB 20784 (Pollack); CUB 22082 (Stasiuk); CUB 21886 (Andersen); CUB 21086 (Boric); CUB 39207 (Murray: "accusatorial attitude"); CUB 25399A (David: "must refrain from embarking into questioning which appears to be both in the form of cross-examination or reflecting hostility at times"); CUB 34598 (Schwenzner: "Interruption by the tribunal must be tempered by patience"); CUB 21324 (Paquette: frequent interruptions).

182. CUB 20050 (Iannone).

183. CUB 41567 (Melki); CUB 31809A (Banville).

184. CUB 32283A (Lamann).

185. CUB 3768 (Godin).

186. CUB 10602 (Ramirez: in order to obtain a document and to obtain legal information).

187. CUB 14341 (Masterson).

188. CUB 10868 (Bertrand); or a representative of the Commission: CUB 10867 (Bristow).

In all cases, if the reason for withdrawal is not known to the parties, the member of an administrative tribunal should mention it when the hearing opens.[189] The parties may then waive reliance on it. Otherwise, the chairperson must render an opinion before hearing the case or sustaining the objection subject to a reservation while undertaking to reply to it in the tribunal's decision on the merits.

1.1.2.2.2 Institutional Aspect

It was in *Lippé* and *Ruffo* that the Supreme Court definitively determined that, like independence, impartiality included an institutional aspect. It concerns the "objective status of the tribunal" when "the system is so structured as to give rise to a reasonable apprehension of bias at the institutional level".[190] Institutional bias concerns the more or less close links that exist between the various parties in a particular justice system. This requires a particular examination of each organization and the role of each of the parties involved. The first case in which the principle was upheld was *MacBain*, where the Federal Court of Appeal found that there was a situation of institutional impartiality between the Canadian Human Rights Commission and the Human Rights Tribunal because, after conducting an investigation and finding discrimination, the Commission established the Tribunal, chose the members and argued before them.[191]

This principle was relied on later to challenge municipal courts in Quebec,[192] military courts in Ottawa,[193] the Conseil de la magistrature (judicial council) in Quebec[194] and the Régie des permis d'alcool au Québec.[195] In the last of these cases the Court spoke of a confusion of roles between the regulators and the lawyers in legal services arguing before them as well as of interference by the employees of the Régie at all stages of the process leading to the withdrawal of licences. This confusion of the roles led to "excessively close relations among employees involved in various stages of the process".[196] In the case of the military courts, the

189. CUB 32283 A (Lomann); CUB 31523 (Morein).

190. *Régie des permis d'alcool*, at 950.

191. *McBain* v. *Lederman* [1985] 1 F.C. 856 (C.A.).

192. *Lippé*.

193. *Généreux*.

194. *Ruffo*.

195. *Régie des permis d'alcool*.

196. *Ibid.* at 954, 957.

Court found that the system "clearly and objectively creates close links of institutional dependence between the minister, . . . the commanding officer who drafts the indictment, . . . the military authority summoning the Court, appointing members and deciding on the hearing date, . . . the officer who is duty counsel and of course the accused".[197] In another case, however, the Quebec Court of Appeal held that, in the case of the Commission d'appel sur les lésions professionnelles [professional injuries appeal board], the legal department and the secretariat played a "role in supporting the commissioners" that did not violate institutional impartiality.[198]

In the case of municipal courts in Quebec, the Supreme Court held that the fact that part-time judges continue to practise law does not violate the requirements of institutional impartiality.[199] This is analogous to the situation of members who act as representatives or lawyers in other cases before other boards. Although that may create some unease, it does not violate the principle of institutional impartiality, at least under the current jurisprudence in administrative law.[200]

The question of the relationship between the Commission and the Board of Referees is certainly delicate. Strictly speaking, the board is not a creation of the Commission: it is created by the effect of the Act (A. 111) whenever an appeal is filed (A. 114). The chairpersons are appointed by the Governor in Council and the other members by the Commission from two lists, from which the members are chosen "in rotation" (R. 78). The appointment of the members is in fact made by the Commissioner representing workers and the Commissioner representing employers but the appointment to sit on a given Board of Referees is made by the clerk, an official of the Commission, who is required to follow the lists. It is the clerk who draws up the list of cases to be heard by the Board of Referees and plans the hearings. Once appointed, the chairperson is responsible for the proceedings (A. 80(7)).

For a challenge against a Board of Referees to succeed, it would be necessary to establish that the Department or the Commission "can influence the decision-making process".[201] However, the Supreme Court

197. *Généreux*, at 307.

198. *Montambeault*, at 1815.

199. *Lippé*.

200. To our knowledge, this issue has not yet been raised in the Federal Court or before the umpires.

201. *Régie des permis d'alcool*, at 965.

held in 1995 that there was no institutional bias simply because the members of a property assessment tribunal on a Reserve were appointed and paid by the Band Council, which was a party before the tribunal.[202] The same idea was expressed more recently in *Katz*.[203] Finally, it will be recalled that in 1989, the Federal Court of Appeal considered the relationship between the Employment and Immigration Commission and an adjudicator ruling on cases involving the deportation of permanent residents.[204] The Court found that the adjudicator was an official of the Commission and was accountable to the same department as the officers presenting the cases at the adjudication, although they were not both accountable to the same directorate. Furthermore, when the adjudicators required a legal opinion, they requested one from the Adjudication Directorate, which then consulted the Legal Services Directorate; the latter unit also gave opinions to the section that included the officers responsible for pleading before the adjudicators. Officers of this section did not play a monitoring role with respect to the adjudicators; they did not report to the same superiors. As far as the allocation of cases to adjudicators was concerned, "the evidence showed that this was done rationally". Finally, there was no evidence to establish that the Director General of the Adjudication Branch violated the independence of the adjudicators who, according to the relevant directive, had to conduct inquiries "in accordance with the rules of natural justice" as "independent decision-making bodies."

Following this same line of authority in the case law, it seems to us that if we take into account all the specific characteristics of our system of justice by arbitration, boards of referees attain the necessary level of institutional impartiality. It is also necessary to take into account the well-established practice whereby assignments and decisions concerning remuneration are not made arbitrarily.[205] Finally, the fact that the assignments are made in rotation on the basis of lists protects the board from pressures that might be exerted by the Commission.[206] It can be said, to use the expression of the Federal Court of Appeal, that the assignments are made on a rational

202. *Matsqui Indian Band*, at 45.

203. *Katz*, at 439.

204. *Mohamed v. Canada*, [1989] 2 F.C. 363, 391-6; see also *Siaticum v. M.E.I.*, [1985] 2 F.C. 430 (C.A.).

205. *Katz*, at 435.

206. The British Columbia Court of Appeal distinguished this situation from that in *McBain* and referred to the observations of Sopinka J. in *Matsqui Indian Band*.

basis. It has been held that the system of appointing boards of referees complies with the Canadian Charter.[207]

The question of compatibility between equal representation on a board and the requirements of institutional or structural impartiality was raised in Quebec in a case involving the former parity review boards (BRP) of the C.S.S.T. and even of the current Commission des lésions professionnelles. On the one hand, we should note that the Supreme Court found in *Matsqui* that the representation of community interests on a board is not reprehensible in itself.[208] On the other hand, the Superior Court of Quebec has in three decisions upheld equal representation in terms of the requirements of independence and impartiality. [TRANSLATION] "Both the membership of the BRPs, which are organizations with equal representation and the way in which they choose their members are consistent with the desire that those affected by the Act should be responsible for its implementation."[209] We consider that this statement could also apply to boards of referees under our Act.

An Umpire recently ruled that the mere fact that members are employees and union members [TRANSLATION] "cannot be held against such a parity committee." [210]

1.1.3 AN ACCESSIBLE, INFORMAL, EFFECTIVE PROCEDURE

As Y. Ouellette has pointed out, [TRANSLATION] "one of the main reasons why a legislature confers decision-making powers on an administrative tribunal rather than on courts of law is the fact that it is looking for a different decision-making culture that is less formal and solemn than the judicial process".[211] As long ago as 1971, the working group on administrative tribunals recognized that the legislature of today [TRANSLATION] "creates in a safe and certain manner tribunals which are responsible for providing expeditious justice and whose operations are

207. CUB 8539 (Jenkins).

208. *Matsqui Indian Band*, p.44-45.

209. *Logistec corp.* v. *Bureau de revision paritaire de la CSST*., C.S. 30/12/92, at 16; *Dittler Brothers Gamers* v. *CSST*, C.S. 5/7/91, at 14; *Société Immobilière Asie.* v. *Delorme Paul*, [1990] C.A.L.P. 1080, 1083 (C.S.).

210. CUB 45671 (Moreau).

211. Y. Ouellette, at 66.

flexible and inexpensive".[212] In 1994, the third working group wrote: [TRANSLATION] "Do we need to point out that this tribunal should perform its adjudicative function in accordance with rules of evidence and procedure adapted to the imperatives of specialization, flexibility, speed and accessibility of administrative justice."[213]

In 1996 the National Assembly declared with respect to the *Act respecting administrative justice* that the "purpose of this Act is to affirm the specific character of administrative justice, to ensure its quality, promptness and accessibility . . ."[214]

The *Employment Insurance Act* creates a highly accessible system of justice. Two obstacles to the accessibility of justice are generally recognized: subjective accessibility, which depends on individuals' knowledge and perceptions of the conditions of access, and objective accessibility, which casts doubt on formal constraints such as the complexity of an act and regulations, time limits as well as physical and economic constraints.

To be sure, the Act and Regulations are complex, but the remedies provided for in Part V are relatively simple. In addition, the individuals may very easily gain access to all the relevant information. The only formalities required for an appeal are set out in ss. R. 78 and 80. The process is free of charge and in the vast majority of cases, the individual is able to make his or her arguments himself or herself. Finally, a well-established practice under the Benefit Manual (c. 13) makes the task of the appellant considerably easier: these are the Commission's representations to the board, a document that contains the Commission's arguments, a statement of the evidence, a refutation of the appellant's arguments and references to the relevant case law.

1.1.3.1 SPEED AND EFFICIENCY

The slowness of justice, about which complaints have often been made, has many causes: time limits for remedies, overcrowding of hearing

212. *Rapport Dussault*, at 6.

213. *Rapport Garant*, at 138; see also *Rapport Ouellette*, at 255 *et seq.*; *see also*, Final Report, *Reform of the Administrative Justice System in Nova Scotia*, Law Reform Commission of Nova Scotia, Jan. 1997, at 32 *et seq.*; Report, *Avoiding Delay and Multiple Proceedings in the Adjudication of Workplace Disputes*, Ontario Law Reform Commission, April 1995, at 13 *et seq.*

214. S.Q. 1996, c. 54 s. 1.

schedules, cumbersome processes, adjournments and delays, counsel not available and so on. What is the situation in the case of boards of referees?

The Act provides that an appeal must be brought within 30 days of the date on which the decision is communicated to the appellant. However, s. 114 provides that the Commission may extend this time "in any particular case for special reasons". The Commission's decision on this request for an extension may itself be appealed to the Board of Referees.

The Federal Court of Appeal has ruled on several occasions that the Board of Referees cannot purely and simply substitute its opinion for that of the Commission. The discretionary power has been conferred on the Commission,[215] although it must exercise this power judiciously; the Court uses the expression "judiciairement." The Commission must not have acted "under the influence of irrelevant considerations or without taking relevant factors into account".[216] The Court refers to the test for abuse of discretionary power set out in the traditional authorities: "It is well settled that if the discretion has been exercised *bona fide*, uninfluenced by irrelevant considerations and not arbitrarily or illegally, no court is entitled to interfere even if the court, had the discretion been there, might have exercised it otherwise."[217]

Once the appeal has been validly filed at the Commission office, whether or not it is accompanied by a request for a hearing, the process quickly takes its course. The Manual (c. 13) gives precise instructions to the clerk for drawing up the hearing schedule: "it must above all be ensured that the appeal is heard as soon as possible"; 90 percent of appeals should be heard within 30 days of the date of their receipt.

With a few exceptions, a period of 60 minutes is scheduled at each hearing and following this time the board will deliberate and render its decision.

It may accordingly be felt that everything is in place for the board to do justice quickly and efficiently, even though incidents do occur such as requests for adjournment, problems in obtaining a quorum and requests

215. CUB 29211 (Dunham: review of the case law on this matter).

216. A-80-90 (Plourde); A-42-90 (Chartier); A-689-86 (Nixon-Nixon); A-64-94 (Lettieri); A-929-96 (Gendron).

217. A-1001-92 (Martin), citing *Boulis* v. *M.E.I.* [1974] S.C.R. 874, 877; *Fraser* v. *M.N.R.* [1949] C.A. 24.

for telephone hearings. The statement made about the Umpire in s. A. 113, "all appeals shall be dealt with by the Umpire as informally and expeditiously as the circumstances and fairness will permit", could also be applied to the board. Moreover, the case law is to the same effect: "The provisions of the legislation concerning appeals seem to envisage a hearing that proceeds quickly and without formality . . ."[218] Accordingly, the fact that the chairperson cuts short redundant debate does not create a breach of natural justice in and of itself.[219]

1.1.3.2 AN INQUISITORIAL PROCESS

Administrative justice is based on the principles of natural justice, especially the adversarial principle. However, it also includes an inquisitorial approach.[220] This means that the tribunal has powers or can develop practices that enable it to play an active role in a dispute. On the one hand, the tribunal or its chairperson is responsible for the procedure; this is provided for in s. R. 80(7). Moreover, a large number of statutes give administrative tribunals investigative powers by reference to the *Commissions of Inquiry Act*, for example. This is not the case with the Board of Referees but s. R. 82 permits the chairperson to ask the Commission to inquire into any question relating to a claim for benefits. Furthermore, the chairperson can order that a hearing be granted (s. R. 80(5)). The chairperson may also require a person to attend a hearing of the board (s. R. 80 (6)). However, neither the Act nor the Regulations provide sanctions if the person refuses to attend. An application must be filed with the Federal Court to enforce the order.

The inquisitorial style of justice in tribunal proceedings is justified above all by the fact that the great majority of appellants are not represented by counsel and this leads the chairperson or the members to intervene more and to ask relevant questions so that the tribunal is well informed. In this context, the recent Quebec *Act respecting administrative justice* may provide inspiration since it provides as follows:

> s. 11. The body has, within the scope of the law, full authority over the conduct of the hearing. It shall, in conducting the

218. CUB 19778 (Reid); CUB 31523 (Morein: the Board is not obliged to listen to lengthy and possibly irrelevant arguments); CUB 43149 (Leblanc: "to function expeditiously, inexpensively . . . ").

219. CUB 25419 (Doyle).

220. Y. Ouellette, at 107-111; *Ruffo*, at 312; *Brempong* v. *M.E.I.*, [1981] 1 F.C. 211, 217 (C.A.); *Singh* v. *M.E.I.*, 177, 195, 215.

> proceedings, be flexible and ensure that the substantive law is rendered effective and is carried out.
>
> s. 12. The body is required. . . . to provide, if necessary, fair or impartial assistance to each party during the hearing.

While it may adopt an inquisitorial style, this does not mean that the board can conduct its own inquiry: "it must base its decision on the facts proved before it".[221]

1.1.3.3 THE TRIBUNAL IS MASTER OF THE PROCEDURE

Cases dating back a considerable time have proclaimed this principle[222] and Parliament has sometimes repeated it: this is true of s. R. 80(7): the chairperson is expressly authorized to determine the procedure at a hearing before the board. However, what does this "mastery of the procedure" mean? The Supreme Court has defined its parameters in fairly broad terms: [TRANSLATION] ". . . it is necessary to refrain from imposing a code of procedure on an organization that the law made master of its own procedure."[223] According to the Supreme Court, such an organization:

> need not assume the trappings of a court.[224]
>
> There is a wide range of decision-making proceedings involving an element of fairness in the procedure and the intensity of this will vary in accordance with its position on the administrative spectrum.[225]
>
> . . . decisions are made concerning the content of these rules in light of all the circumstances in which the tribunal in question operates.[226]
>
> [that] will vary in line with the context and nature of the interests at issue.[227]

221. A-3-95 (Eppel, 28/9/95).

222. *Komo Construction* v. *Labour Relations Board*, [1968] S.C.R. 172, 176.

223. *Komo Construction*, at 176.

224. *Kane* v. *University of British Columbia*, [1980] 1 S.C.R. 1109, 1112.

225. *Martineau* v. *Disciplinary Committee*, [1980] 1 S.C.R. 602, 608.

226. *Syndicat des employés ...* v. *Canada* [1989] 2 S.C.R. 879, 886.

227. *Chiarelli* v. *Canada* [1992] 1 S.C.R. 711.

1.1.3.4 *SPECIFIC ROLE OF THE CHAIRPERSON*

In the employment insurance administrative justice system, the chair of the tribunal has an important role.[228] Under our system, the chairperson of the board has a particularly important role to play. Besides his or her particular status (A. 111(2)), the chairperson has many specific duties under ss. R. 80, 81, 82, 83, as well as s. A. 114(2). Section R. 78(2) provides that the chairperson must necessarily be part of the quorum and that in the case of a tie vote, the chairperson shall have a casting vote.[229] However, to respect the decision-making independence of each member and the credibility of the group, s. R. 83 provides for the formal right of each member, including the chairperson, to dissent, and this member is also entitled to include the reasons for his or her dissent in the minutes of the proceedings of the board.

The particular status of the chairperson should not diminish the indispensable role of the other members since the board is a collegial tribunal made up of equal members, as we will see below.

1.1.3.5 *APPROPRIATE RULES OF EVIDENCE*

Administrative tribunals have always been governed by a system of evidence that is adjusted to administrative justice in particular. The Supreme Court has recognized this: "the rule of autonomy in administrative procedure and evidence, widely accepted in administrative law."[230]

These rules of evidence are based on the principles of natural justice but are not as homogenous as those applying to courts of law. Their sources are more varied. Moreover, each tribunal has a great deal of independence under its act and regulations to adapt the contents of these rules to the context in which it operates.

1.1.3.6 *REPRESENTATION*

In administrative law, legal representation or representation by counsel must be separated from representation by any person of one's choice.

228. Macaulay and Sprague, vol. 1, c. 4A, and vol. 2, c. 13.

229. CUB 10665B (Watson).

230. *Université du Québec à Trois-Rivières* v. *Larocque* [1993] 1 S.C.R. 471, 485; CUB 12281 (Allison).

In the courts of law, representation by counsel is common and often mandatory. Before administrative tribunals, the principles of natural justice include the right to legal representation. Section 2(*e*) of the *Canadian Bill of Rights* recognizes that any person required to testify before a court or tribunal has the right to retain counsel. In our Act and Regulations the expression "representative" is used only on three occasions (A. 111(*b*) and R. 78(8)); these provisions do not expressly set out the right to be represented before a board but the case law has interpreted them in this way.

The right to representation by counsel before an administrative tribunal is not absolute. The existence of this right depends on the nature of the dispute, the complexity of the case, the seriousness of the allegations contained in the pleadings and the consequences that could result from the tribunal's decision.[231] The tribunal thus retains some discretion to permit or refuse legal representation depending on the extent to which are proceedings are of a judicial nature and the further delays and institutional constraints that could be caused.[232]

Where the right to counsel exists, an administrative tribunal may not persuade the individuals to waive their right to such assistance.[233] It may be that a reasonable period has to be allowed for counsel to be retained.[234] Where the right is recognized, the tribunal may not unduly limit the role of counsel.[235] Furthermore, failure to advise the claimant of the right to legal aid does not constitute a breach of natural justice.[236]

It should be noted that s. 128 of the *Act respecting the Barreau du Québec*, which applies in Quebec, does not give advocates an exclusive monopoly on representation before any tribunal. This provision probably does not apply to federal tribunals since such professional legislation does not apply to the federal government.[237]

231. Garant, vol. 2, at 296; Macaulay and Sprague, vol. 2, c. 12-27; CUB 8086 (Radke).

232. See the decisions of the Federal Court, especially: *Howard* v. *Stony Mountain* [1984] 2 F.C. 642 (C.A.); *Tremblay* v. *Laval Institution*, [1987] 3 F.C. 73; CUB 24378 (Lloyd).

233. *Hinton* v. *M.M.I.* [1975] F.C. 17.

234. *McCarthy* v. *M.M.I.* [1979] 1 F.C. 121.

235. *Re Men's Clothing and Arthurs* (1979), 26 O.R. 29 (Div. Ct.).

236. CUB 26600 (Pietrzak).

237. *R.* v. *Lefebvre and Professional Institute*, [1980] 2 F.C. 99 (C.A.).

The right to representation by any person of one's choice, including counsel, is widely recognized by the boards of referees.[238] Depending on the circumstances, counsel's absence on the day of the hearing may or may not be grounds for adjournment.[239] Representation before courts and tribunals is a procedural matter, which in the case of federal ones comes under the jurisdiction of the federal legislator. Representation or legal aid before a court should not be confused with representation before an administrative authority such as a Commission official.[240]

The role of a representative must be limited to that of an agent of one of the parties; the representative may not take it upon himself or herself to act as a member of the tribunal by playing a role similar to that of a member.[241]

1.1.3.7 PUBLICITY AND IN CAMERA PROCEEDINGS

The principle that the hearings of a quasi-judicial tribunal should be public has been upheld by the Federal Court, which has recognized that an administrative tribunal has complete discretion to refuse to hold in-camera hearings where the applicant has no valid reason to request them.[242]

A number of provisions provide guidance for administrative tribunals in their decision as to whether to proceed in camera. The legislature prescribes tests for the holding of in-camera proceedings. Tribunals must comply with the law and, in interpreting these tests, not forget that public hearings should be the rule. Thus, the Quebec courts have decided that some in-camera orders were not justified by the public interest and prevented interested parties from having their testimony heard.[243]

On the other hand, where the Act is silent, since administrative tribunals are "master of their own proceedings", they have discretionary power to decide whether proceedings will be held in camera.[244] However, they must

238. CUB 19778 (Reid); CUB 34446 (Desruisseaux); CUB 12505 (Frederick); CUB 18417(Nabe); A-431-80 (Samonas). The quality of the representation is not a matter for the board to be concerned with: CUB 42127 (Nagy).

239. CUB 34446 (Desruisseaux); CUB 17766 (Robert).

240. CUB 29070 (Riopel); CUB 34375A (Constantineau: giving statements without the presence of counsel does not violate s. 7 and 10(*b*) of the Charter).

241. CUB 12699 (Supruniuk); CUB 13820 (Vanderhaeghe).

242. *Millward* v. *Public Service Comm.*, [1974] 2 F.C. 530.

243. *Bouchard* v. *Commission de police*. Alma, 21/08/85, J.E. 85-968 and C.A.Q. 11/07/87 J.E. 87-955; see also *Southam* v. *Mercier* [1990] R.J.Q. 437 (C.S.).

244. *Southam* v. *M.E.I.*, [1987] 3 F.C. 329; see the statements of Rouleau J., at 335-337.

not forget that public hearings are the rule and that proceedings should be held in camera only in exceptional cases. The Ontario Court of Appeal has held that where an act is silent, a tribunal must sit in public unless there is good reason to hold the hearing in camera.[245] Proceedings should be held in camera only when the public interest so requires.[246]

The principle that hearings should be held in public is designed to ensure that the activities of administrative tribunals are transparent. The Federal Court reiterated this principle on the occasion of an application by certain media companies to have hearings concerning an application for review of the grounds for detaining persons claiming refugee status held in public, contrary to what the adjudicator had decided. The Court quashed the in-camera orders:

> I am satisfied that these tests in the case at bar have been met and it is not at all unreasonable to extend to proceedings of such decision-makers the application of this principle of public accessibility. After all, statutory tribunals exercising judicial or quasi-judicial functions involving adversarial-type processes which result in decisions affecting rights truly constitute part of the "administration of justice". The legitimacy of such tribunals' authority requires that confidence in their integrity and understanding of their operations be maintained, and this can be effected only if their proceedings are open to the public.[247]

When the charters came into effect, the principle of public hearings gained increased protection. In Quebec, s. 23 of the *Charter of Human Rights and Freedoms* provides that hearings shall be public, although "[t]he tribunal may decide to sit *in camera*, however, in the interest of morality or public order."

As the Court of Appeal has noted, public hearings are the rule; this gives the public and the media the right to request copies of the tribunal record unless an order is made to the contrary.[248]

245. *R.* v. *Tarnopolski*, [1970] 2 O.R. 672, 680 (Ont. C.A.); *Bruton* v. *Regina City Policemen's Ass.*, [1945] 3 D.L.R. 437 (Sask. C.A.).

246. *Fraternité interprovinciale des ouvriers en électricité* v. *Office de la construction du Québec*, [1983] C.A. 7; *St-Louis* v. *Treasury Board*, [1983] 2 F.C. 332.

247. *Southam* v. *M.E.I.* at 336-337.

248. *Lortie* v. *R.*, [1986] C.A. 451; *Bédard* v. *Laviolette*, J.E. 81-463 (C.S.).

The public nature of justice and incidentally also of administrative justice is further emphasized by s. 2(*b*) of the Canadian Charter:

> 2. [Fundamental freedoms] Everyone has the following fundamental freedoms
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

According to the case law, the development of the right of access to tribunals requires that the principle of public hearings receive the same protection as freedom of expression.[249] An order that proceedings be held in camera constitutes a restriction on the freedom of the media. The courts must strive to balance several rights that conflict with one another such as the right to a fair hearing, the right to privacy, the right to freedom of expression, freedom of the press and protection of the administration of justice.[250]

The courts have rarely had to render decisions on this issue in administrative law; such disputes are much more common in criminal law. Recently, the Superior Court had to decide whether the order for proceedings to be held in camera made by the committee of inquiry of the Conseil de la magistrature in its review of complaints filed against a judge violated s. 2(*b*) of the Canadian Charter and s. 23 of the Quebec Charter. The Court began by examining the reason given by the committee for ordering an in-camera hearing[251] and considered whether the order was contrary to freedom of the press and the right to a public and impartial hearing. An in-camera order will be found to be necessary if it is designed to preserve public order and morality. In that case, these values were not at issue. Then the Court applied the test under s. 1 of the Canadian Charter; it concluded that no evidence had been adduced concerning the possible disturbance of children or of any possible influence on them of making the discussions public. On the other hand, the public was aware of some of the complaints. According to the Court, the order violated the freedom of the press and was not justifiable: [TRANSLATION] "Complete exclusion of the public is a measure that greatly exceeds the violation of freedom of the press and the public hearings provided for in the charters in accordance with the tests imposed in *Oakes* and *Edward Books and Art Ltd.*"[252]

249. *R.* v. *Southam*, [1984] 2 S.C.R. 145.

250. *Pacific Press* v. *Minister of Employment and Immigration*, [1990] 1 F.C. 419 (F.C.A.); *Toronto Star Newspaper* v. *Kenny*, [1990] 1 F.C. 425.

251. *Southam Inc.* v. *Mercier*, [1990] R.J.Q. 437, 443 (C.S.).

252. *Ibid.*, at 447.

In addition to the in-camera problem, there is also the problem caused by publication and distribution bans. In *Southam Inc.* v. *Lafrance*,[253] the Quebec Court of Appeal considered this issue. It found that publication and distribution bans were justifiable and necessary for reasons of public order, especially respect for the right to a fair and equitable trial and the right to one's reputation.

Our Act refers to in-camera proceedings only in cases where the board hears a case involving an allegation of sexual or other harassment (A. 114(2)).[254] At the request of the claimant, the chairperson may order in-camera hearings or ban any form of publication or dissemination of details concerning the harassment if he or she feels that the nature of the possible disclosure of personal or other matters is such that the interest of the claimant or the public takes precedence over the right to publish the information. Furthermore, the chairperson may, at the request of the claimant or the employer, exclude the claimant or the employer, their representatives and any witness or person who may testify from the hearing while oral testimony is being given. The chairperson may order that a copy of the sound recording of this testimony be given to the claimant or the employer who has been excluded from the hearing so that he or she may reply to it at the close of the hearing in the absence of the other excluded persons; they then have a right to disclosure of the recording of the testimony.

Other than in A. 114(2), our Act and Regulations do not discuss the public nature of hearings; therefore they should be open to the public, according to the case law. However the Benefit Manual, a Commission directive, limits this access to certain authorized persons, specifically the parties, their representatives, their witnesses, as well as anyone else who may be affected by the impugned decision.[255] This restriction seems to be justified by the idea that the claimant should be in the best condition possible to present his or her case and the board should be able to carry out its duties properly and dispassionately after straightforward and expeditious proceedings. At least one Umpire seems to agree with the situation on the ground that the board is not a court that must be open to the public.[256]

253. C.A. Mtl, 29/03/90, J.E. 90-636.

254. CUB 29014A (Diyorio).

255. CUB 24974 (DesChênes).

256. CUB 9098 (Goodwin).

The Manual (c. 13) states that the press may be admitted to hearings by informing the chairperson who then contacts the parties and permits admission unless there are strong objections to it. The Commission does not object to the presence of the media as an observer.

1.2 CHARACTERISTICS OF TRIBUNAL PROCEEDINGS IN EMPLOYMENT INSURANCE CASES

1.2.1 EQUAL REPRESENTATION

The idea of equal representation of the interests of workers and employers has long existed within labour organizations, whether they be labour relations boards, arbitration tribunals or even organizations involved in occupational health and safety. Thus, in Quebec, for example, the legislature created bureaux de représentation paritaire (BRPs) [equal representation boards] in 1985; these are a kind of administrative tribunal of first instance and we referred to them earlier. In a 1994 report, a working group stated the following: [TRANSLATION] ". . . equal representation provides employers and workers with the assurance that one member of the panel is particularly sensitive to their separate values and problems."[257]

In the 1997 reform, the Quebec legislature created a new tribunal, the Commission des lésions professionnelles, which embodies the same principles of equal representation as the bureaux de révision paritaires.[258]

The Act has long since recognized equal representation. There is no question as to the reason for this.[259] The Act and the Regulations provide that this kind of representation should be implemented. The presence of two members representing the values of employers and those of unions is strictly enforced unless the claimant or the employer agree to a board of two, including the chairperson, sitting in a case (R. 78).

257. *Durant Report*, Quebec, May 6, 1994, at 39.

258. S.Q. 1997, c. 27, ss. 385 *et seq.*

259. Issays, at 138; CUB 8641B (Laughlan: "their own experience and their understanding of . . . their own community").

The Federal Court has found s. R. 78 to be perfectly valid.[260] It defines a quorum as being "the minimum number of members who must be present for this body to be able to validly exercise its powers". A decision of the Board of Referees, with the claimant's or the employer's consent to sit as two, is perfectly valid but this consent is essential.[261]

1.2.2 COLLEGIALITY AND QUORUM

A board is essentially a collegial tribunal in the sense in which s. 111 prescribes its membership, namely a chairperson and one or more members. It is the Regulations that prescribe the quorum, which is in principle three, that is a chairperson and two members, one of whom represents employers and the other insured persons. In exceptional cases, that is, with the consent of the claimant or the employer, this quorum may be only two, including the chairperson. This provision of the Regulations has been upheld by the Court of Appeal.[262]

The question of a quorum goes to the very jurisdiction of the tribunal; it is a question of public order. The case law is very categorical on this point, including the decisions of the Federal Court of Appeal.[263] A quorum must be maintained at all times.[264] A tribunal that sits after the mandate of its members has expired[265] or where they have been irregularly appointed[266] is improperly constituted.

This case law applies to the Board of Referees. A quorum of two is possible only where the chairperson is one of them and the claimant or the employer waives the presence of a member representing the unions or employers, as appropriate.[267] The consent of the parties is thus limited and may not "confer jurisdiction that the Act does not confer".[268]

260. A-439-81 (M. Allard).

261. CUB 9197A (French).

262. *Ibid.*

263. *Doyon* v. *Public Service Staff Rel. Bd.*, [1979] 2 F.C. 228 (C.A.); *Nanda* v. *P.S.C.*, [1972] F.C. 277, 257 (C.A.); *Com. de Police* v. *Gionnet*, JE 87-691 (Que. C.A.); *Ass. des officiers de direction* v. *Com. de Police* [1994] R.J.Q. 1505 (Que. C.A.).

264. *Re Tariff Board*, [1977] 2 F.C. 228 (C.A.).

265. *Lemieux* v. *Comité de discipline* S.Q., J.E., 93-1365 (C.S.).

266. *Moreau* v. *Comité de discipline (Pharmaciens)* J.E. 94-1317 (C.S.); *Morcil* v. *Tribunal des professions* [1993] R.J.Q. 830 (C.S.).

267. CUB 9197 (French); CUB 12280 (Alarie).

268. CUB 12280 (Alarie).

A quorum must be maintained at all times; if a member is absent for most of the hearing, the decision will be quashed.[269]

The question of the quorum is linked to the question of maintaining the membership of this quorum. Thus, the membership of the board may not be changed during the hearing process[270] or after an adjournment.[271] Where the chairperson asks the Commission for additional investigation or further evidence, the hearing must be continued by the same board consisting of the same members.[272] Where the chairperson or another member dies or can no longer sit when a hearing has not been completed, it seems that the case must be submitted to another Board of Referees "for a hearing *de novo*".[273]

The membership of a board, just like the quorum, is a question of jurisdiction and the "jurisdiction of a board is always based on the strictest provisions . . . ".[274] Thus, an Umpire does not have the power to order that a panel have at least one woman as a member.[275]

The case law enshrines another important rule of administrative law rule to the effect that the decision maker must have heard the evidence.[276] The Supreme Court has stated the following on this point: "No member who has not heard all the evidence may properly take part in the decision."[277] Accordingly, someone who is absent from part of the hearing cannot take part in the decision; it would be illegal to do so.[278]

269. A-244-87 (Brodie); CUB 120 95 (Vercaigne).

270. CUB 12642 (Michaud: two sessions of a hearing); CUB 12885 (Nicholson); CUB 26374 (Kirkpatrick).

271. A-553-83 (Hance).

272. CUB4554 (Fortier); A-553-83 (Hance).

273. CUB 12280 (Alarie).

274. CUB 12280 (Alarie).

275. CUB 12885 (Nicholson).

276. Garant, vol. 2 at 273-277; CUB 12280 (Alarie); CUB 12095 (Vercaigne); CUB 7968 (Denham).

277. *Grillas* v. *M.M.I.*, [1972] S.C.R. 577, 594.

278. CUB 12642 (Michaud); CUB 18003 (Boucher).

1.2.3 SOCIAL AND ECONOMIC OBJECTIVE OF THE ACT

The Board of Referees is an administrative tribunal involved in the application of important legislation of a socio-economic nature. It acts to decide disputes between the Commission, which is a government agency, and claimants under the employment insurance scheme or employers. The *Employment Insurance Act* is not an insurance statute like others; it provides protection against a social risk that is not like the events or accidents normally covered by various insurance policies; furthermore it contemplates social benefits that go beyond the strict limits of unemployment. A long line of authority has confirmed the purpose of this legislation.[279]

The philosophy that seems to provide a basis for the members of this administrative tribunal may result implicitly from s. A. 49, which provides that the Commission shall give claimants the benefit of the doubt in determining whether there are circumstances or conditions that have the effect of making the claimant ineligible for benefit if the evidence adduced on both sides is equivalent.[280] The Court of Appeal has stated that between two acceptable interpretations, that which is more favourable to the claimant must be accepted.[281] In many situations, such as dismissal for misconduct, benefit of the doubt is given to the claimant.[282]

279. *Bliss* v. *A.G. Canada* [1979] 1 S.C.R. 183, 185; *Hills* v. *Canada* [1988] 1 S.C.R. 513, 535; *Tétreault-Gadoury*, at 3, 41; CUB 6266 (Rose): "social legislation".

280. *White* v. *Canada* [1974] 2 F.C. 233 (C.A.); "interpretation that favours the unemployed".

281. A-1124-92 (Archambault); CUB 21630 (Guochan: where the language is ambiguous).

282. CUB 18895 (Leblanc); CUB 17649 (Fradette); CUB 8203 (Josephat); CUB 12747 (Kavanaugh).

CHAPTER 2

THE HEARING

The hearing by a board is necessarily preceded by giving official notice to the parties. On the appointed date, the chairperson must proceed to open the hearing and allow the board to receive preliminary objections before hearing the evidence as such.

2.1 NOTICE

The hearing before an administrative tribunal is necessarily preceded by giving notice, which must indicate to the interested parties that a decision will be rendered, the subject of this decision and, where appropriate, the complaints alleged; the prior notice to the parties or their representatives in the record must also indicate the date and place of the hearing.[283] The notice must be sent to the parties as well as to any person interested in intervening in a case, that is those whose rights are directly affected.[284] The notice must be sent in sufficient time for the individual to be able to prepare adequately.[285]

The consequence of a failure to give notice or of insufficient notice is that the decision will be invalid,[286] unless there is an express or implicit waiver by the person who would have been able to rely on the defects in the notice.[287]

Neither the Act nor the Regulations contain a provision concerning notice, but the Benefit Manual (c. 13) makes up for this. It states that the appellant, all the interested parties and their representatives must receive at least seven days' notice and a copy of the appeal docket; the Notice of Hearing form is used (INS 5116). Where the chairperson uses the power to summon witnesses conferred on him or her by s. R 80(6), notice is also sent (INS 3236).

283. Garant, vol. 2 at 241 *et seq.*; Mullan, nos.111-116; Macaulay and Sprague, vol. 2 ch. 12.1.

284. *Telecommunication Workers Union* v. *Canada*, [1995] 2 S.C.R. 781, 798; *Raburn* v. *C.L.R.B.* 95 T-1210 (F.C.A.).

285. *Rodney* v. *M.M.I.*, [1972] F.C. 663, 669 (C.A.).

286. *Cardinal* v. *Kent*, [1985] 2 S.C.R. 643, 661.

287. *Multi Data* v. *A.G. Canada*, [1972] 2 F.C. 469 (C.A.); *MacDonald* v. *National Parole Board*, [1986] 3 F.C. 157.

Our case law has frequently upheld the rule that notice must be given in the proper form of the subject, time and place of the hearing.[288] The notice must be "sufficient" and indicate "the scope of the hearing in order to permit the persons protected by this rule to derive the maximum benefit from their right to be heard".[289] This notice also naturally has the purpose of allowing the parties, and especially the claimant, to attend.

Where the claimant or another party fails to appear after receiving sufficient notice, he or she is deemed to waive the right to attend with all the consequences that this entails.[290] The board may accordingly proceed without the claimant or the other party in this case.

Where the notice is received late by a claimant, there will not necessarily be a breach of natural justice if there is nothing to show that he or she "was not capable of making a complete statement of his case before the board, despite the late arrival of the official notice."[291] On the other hand, 11 days notice was held to be insufficient because fishermen could be away for long periods because of the nature of their employment.[292]

In our system, giving notice includes providing the docket prepared by the Commission as set out in c. 13 in the Manual. The docket includes the forms, the Commission's position, all evidence or exhibits and the Commission's arguments. Disclosure of the docket is another requirement of natural justice; it must be prior to the hearing.[293] However, under certain conditions, some parts of the docket may be released at the hearing.[294]

288. CUB 10999 (Allen); CUB 9895 (Kornatz).

289. CUB 12281 (Liscombe).

290. CUB 31372 (Armitage); CUB 15316 (Fleming); CUB 25116 (Dumais); T2369-95 (Dulaba).

291. CUB 14805 (Dadvand); CUB 7793 (Bye); CUB 19376 (Quantz).

292. CUB 10999 (Allen).

293. CUB 26882 (Martial).

294. See 3.6: Disclosure of evidence.

2.2 COMMENCEMENT OF PROCEEDINGS

2.2.1 ROLE OF CLERK (ASSISTANT TO THE BOARD)

Although the clerk, whose duties are described in the Benefit Manual, is an official of the Commission, he or she plays an indispensable role as an agency that is independent of the Board of Referees.[295] This role is essential to the application of the principles of natural justice. The clerk prepares the hearing schedule, sends notices of hearings with copies of the appeal docket, summons the chairperson and members in rotation, acts on the requests of the chairperson or the Umpire, as appropriate, ensures that the hearing room is prepared, recordings are made of the hearings and, if necessary, organizes telephone hearings and so on. The clerk accordingly acts as the agent of the board even if it is not a permanent institution.

Once the chairperson is appointed, the clerk is accountable to him or her because the chairperson is responsible for the procedure. However, if an incident occurs before the hearing, such as a request for an adjournment, for example, the clerk informs the other parties by telephone and then informs the chairperson, who decides whether or not to grant the adjournment. If the chairperson refuses the adjournment, the clerk, with the chairperson's authorization, records the request for adjournment and attaches it to the record as an exhibit.

At the conclusion of the hearing or process, the clerk ensures that the board's decision is recorded in writing with all the relevant details, signatures and dissenting opinions, if any. The decision is officially communicated by the chairperson to the office of the Commission through the clerk, who also ensures that it is communicated to the parties.

2.2.2 ROLE OF CHAIRPERSON OF THE HEARING

The chairperson is an essential component in accessible, informal and efficient proceedings. His or her role at the hearing is also very important: "The Chairman is the key person as it were, and only when he is present . . . may the Board of Referees . . . maintain its jurisdiction."[296]

295. We will continue to use the term "clerk," which is commonly used in administrative law to designate the person who holds such a position with a tribunal.

296. CUB 12280 (Alarie).

On the day of the hearing, the chairperson must first check with the clerk whether all the preliminary formalities have been observed and whether the board is complete and the appellant and other persons summoned are present. Usually the chair will offer to record the proceedings.

So far this issue has posed some problems. It has already been held that the refusal to record the proceedings does not constitute a denial of a fair trial, that is, a denial of natural justice.[297] However, the Supreme Court has ruled that "[e]ven in cases where the statute creates a right to a recording of the hearing, courts have found that the applicant must show a 'serious possibility' of an error on the record or an error regarding which the lack of recording deprived the applicant of his or her grounds of review".[298] Our Act does not require that hearings be recorded, but the case law seems to encourage the chairperson to ask claimants if they want the hearing to be recorded. The case law indicates several advantages to this, including assurance of a fair hearing, respect for the principles of natural justice, and a complete record in case of an appeal.[299] If there is no recording or if the tapes have been misplaced or destroyed or are defective, the appellant may obtain an order for a new hearing if it can be demonstrated that this failure limits his or her ability to exercise fully the right to appeal.[300]

The chairperson has the task of opening the hearing, chairing it and conducting its deliberations in such a way as to ensure that each of the parties involved has an opportunity to adequately make representations (s. R. 83(1)(*i*)). The chairperson is responsible for keeping order and has authority to decide questions of procedure (s. R. 80(7)) in addition to the specific powers conferred by the Act and Regulations. "Procedure" applies to the application of the principles of natural justice and all events that may occur during a hearing.[301]

297. CUB 12573 (Arsenault); CUB 43160 (Vasquez).

298. *Canadian Union of Public Employees* v. *Montréal* [1997] 1 S.C.R. 793, 842; CUB 42216 (Belley); CUB 47548 (Côté); also *R.* v. *Hayes* [1989] 1 S.C.R. 44; *Kandiah* v. *M.E.I.* [1992] 141 N.R. 232 (F.C.A.).

299. CUB 44561A (Martello); CUB 47979 (Bruce).

300. CUB 41824 (Genge); CUB 42254 (Menzies); CUB 38080A (Levesque); CUB 44572 (Goulet); CUB 43590 (Jiwani); CUB 47283A (Tremblay); CUB 47794 (Grimard); CUB 29199 (Carter); CUB 26426 (Giali); CUB 27351 (Labatt: the tapes of proceedings before the Board should be preserved until the expiry of the appeal period).

301. CUB 1334446 (Desruisseaux); CUB 43144 (Cheng); CUB 12281 (Liscombe); CUB 6020 (Potvin); CUB 30792 (Glessay: to be allowed to testify and cross-examine); CUB 43149 (LeBlanc); CUB 5850 (Bourque: maintaining quorum); A-44-91 (Harnish: receiving documents); CUB 29257 (Hinse: excluding witnesses); CUB 5028 (Tremblay: order in which witnesses are heard); CUB 23651 (Tesfai: ruling on postponement); CUB 11301(Reelis: respect the directions of the Umpire).

The chairperson of an administrative tribunal is normally expected to make the usual introductions, state the role of the tribunal and set out the subject of the proceedings; he or she may even summarize the claims of the parties as they appear in the docket.

At the outset the chairperson must check whether only those persons who are authorized to attend are present in the room. This measure is not based on the Act or the Regulations but on the Benefit Manual (c. 13) and the Board of Referees' Manual. The following are entitled to participate in or attend a hearing: the claimant, the employer, any other person who appeals, any representative of theirs, any official designated by the Commission, any legal representative of the Commission, any other person who may be affected by the Commission's decision and any witness.

Neither the chairperson nor the board has the power to compel the attendance of witnesses or require people to produce documents; they may invite them to do so.[302] Under certain circumstances, where the evidence is contradictory, the chairperson should take the initiative in this respect.[303] The chairperson's power to request that someone attend a hearing should not be confused with the power to compel a witness.

If it becomes apparent at the hearing that the case differs greatly from how it appears in the record or that important questions have not been investigated, the chairperson may use the power under s. R. 82 to ask the Commission to investigate any question related to the case.

2.3 PRELIMINARY OBJECTIONS

At the commencement of a hearing, any party before a tribunal may make so-called preliminary objections. Strictly speaking, these do not involve the grounds of appeal referred to in s. R. 79. Ordinarily, they are arguments to have the appeal dismissed for reasons that do not go to the merits of the dispute; they may also involve an application of some other kind.

302. T 1680-85 (Bacon); CUB 21911 (Lavigne-Lincourt); CUB 24699 (Irvine).

303. CUB 12897 (Pulzoni)

2.3.1 OBJECTION TO THE TRIBUNAL'S JURISDICTION

It is by bringing an application at the commencement of the hearing that a party may object to the material jurisdiction of the tribunal within the meaning of s. A. 114. It is possible that on its face the case does not involve a decision of the Commission or that the appellant is not a claimant or an employer or any other person who is the subject of such a decision. If the parties realize that the board does not have the necessary quorum or that the membership is incorrect, this is also the point at which this objection should be raised.

2.3.2 THE APPEAL IS LATE

The party which realizes that the appeal is late, that is beyond the period of 30 days prescribed in s. A. 114 or any additional time allowed by the Commission for special reasons, may raise a preliminary objection to this effect. However, normally a late claimant takes the initiative to ask the Commission for a postponement. It is the task of the Commission under s. A. 114 to determine what the special reasons are but it must exercise "this discretion judiciously",[304] that is in a manner that is not arbitrary.[305] The decision of the Commission in this regard may be appealed to the board.[306]

The board may not substitute its discretion for that of the Commission.[307] If the Commission asks the claimant to explain the delay, the claimant must provide reasons.[308]

In all cases, it is necessary to respect "the highly understandable desire of Parliament to impose a normal time for appeal".[309] It is really necessary to have a "special reason".[310] We believe that the concept of "special reason" applicable to extensions of the 30-day period for appeals to the board is similar to that applying to appeals to the Umpire (s. A. 116).

304. A-620-88 (Brunet), and CUB 18996 (Mestre); A-42-90 (Chartier); A-346-93 (Knowler) A-906-96 (Andrew); CUB 7639 (Gagnon); CUB 19843 (Murphy); CUB 20502 (Montgomery); CUB 16160 (Corrado); CUB 22746 (Gill).

305. A-1001-92 (Martin).

306. A-42-90 (Chartier); A-80-90 (Plourde); CUB 20106 (Deblois).

307. CUB 45962 (Moser).

308. CUB 46572 (Loiselle).

309. CUB 7639 (Gagnon: a period of 11 months had elapsed and the real reason was that the claimant had not realized the impact of the decision).

310. A-1001-92 (Martin); A-64-94 (Lettieri); A-432-96 (Cardamone).

Thus, the difficulty experienced by the claimant in contacting his or her counsel and counsel's failure to act on a mandate for months is not a valid reason.[311] The fact that the lawyer was out of town most of the time did not excuse a delay of more than six months.[312] The appearance of a new decision one year after the Commission's decision was not a valid reason for extending the time.[313] The fact that the claimant was awaiting a reply from his MP is also not a valid reason for extension.[314] Nor was the fact that the claimant did not feel that he had sufficient evidence after the normal period.[315] The same is true of a change of address.[316]

Good faith and ignorance of the law are not usually considered to be valid reasons.[317] Absent clear indications to the contrary, "it is a fundamental principle that ignorance of the law does not excuse a failure to observe a legislative limitation period".[318] A union's failure to act,[319] or the fact that a person is waiting for the Commission to appeal are not valid reasons.[320] The same is true of the claimant's negligence or forgetfulness.[321]

The following have been considered to be "special reasons" — a claimant's particular difficulties in expressing himself;[322] the loss of the application for appeal in the mail;[323] an application for legal aid the reply to which was received after the time expired;[324] language problems experienced by the claimant;[325] the extent of the overpayment, the inconvenience that it caused, the circumstances of the case and the lack of harm to the

311. CUB 15899 (Lisé); CUB 20502 (Montgomery); CUB 25118 (Morin: counsel unavailable after 15 days' notice).

312. CUB 11066 (Lamoureux).

313. A-80-90 (Plourde); CUB 18940 (Verreault).

314. A-393-92; (Bazan) CUB 6747 Desnoyers).

315. A-1001-92 (Martin).

316. CUB 20265 (Sabourin).

317. A-0644-93 (Larouche); A-1789-83 (Gauthier).

318. A-108-76 (Pirotte); *Mihm* v. *M.M.I.*, [1970] S.C.R. 3348, 353.

319. CUB 8315 (Gigone).

320. CUB 10630 (Laliberté).

321. CUB 16241 (Benesh); CUB 7639 (Gagnon); CUB 6841 (Wintonik); CUB 23793 (Ruscitti).

322. CUB 22746 (Gill).

323. CUB 11352 (Reid).

324. CUB 11158 (Stuart).

325. CUB 9684 (Mansourian: only six weeks' delay).

Commission;[326] health problems of the claimant or a relative;[327] the fact that the party was waiting for a decision of a criminal court or a decision of the Commission in a similar case;[328] the fact that the claimant sent his docket to a minister or an MP;[329] and an administrative error made by the clerk.[330]

2.3.3 MOTION FOR ADJOURNMENT

Depending on the circumstances, the *audi alteram partem* rule may mean that one of the parties has the right to request an adjournment. Since the tribunal is responsible for its procedure, it has the power and the duty to determine whether an adjournment is truly necessary or merely abusive; the courts will intervene only if the refusal of an adjournment is unjust or arbitrary.[331] The Superior Court of Quebec summarizes the state of law: "An examination of the decisions of our courts shows that a decision to refuse an adjournment will be found to be unfair and arbitrary when it causes definite irreparable harm to the party requesting it, as long as that party is not at fault."[332]

In another decision, which involved the hearing of an application for union certification, the appellant was not able to attend the hearing since he had not been informed of it; he was away for a long period.[333] One of his employees requested an adjournment, which the tribunal refused to grant. It was held that the refusal of the adjournment caused serious harm to the appellant and, since he had not been informed of the hearing date, he had a valid reason for not attending and not having informed the tribunal.

326. CUB 18847 (Hearn); CUB 24080 (McKay).

327. CUB 8515 (Clark); CUB 8082 (Rousselle); CUB 11003 (Ross: serious accident involving the claimant's brother).

328. CUB 7607 (Devine); CUB 9469 (Geoffrion); CUB 6837 (Duncan).

329. CUB 7510 (Swager); CUB 6720 (Bansie).

330. CUB 6655 (Dick).

331. *Ruiz* v. *M.M.I.*, [1977] 1 F.C. 311 (C.A.); this was a case where the Court found that the tribunal had not erred in rejecting the request for adjournment. To the same effect, *Burnbrae Farms Ltd* v. *Canadian Egg Marketing Board*, [1976] 2 F.C. 217, 227; *McCarthy* v. *M.M.I.*, [1979] 1 F.C. 121; *Re Iwasyk and Saskatchewan Human Rights Commission* (1978), D.R.L.(3d) 289 (Sask. C.A.); *Sarco Canada* v. *Antidumping Tribunal*, [1979] 1 F.C. 247 (C.A.); *Union of B.C. Indian Chiefs* v. *Westcoast Transmission Co.* (1981), 37 N.R. 485 (F.C.A.).

332. *Pruneau* v. *Chartier*, [1973] C.S. 736-738; *Dufour* v. *Commission des loyers*, [1976] (C.S.) 1624; *Pierre* v. *M.M.I.*, [1978] 2 F.C. 849 (C.A.); *Sewjattan* v. *Minister of Employment and Immigration*, [1979] 2 F.C. 256 (C.A.); *Ho Foo Tam* v. *M.E.I.*, (1982) 46 N.R. 1 (F.C.A.).

333. *Jim Patrick* v. *United Stone* (1960), 21 D.L.R. (2d) 189 (Sask. C.A.).

Similarly, the Superior Court of Quebec held that the rules of natural justice had been breached by the Conseil des services essentiels [essential services board] when it refused the applicant's request for adjournment, since the notice had been given to him only an hour and 45 minutes before the hearing. The applicant was entitled to an adjournment to be able to prepare adequately, that is, to find a lawyer and to be able to respond to the opposing arguments. A decision to the opposite effect would have caused him serious harm.[334]

An adjournment will be granted whenever a refusal would cause definite and irreparable harm to the party seeking it. Thus, in one case,[335] a municipal by-law was challenged before the Ontario Municipal Board by a number of individuals. On the first day of the hearing, after the representative of the city had informed the board that his submissions would take until the following day, the representative of the applicants had accordingly allowed his witnesses to leave. A few hours later, however, the representative of the applicants was asked to submit his evidence; since he could not proceed he requested an adjournment but was refused. On this question, the Divisional Court of Ontario stated:

> . . . counsel for the present applicants had reasonable and obvious grounds for believing that the hearing would continue into the following day and it was not unreasonable that he should let his witnesses go. That being so, the Board should have granted the requested adjournment until the following morning. Its failure to do so, in all the circumstances, amounted to a denial of a fair hearing and, accordingly, a denial of natural justice . . . .[336]

Moreover, this principle has been applied in several other judicial decisions.[337]

The courts have refused requests for adjournment for various reasons. In 1989, a majority of the Supreme Court[338] refused to grant an adjournment

334. *Syndicat national des employés de l'Hôpital Charles-Lemoyne* (C.S.N.) v. *Conseil des services essentiels*, J.E. 86-771 (C.S.Q.).

335. *Gasparetto* v. *Sault Ste-Marie*, [1973] 2 O.R. 847 (Div. Ct).

336. *Ibid.* at 851. See also *Saskatchewan Teacher's Federation* v. *De Moissac* (1974), 38 D.L.R. (3d) 296 (Sask. C.A.); *Re Mady and Discipline Committee of the Royal College of Dental Surgeons* (1975), 5 O.R. (2d) 414 (Div. Ct).

337. *Re Sreedhar and Outlook Union Hospital Board* (1973), 32 D.L.R (3d) 491 (Sask. C.A.); *R. v. Ontario Labour Relations Board* (1971), 13 D.L.R (3d) 289 (Ont. C.A.); *R.* v. *Botting*, [1966] 2 O.R. 121 (Ont. C.A.); *Succession Graner* v. *The Queen*, [1973] F.C. 355; *Singh* v. *M.E.I.*, [1982] 2 F.C. 689; *Rogates* v. *M.E.I.*, F.C. , no. T-663-82; *Warner Bros. Dist.* v. *Director of Investigation and Research*, F.C., no. T-1063-83; *Cantin* v. *Régie des alcools. . .*, J.E. 94-793 (C.S.).

338. *Prasad* v. *Canada, M.E.I.*, [1989] 1 S.C.R. 560.

to a person who sought a permit to remain in Canada. This person sought an adjournment to continue certain approaches that had been made to the Minister. After establishing that the adjournment depended on a discretionary power and that the exercise of this power must comply with natural justice, the Court stated that the existence of another parallel remedy did not give the individual an automatic right to an adjournment.[339] However, an administrative tribunal does not necessarily have to grant an adjournment where parallel criminal proceedings have been instituted.[340]

The Quebec Court of Appeal refused a request for adjournment on the ground that the appellant had made an excessive number of requests and had already been granted three adjournments; the Court held that the appellant had had ample opportunity to prepare a defence.[341]

However, the case law requires that the party requesting the adjournment not have committed any fault, negligence or carelessness. At the hearing of an application for union certification, the applicant had requested an adjournment on the ground that the union representative, who alone was in a position to act appropriately, had been detained elsewhere on business. The board refused the adjournment and noted that the party had been informed long before the date of the hearing and had not informed the tribunal of the fact that the date was not suitable. The applicant challenged this decision in the Ontario Court of Appeal, which refused to intervene because the decision to refuse the adjournment was justified by the fact that the party in question knew in advance that the date of the hearing was not suitable and consequently, since he had not done anything, he was responsible for the situation.[342]

Similarly, the Federal Court held that the Appeal Board of the Public Service Commission had properly refused to grant an adjournment to a party which was dissatisfied with the tribunal's attitude and withdrew from the hearing without just cause.[343] The Court held that the decision in which the Umpire refused to adjourn the hearing was justified since the applicants argued that they had retained counsel only a few days prior to the hearing although they had received notice of the precise date 23 days earlier.[344]

339. *Ibid.*

340. *Canada M.E.I.* v. *Lundgren*, [1993] 1 F.C. 187.

341. *Gauthier* v. *Comité de discipline (comptables agréés)*, J.E. 87-124 (Que. C.A.).

342. *Piggott Construction* v. *United Brotherhood* (1974), 39 D.L.R (3d) 311 (Sask. C.A.).

343. *Millward* v. *Public Service Commission*, [1974] 2 F.C. 530 (C.A.).

344. *Krebs* v. *M.N.R.* [1978] 1 F.C. 205 (C.A.) cited in A-835-97(Kenny).

It emerges from these decisions that an administrative tribunal only rarely grants an adjournment when notice of hearing has been given within a reasonable time. If the notice allows the party to make all the changes in schedule required by the hearing date, an adjournment will be refused. A request for adjournment should not be designed to remedy a defect in the due diligence of the parties.[345]

An administrative tribunal's refusal to grant an adjournment may accordingly constitute a breach of the *audi alteram partem* rule if the adjournment is necessary for the production of evidence or a full defence, if the party requesting it is not itself at fault, or if serious harm could well be caused to this party if proceedings commenced immediately, unless the tribunal considers it urgent in the circumstances to proceed promptly.

Before a Board of Referees, granting an adjournment is in principle a discretionary power that must be exercised in accordance with the rules of natural justice.[346] The board may only grant an adjournment when there are "serious reasons".[347] Thus, an adjournment must normally be granted where the claimant makes it known in advance that he or she cannot attend the hearing for a valid reason.[348] The appellant is entitled to an adjournment when he or she receives the docket late,[349] when he or she is taken by surprise by the filing of an important document at the hearing[350] and when there is additional important information to submit to the board.[351] An adjournment will be granted if the appellant's representative can argue that an important element of the evidence is not yet available, such as the transcript of a criminal trial relating to the questions in dispute and likely to influence the result.[352] In general, an adjournment must be requested, otherwise the board cannot be criticized for not granting one.[353]

345. *Syndicat international des travailleurs unis de l'automobile* v. *Tremblay*, C.S. Mtl, D.T.E. 88T-722; *Taverne Le Relais Inc.* v. *Régie des permis d'alcool*, [1989] R.J.Q. 2490 (C.S.Q.).

346. CUB 15313 (Knight).

347. CUB 42398 (Hétu); CUB 46055 (Mercier: claimant's illness).

348. CUB 15313 (Knight: the claimant's husband had been involved in an accident); CUB 12787 (Fortier: transportation problems); CUB 12417 (Detlor: the claimant had just obtained a new job and did not wish to be away from it); CUB 26048 (Costisella: the claimant was studying abroad); CUB 6502 (Scebba: the claimant was away and his counsel did not attend the hearing); CUB 2735 (Birkholz); CUB 35124 (Clarke).

349. CUB 31622 (Lavictoire); CUB 8137 (Charbonneau-Morin).

350. CUB 26146 (Porter).

351. CUB 29357 (Rose: to the Board rather than to the Commission); CUB 23651 (Tesfai: new psychiatric evidence).

352. CUB 22525A (Grafeneder); CUB 13664 (Charest); adjournment to permit the Commission to investigate.

353. CUB 41319 (Majesté).

However, a party may not argue that it is entitled to an adjournment if the party is at fault, for example, by having given the Commission a wrong address.[354] As the Umpire has noted, it must be borne in mind that "these appeals to the boards of referees number in the thousands each year in Canada and the boards cannot always accommodate the dates preferred by counsel";[355] however, some claimants or their counsel make exaggerated demands with respect to their availability. A party that delays in retaining counsel does not have the right to an adjournment for that reason alone.[356]

A Board of Referees is not required to adjourn until the grievance submitted by the claimant to an arbitration tribunal has been heard and decided.[357]

Requests to the board for adjournment before the hearing opens or when it opens or even during the hearing are fairly frequent. Whether the decision is made by the chairperson or the board, it must be informed by a concern to ensure that the parties receive a full and complete hearing.[358] An initial ground that was found to be valid was that the claimant was not able to attend the hearing for a serious reason.[359] The fact that the claimant received the record late may also offer sufficient reason for an adjournment.[360] Absence because the claimant was studying abroad has also been found to be valid.[361] The same was true of waiting for an important element of the evidence, namely the transcript of a criminal trial involving the same facts.[362]

2.3.4 MOTION TO RECUSE OR DISQUALIFY

A party will normally request that the chairperson or a member of the board recuses himself or herself in a preliminary motion for one of the reasons set out in s. R. 78 or those recognized in administrative law.[363] The motion aims at ensuring the impartiality of the tribunal and its members.

354. CUB 7362 (Lasalle).

355. CUB 25118 (N. Morin).

356. A-845-97 (Kenny).

357. A-309-81 (Pérusse, 14/12/81).

358. CUB 15313 (Knight); CUB 12787 (Fortier), *Krebs* v. *M.N.R.* [1978] 1 (F.C.A.); CUB 23419 (Roza-Péreira).

359. CUB 12417 (Detlor); CUB 25118 (Morin) A-733-97 and CUB 36620A (Dhaliwal); CUB 11161 (Spinney).

360. CUB 31622 (Lavictoire); CUB 8137 (Chabonneau-Morin).

361. CUB 26048 (Costisella).

362. CUB 22525A (Grafeneder).

363. See Impartiality 1.1.2.2.

2.3.5 MOTIONS ON LINGUISTIC GROUNDS

The *Official Languages Act* applies to the Board of Referees in such a way that an appellant may request a hearing in either of the official languages. If this is not done when a hearing is requested under s. R. 80, it is possible to do so when the hearing opens.

Moreover, s. 14 of the Canadian Charter confers a right to the assistance of an interpreter before any court, including an administrative tribunal.[364] The same right is conferred by s. 2(*g*) of the *Canadian Bill of Rights*.[365] The assistance of an interpreter is obviously not limited to the official languages.[366] The right to an interpreter has been strongly supported by the courts even though it was not shown that a lack of translation might have influenced the outcome of the case, it is enough to demonstrate harm has been done.[367]

The members of the board are deemed to know the official language in which proceedings are conducted. However, it has been held that the fact that a member did not speak English did not constitute a breach of natural justice.[368]

364. CUB 11161 (Spinney).

365. *A.G. Ontario* v. *Reale*, [1975] 2 S.C.R. 624; *Weber* v. *M.M.I.*, [1977] 1 F.C. 750 (C.A.); *Lebka* v. *M.M.I.*, [1972] 2 S.C.R. 660; *Can. Javelin* v. *R.T.P.C.*, [1981] 2 F.C. 82.

366. CUB 17694A (Marier: case of a deaf mute).

367. A-380-97 (Caron); see also CUB 11992 (Amoroso); CUB 7436 (Sahtoa); CUB 6899 (Anderson); CUB 36309 (Kucyniak).

368. CUB 7786 (Buyck).

2.4 PLACE AND DURATION OF HEARING

The notice of hearing indicates the date, time and place of the hearing. Some problems may occur with respect to these matters, as we have seen, as well as the duration. These questions must be assessed in light of natural justice.

Since the board is a tribunal, the room where it sits must be adequate and sometimes sufficiently large to accommodate in comfort those who are interested and likely to testify. In one case, it was found that a hearing room that was too small limited the right to a fair hearing.[369]

The choice of location where the appeal will be heard has a certain importance: "boards of referees may take into account in their decisions the particular circumstances of a community. . . ."[370] It seems that a claimant may request that the case be heard in another location. However, if this request is accepted, the claimant may not later complain about it.

As far as the duration of the hearing is concerned, it must be sufficiently long so that it is possible to talk about a fair hearing in light of the characteristics of administrative justice: "the hearing takes place quickly and without formality".[371] Thus, the fact that the board has limited the duration of a hearing to 10 minutes may not in itself be criticized when the appellant has wilfully failed to adduce certain evidence.[372] The duration of a fair hearing may depend on the complexity of a case and the importance of the evidence the parties are entitled to present. Under a well-established practice, cases that do not involve particular problems are scheduled for a hearing that may last approximately one hour. It is recommended, however, that in his or her comments the chairperson not set out rigid limits since this could help to upset the parties.[373] The boards are certainly "subject to time constraints" and may impose time limits, albeit not without "informing the parties ahead of time".[374] A claimant should not be

369. CUB 3805 (Lajoie).

370. CUB 13092 (Hooper).

371. CUB 19778 (Reid).

372. A-308-81 (Olivier).

373. CUB 34956A (Damani: "you have five minutes to finish"). In a case involving an administrative tribunal, a court found that the warning given by the chairperson to the effect that the tribunal members had a plane to catch soon was contrary to natural justice: *Gagné* v. *Directeur de l'établissement de Baie-Comeau*, JE 91-807 (C.S.Q.).

374. CUB 34956A (Damani).

deprived of reasonable time to bring testimonial evidence even if he or she has provided the board with a written statement.[375] The board must sometime be patient and not shorten unduly the debates.[376] It may put an end to repetitive arguments or arguments of a doubtful relevance.[377]

375. CUB 19057 (Annesty); CUB 14876 (Hays: "a proper opportunity to explain her side of the story"); CUB 25396 (Mlinar: "a duty to hear out the claimant, within the limits of reason").

376. CUB (Schwenzner).

377. CUB 31523 (Morein: "the Board was not obliged to listen to lengthy and possibly irrelevant arguments from a claimant or his counsel but must bring them to the point").

CHAPTER 3

EVIDENCE

Although the Supreme Court has recognized that "the principle of the independence of administrative procedure and evidence" is broadly accepted, it "has never had the effect of limiting the obligation on administrative tribunals to observe the requirements of natural justice."[378] For example, there is a clear line of cases confirming that a refusal to admit admissible and relevant evidence constitutes a violation of natural justice tantamount to refusing to exercise jurisdiction.[379]

Administrative tribunals have the power to make decisions on the relevance and admissibility of evidence. For example, they may refuse to admit testimony or documentary evidence based on an objection or on their own motion. They may rule on objections immediately or admit the evidence under advisement and deal with the objections in their decision on the merits. Tribunals generally take the safer course and admit the evidence under advisement, as it is riskier to refuse to admit evidence whose relevance is being challenged than to allow it in subject to rejecting it in the final decision. It is generally not a denial of natural justice to take an objection under advisement.[380]

The issue of whether evidence is admissible or relevant can be regarded as one of natural justice or error in law.[381] Where boards of referees are concerned, it matters little whether it is one or the other, but in our opinion, it is preferable to view the issue as one involving the legal right of "each party . . . to make representations" under s. 83(1) of the EI Regulations.

The case law has established that tribunals must offer each party an equal opportunity to make its case in terms of presenting witnesses or documentary evidence. Each party must have an equal opportunity to produce evidence and make submissions.[382] By way of illustration, a

378. *Université du Québec à Trois-Rivières*, at 471, 485.

379. *Roberval Express* v. *Union des chauffeurs*, [1982] 2 S.C.R. 888 at 904; *Rajpaul* v. *Canada* (M.E.I.) [1987] 3 F.C. 257 (C.A.); *Nanda* v. *Canada (Public Service Commission)*, [1972] F.C. 277 (C.A.).

380. Garant, vol. 2, at 266, cited with approval in *Université du Québec à Trois-Rivières*, at 491.

381. *Chung* v. *M.E.I.* [1981] 2 F.C. 764; *De Vilbiss* v. *A.D.T.* (1982) 44 N.R. 416 (F.C.A.).

382. *Renaissance Internationale* v. *M.N.R.*, [1982] 83 D.T.C. 5024; *Disco-Bar Caprice* v. *Régie des permis d'alcool*, J.E.-83-380 (C.S.); *Via Rail* v. *Butterill* (1981), 130 D.L.R (3d) 289 (F.C.A.); *LaSalle* v. *Delierrer*, D.T.E. 92 T-157 (C.S.); A-913-84 (Goodwin).

tribunal cannot refuse to admit the evidence of a party to punish that party for a delay.[383] A tribunal cannot admit evidence unbeknownst to the other party,[384] such as after the hearing has ended[385] or before has begun.[386] If a tribunal admits one party's evidence, it must always allow the other to submit relevant evidence to contradict it.[387]

Theoretically, due to the principle of the autonomy of administrative evidence and procedure, civil and criminal evidentiary rules do not apply to administrative tribunals:[388] "[B]oards of referees, like other administrative tribunals, are not bound by the strict rules of evidence applicable in criminal or civil courts; they may, therefore, receive and accept hearsay evidence."[389]

However, natural justice may require that similar rules be applied, and such rules may be applicable by reference (in fact, some statutes expressly provide for this).[390]

Statutes and regulations are some of the places to look for evidentiary rules applicable to administrative tribunals. At the federal level, one should consult the *Canada Evidence Act* and the tribunal's enabling statute. If the tribunal sits in Quebec, the *Civil Code of Quebec* and *Code of Civil Procedure* cannot be overlooked since they are the province's *jus commune.* Even federal administrative tribunals must sometimes apply the codes, except when they are inconsistent with an applicable federal rule. Section 40 of the *Canada Evidence Act* specifically incorporates the laws of evidence in force in the province in which the proceedings are taken,

383. *Canada (A.G.)* v. *Leclerc*, [1979] 2 F.C. 365 (C.A), A-0689-98; CUB 10399A (Henri).

384. *Badjack* v. *Canada (Public Service Commission)*, [1982] 46 N.R. 41 (F.C.A.); *Yukon Conservation Society* v. *Yukon T.W.B.* (1982), 11 C.E.L.R. 99 (F.C); CUB 10602 (Ramirez); CUB 12094 (Castillo).

385. *Pfizer* v. *Deputy Minister of N.R.* [1977] 1 S.C.R. 456; *Canadian Pacific and Canadian National* v. *B.C. Forest Products* (1980), 34 N.R. 209 (F.C.A.) CUB 14341 (Masterson).

386. *Cathcart* v. *Public Service Commission* [1975] F.C. 407; CUB 32283A (Lomann).

387. *M.R.I.* v. *Noor* [1990] R.J.Q. 668 (C.A.); *Quebec (Commission des affaires sociales)* v. *Heu*,[1985] C.A. 205; *Berthelot* v. *Institut Leclerc*, [1986] R.J.Q. 2254 (Que. C.A.); *Fraternité des policiers* v. *Lachute*, J.E. 91-267 (C.A.).

388. *Mehr* v. *Law Society of Upper Canada*, [1955] S.C.R. 344; *A.G. Canada* v. *Restrictive Trade Practices Commission* (1981), 113 D.L.R (3d) 295 at 302 (F.C.); *Canada* v. *Mills*, (1985), 60 N.R. 4 (F.C.A.); *Re McKendry*, [1973] 1 F.C. 126 at 130 (F.C.A.); *Ager* v. *R.*, [1984] 1 F.C. 157 at 167.

389. A-1873-83 (Mills).

390. For example, see the *Immigration Act*, R.S.C. 1985, c. I-2, s. 68(3): "The Refugee Division is not bound by any legal or technical rules of evidence and, in any proceedings before it, it may receive and base a decision on evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case." See also s. 50 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, and s. 15 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 15.

subject to that Act and other acts of Parliament. This means the *Civil Code of Quebec* and *Code of Civil Procedure* apply to boards of referees unless there are federal rules in the area. In all other provinces, the existing *Evidence Act* also applies by reference under the same conditions.

The rules of evidence applicable to administrative tribunals are largely the result of flexible, pragmatic case law inspired by the rules of natural justice.[391] The cases seek a balance between two legitimate objectives: the search for truth, and the right to a fair hearing.

3.1 NATURE OF PROOF

Evidence plays a crucial role in the administration of administrative justice. If a tribunal makes a decision without having heard or considered evidence, its decision will be quashed on the ground that it denied natural justice or exceeded its jurisdiction (a distinction must be drawn between the complete absence of evidence and insufficient evidence, however);[392] the latter is a matter of probative value or weight.

From this stems the fundamental principle that a tribunal's decision must be based on evidence submitted by the parties and otherwise admissible evidence.[393] In other words, the evidence must have been tendered to the tribunal or otherwise validly admitted by it.

To make a decision based on the evidence means to use reliable information that tends logically to show the existence or non-existence of facts relevant to the issue to be determined. Lord Diplock humorously remarked: "the requirement that a person must base his decision upon evidence means ... that he must not spin a coin or consult an astrologer."[394] An administrative tribunal has not based its decision on the evidence if, for example, it has relied solely on a policy manual and has not considered the evidence in the docket.[395]

391. Y. Ouellette, at 256. In addition, see Macaulay and Sprague, vol. 2, c. 17; L. Verschelden, *La preuve et la procédure en arbitrage des griefs* (Montreal: Wilson & Lafleur, 1994); and J.C. Royer, *La preuve civile*, 2d. ed. (Cowansville: Yvon Blais, 1995); Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999); L. Ducharme, *Précis de la preuve*, 4th ed., Montreal: Wilson & Lafleur, 1993; Stanley Schiff, *Evidence in the Litigation Process*, Carswell, 4th ed. 1993; R.J. Delisle, *Evidence, Principles and Problems*, Carswell, 1996; G. Cudmore, *Civil Evidence Handbook*, Carswell, 1994.

392. Garant, vol. 2, at 202-212; Mullan, nos. 168-170.

393. A-309-81 (Pérusse: "The board had to decide in accordance with the evidence it had before it"); A-452-81 (Laplume); A-697-95 (Bunte).

394. *R.* v. *Deputy Industrial Injuries Commissionner, ex parte Moore*, [1965] 1 Q.B. 456 at 468 (C.A.).

395. *Canada Steamship Lines* v. *C.S.S.T.*, J.E. 85-690 (C.S.); *Société Asbestos* v. *C.S.S.T.*, [1984] C.S. 196; *Re Dale Corp. and Rent Review Commmission* (1983), 149 D.L.R (3d) 113 (N.S.C.A.).

The case law firmly establishes that the board must rule on all the evidence and not only on the statements and testimony given at the hearing.[396]

The tribunal is "statutory." This means that a statute sets out what must be proven through documents and testimony that expresses facts (events or situations observable through senses) or opinions. Whereas facts are objectively observable, opinions are subjective. Evidence can include either; and the distinction between fact and opinion is important because of its impact on probative value.

It would appear that information conveyed to or obtained by a tribunal in the ordinary course is not necessarily evidence. For example, the explanations of court support staff, a legal opinion obtained by a tribunal or one of its members, or the pleadings a solicitor of record, are not considered evidence in administrative law;[397] this applies to representatives' statements before the board.[398] Neither are the submissions of the Commission, which do not prove their contents *per se*.[399] The submissions contain the Commission's position, set out its claims and arguments, and refer to items of evidence (letters, documents investigation or interview reports).

The other important issue in this area is the requisite standard of proof in administrative tribunals. As we shall see, the question of which party has the burden of proof, and the possibility of the burden being shifted from one party to the other based on a system of presumptions, each depends on this standard.

According to the traditional principles of public and private judicial law, the standard in criminal proceedings is proof beyond a reasonable doubt, and is grounded in the constitutional principle of presumption of innocence. By contrast, the civil standard is proof on a balance of probabilities (preponderance of evidence). It has always been felt that administrative proceedings are civil and that, unless otherwise specified, the applicable standard is proof on a balance of probabilities.[400]

396. A-78-89 (Lepire); A-272-96 (Boucher); A-355-96 (Rancourt); A-737-97; A-737-97 (El Maki).

397. *Forbes* v. *M.E.I.* (1984), 55 N.R. 124 (F.C.A.); *Grillas*, at 584; *Can. Transport Commission* v. *Worldways Airlines*, [1976] 1 S.C.R. 751 at 756.

398. CUB 4633 (Bouliane).

399. CUB 17907 (Shewpal).

400. *Poirier* v. *Communauté urbaine de Montréal*, J.E. 83-254 (C.A.); *Ontario Human Rights Commission* v. *Etobicoke* (1982), 132 D.L.R (3d) 14 (S.C.C.); A-600-94 (Gates); A-897-90 (McDonald); CUB 32877 (Windsor); CUB 23188 (Allsop); CUB 7965 (Davis); A-396-85 (Falardeau); CUB 48021 (Desbiens); T-1182-93 (Charest); CUB 43153A (Purba); CUB 41567 (Melki).

Balance of probabilities (or preponderance of the evidence) means that existence of a fact is more likely than its non-existence, and that the issue to be determined is not only possible, but probable, rather than improbable. If the evidence is such that the tribunal can say: we think it more probable than not, the burden is discharged. If the probabilities are equal, it is not discharged.[401]

Administrative law has not treated this preponderance principle as a rigid and universal rule. Variations have been allowed in disciplinary matters and in cases where quasi-criminal sanctions might be imposed. Clear and convincing evidence is likely to be required in such circumstances, and has been in serious professional misconduct cases where the penalty is quasi-criminal,[402] and in disciplinary grievance arbitrations.[403] Some cases stand for the proposition that this standard applies to situations where a tribunal might suspend or revoke a licence on the basis that a law or regulation has been violated.[404]

Boards must have before them sufficiently detailed evidence in cases of penalties[405] and misconduct.[406] The difference between balance of probabilities and clear and convincing evidence is one of degree, and it is the court's or tribunal's role to establish what that degree is.

401. Sopinka, Lederman and Bryant, at 154 *et seq.*

402. M. Goulet, *Le droit disciplinaire des corporations professionnelles* (Yvon Blais, 1993); *Béliveau* v. *Comité de discipline du Barreau*, [1992] R.J.Q. 1822 (C.A.).

403. F. Morin, *L'arbitrage des griefs* (Cowansville: Yvon Blais).

404. Y. Ouellette, at 279.

405. A-897-90 (McDonald).

406. A-636-85 (Joseph); CUB 22544 (Johnston); CUB 21645 (Bennett); CUB 17204 (Godoy).

3.2 BURDEN OF PROOF

Theoretically, a person who is seeking an authorization or benefit or is challenging a decision must satisfy the tribunal as to his or her right or eligibility. In this respect, the proceedings are adversarial and not inquisitorial. Although it has often been said that the burden of proof is on the applicant or appellant,[407] this is not an immutable principle. There are many kinds of administrative tribunals, and owing to the principle that tribunals are in charge of evidence and procedure, there are numerous frameworks in this regard. The frameworks vary according to the legislation and the kinds of facts involved. The burden of proof may be reconfigured, or even shifted from the government to the citizen, if social welfare is involved, the parties are economically unequal, or information in the possession of the government places it at an advantage.

It should be borne in mind that the burden of proof issue should not be confused with the order in which a tribunal hears the parties and their witnesses — a procedural issue that falls within that tribunal's discretion.[408] He or she who bears the burden of proof must take the initiative to persuade the tribunal and "bear the consequences of any gap in the evidence".[409]

The burden of proof is sometimes reversed in professional discipline cases and disciplinary grievance arbitrations, where the procedure is considered adversarial because the citizen is being accused of a wrongdoing that must be proven to the tribunal. The disciplinary body or employer must discharge the burden of proof;[410] to hold otherwise would be to require the professional or employee to establish his or her innocence without hearing the evidence against him or her. That would be a denial of natural justice.

In discrimination complaints before human rights tribunals, the burden is partially shifted to the party accused of discrimination. If the complainant presents *prima facie* proof of discrimination, the employer or other party

407. *Martelli* v. *Société de l'Assurance-Automobile du Québec*, J.E. 95-1803 (C.S.); *Régie de l'Assurance-Automobile du Québec* v. *C.A.S.*, J.E. 87-161 (C.S.); *Saine* v. *C.A.S.*, [1994] R.J.Q. 2361 (C.S.).

408. *Union Gas* v. *TransCanada Pipeline*, [1974] 2 F.C. 313; *A.G. Canada.* v. *Restrictive Trade Practices Commission.*

409. A-3-96 (Gagnon).

410. F. Morin and R. Blouin, at 331.

suspected of discrimination must show its action was justified under an exception provided by law or that reasonable accommodation had been made.[411]

In administrative tribunals that deal with social welfare issues, the tendency is to balance the burden of proof between the citizen and the state. Y. Ouellette writes:

> [TRANSLATION] The principle of the autonomy of evidence has made it possible for administrative tribunals to adapt to circumstances that appeared to call for them to exercise discretion and apply their creativity. The burden of proof should not be assigned on an impulse, based on what others are doing. The choice should stem from considered thought about the stakes involved and the inequalities between the parties. Given the climate of confrontation it would engender between citizens and the state, it might seem fundamentally unfair, and perhaps even inconsistent with the spirit of social welfare legislation, to require the victim of a work accident or a social assistance recipient to bear the burden of proof. The state should neither act nor be seen to act as the adversary of its citizens, because its role is to give citizens that to which they are entitled — nothing more; nothing less. Thus, in cases such as these, owing in part to the unequal power involved, the procedure can be inquisitorial rather than adversarial, whether or not the claimant is represented. On appeal, the government should disclose the entire case to the tribunal, whether favourable or unfavourable to the citizen. . . . [412]

Under s. 49(2) of the EI Act, the Commission must give the benefit of the doubt to the claimant on the issue of whether any circumstances or conditions exist that have the effect of disqualifying the claimant under s. 30 or disentitling the claimant under s. 31, 32 or 33, if the evidence on each side of the issue is equally balanced. This provision effects a kind of lightening of the burden of proof before the tribunal, but it does so under conditions specified by the statute, i.e., when the evidence of the claimant and the evidence of the Commission are of equal weight.

411. *Holden* v. *C.N.R.* (1990), 112 N.R. 395 (F.C.A.); *Canada (M.D.N.)* v. *Montgrain*, [1992] 1 F.C. 472 (F.C.A.); *Ontario (Human Rights Bd.)* v. *Simpson-Sears* [1985] 1 S.C.R. 536; *Central Alberta* v. *Alberta* [1990] 2 S.C.R. 489.

412. Y. Ouellette, at 274-275.

Our cases are quite clear on the allocation of the burden of proof between the parties. In the following kinds of cases or situations, it can be regarded as shared.

(a) Establishing entitlement to regular benefits under ss. 14 and 35 of the EI Regulations: claimants must show they meet the requisite conditions (s. 49 of the EI Act) and the Commission must verify whether the claimant truly meets them (s. 9 of the EI Act).[413]

(b) Labour dispute cases: the Commission must prove that the loss of employment was the result of a work stoppage attributable to a labour dispute.[414] The claimant must prove he or she satisfies the requirements, i.e., that he or she is not participating in, financing or directly interested in the labour dispute (ss. 49 and 36(4) of the EI Act).

(c) Penalty cases: the Commission must show the claimant or employer knowingly made a false or misleading claim or declaration. The claimant or employer must either show that the declaration or claim was not false, or that it was not made knowingly.[415]

(d) The issue of availability for work: the claimant must show that he or she is willing to work and is seeking suitable employment; the Commission must show that the claimant is not available for work for an unacceptable reason.[416]

(e) Voluntarily leaving employment: the Commission must show the claimant voluntarily left his or her employment on his or her own initiative. The claimant must show he or she had a valid reason for doing so within the meaning of s. 29(c) of the EI Act and s. 51 of the EI Regulations.[417]

(f) Determination of earnings for the purpose of entitlement to benefits: the Commission must collect the rejected information to determine the earnings and how they should be allocated. The

413. A-541-85 (Harbour).

414. A-396-85 (Falardeau); A-1062-92 (Touzel).

415. A-694-94 (Purcell); A 600-94 (Gates); CUB 21293 (Weedon); CUB 23162 (Bolduc); CUB 12220 (Leppers).

416. A-686-93 (Stolniuk); A-499-94 (Faltermeir); A-736-95 (White); A-1472-92 (Whiffen).

417. A-269-94 (Ekosky); CUB 21970 (Staples).

claimant must report all money paid or payable to him or her and either prove that it was not earnings, or that it should not be allocated in the way it was allocated.[418] In the following instances, the claimant alone is considered to have the burden of proof.

In the following instances, the claimant alone is considered to have the burden of proof.

(a) Claims for a category of special benefits.[419]

(b) Antedated claims for benefits: the claimant must show he or she meets the conditions and has a valid reason for filing late.[420]

(c) Refusal of employment: the claimant must show the employment is not suitable or that he or she refused it for a valid reason.[421]

(d) Absence from Canada: claimants who leave Canada without permission must show they satisfy the conditions of s. 55 of the EI Regulations.[422]

(e) Unreported earnings: a claimant who has neglected to report earnings must either show that they are not wages, or that they are not from employment within the meaning of s. 15 of the EI Regulations.[423]

(f) Determination of a week of unemployment (ss. 9 and 11 of the EI Act and ss. 29-32 of the EI Regulations): the claimant must establish he or she did not work the full week.[424]

(g) Requests for an amendment under s. 120 of the EI Act: the claimant must show new facts or another ground recognized by administrative law.[425]

418. A-841-96 (Fox); A-136-96 (Caron-Bernier).

419. A-370-95 (Peterson).

420. A-172-85 (Albrecht).

421. A-396-85 (Falardeau); A-800-80 (Moura).

422. CUB 23424 (Bosdet); A-370-95 (Peterson).

423. CUB 36750 (Wilson); CUB 39407 (Foster); CUB 26791 (Reid); CUB 36690 (Hyde).

424. A-245-97 (Lazar); A-999-96 (D'Astoli).

425. A-185-94 (Chan).

(h) Special benefits: the claimant must prove inability to work because of sickness or injury.[426]

(i) If the claimant has made a seemingly false or incorrect statement, the burden of proof is reversed.[427]

Finally, the burden is shifted to the Commission and the employer in cases of dismissal for misconduct. The Commission must establish that the loss of employment is the result of the employee's disciplinary misconduct.[428] The Commission cannot merely allege that there has been a conviction following criminal proceedings; it must adduce "more evidence" before a disqualification on the basis of misconduct can be sustained.[429]

3.3 ADMISSIBILITY OF EVIDENCE

Admissibility, relevance and weight are distinct issues. Inadmissible evidence is evidence that cannot be considered, but writers tend to confuse the admissibility of evidence and its relevance. Evidence is relevant if it is directly or indirectly related to a fact to be determined, and is capable of advancing the inquiry and making the existence or non-existence of a fact more probable. The weight or probative value of that evidence is a matter for the tribunal to decide. In administrative justice, questions of admissibility are not often raised; the main concern is the probative value of the evidence, provided that it is relevant.

Nevertheless, issues related to judicial notice, evidence obtained under conditions that bring the administration of justice into disrepute, executive privilege in the public interest, professional privilege, self-incriminating testimony and hearsay will each be considered from the point of view of admissibility. A discussion of relevance and weight will follow.

426. CUB 8121 (Brinton); CUB 4496 (Lamontagne).

427. CUB 46026A (Piché); CUB 45464 (Ficara: It is up to him to give an explanation and convince the board that the statements were made in good faith and not knowingly false).

428. A-130-96 (Meunier); A-3-96 (Gagnon); A-732-95 (Fakhari); A-241-82 (Davlut).

429. CUB 43119A (Oliver).

3.3.1 JUDICIAL NOTICE

Judicial notice is a court's or tribunal's personal recognition of certain generally known facts whose accuracy cannot be reasonably questioned; in other words, they need not be proved. The court or tribunal should take notice of such facts on its own.[430] In French, the term is known either as "connaissance d'office" or "connaissance judiciaire."[431] The *Civil Code of Quebec* states the principle as follows: "Judicial notice shall be taken of any fact that is so generally known that it cannot reasonably be questioned" (art. 2808).

Notice is taken of the law and certain facts. Tribunals take notice of their enabling statute, general laws and regulations and easily accessible cases, and may do their own legal research without depending on the parties.[432] One such instance of this would be where the parties are not represented by counsel. However, it has been suggested that if a tribunal or court intends to rely on cases the parties have not cited, the cases should be disclosed to the parties so they have the opportunity to comment them.[433] This situation would not arise frequently before a Board of Referees.

The first kind of facts of which notice is taken are facts generally known to the public.[434] The second, noticed by specialized tribunals, are generally known facts, and information and opinions that fall under the tribunal's area of expertise.[435] This rule is sometimes expressly set out in a statute.[436]

Judicial notice must be used with caution and should not be the basis for a tribunal to bypass or ignore reliable or uncontradicted evidence. Y. Ouellette recommends the following precautions:

430. *R.* v. *Potts* (1982), 36 O.R. (2d) 195; Cudmore, at 502; Sopinka, Lederman and Bryant, c. 19.14 to 21.

431. *Montana Indian Band* v. *Canada*, [1994] 1 F.C. 425; see *Canada Evidence Act*, s. 18.

432. A.-184-95 (Borghi: "Courts are not bound to consider only those authorities submitted by counsel").

433. *D. Stephano* v. *Lenscrafters*, [1994] R.J.Q. 1618 (C.S.); *IWA*, at 302-303.

434. *Calder* v. *A.G. British Columbia*, [1973] S.C.R. 313 at 346 (past or contemporaneous historical events).

435. *Air Canada* v. *Mirabel* [1989] R.J.Q. 1164 (C.A.); *Montréal (C.U.M.)* v. *Propriété Gunter Kaussen*, [1987] R.J.Q. 2642 (C.P.); *CUPE* v. *N.B. Liquor Corp.*, [1979] 2 S.C.R. 227 at 235-6; *Re Ringrose and College of Physicians of Alberta* (1978), 83 D.L.R (3d) 680 (Alta. C.A.); *Huerto* v. *College of Physicians* (1996), 133 D.L.R (4th) 100 (Sask. C.A.); A-708-95 (Dunham: " . . . it may have regard to facts that come to its own attention"); CUB 8641B (Laughlan: "their own experience and their understanding of . . . their own community").

436. *Immigration Act*, R.S.C. 1985, c. I-2, s. 68; *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 16.

> [TRANSLATION] Certain precautions should be taken to prevent judicial notice from being challenged. If a decision-making body intends to use a physically identifiable information source such as a public document, it should give notice of its intent to do so and allow the parties to refute or comment it, unless the information is routine or some other solution is justified by exceptional circumstances and the public interest.[437]

Y. Ouellette further states:

> The problem is naturally more complex when the information source is not physically identifiable, as with memory or experience acquired over time. In quasi-judicial proceedings, knowledge is key to assessing the evidence and an expert should not be expected to act as a novice. However, when this knowledge is used to counter evidence or in place of evidence, the parties are taken by surprise. Decision makers should generally give them notice that they intend to use this actual or purported knowledge so that it may be challenged.[438]

We believe the last comments are difficult to apply. It would seem rather onerous to require a tribunal to reopen the hearing and seek the parties' comments. If the experience gained by members of a tribunal in its field of expertise is involved, it is difficult to imagine how it could be the basis of argument at the hearing. Judicial notice should not be confused with evidence gathered in a private investigation conducted by the tribunal or one of its members. This kind of evidence would simply have been gathered or obtained unbeknownst to the parties.

A tribunal should not allow specific information into the docket unless expressly authorized by law like boards of referees under s. 82 of the EI Regulations.[439] It should not conduct a personal or private investigation into a case before it, by means of private or secret interviews with a party. Such an initiative would violate the principle of natural justice. Tribunals are bound by a constant duty of transparency.

437. Y. Ouellette, at 317; Macaulay and Sprague, vol. 2, c. 12-191.

438. *Ibid.*

439. CUB 9493 (Perreault: letter from the employer obtained by the Chairperson); CUB 39716 (Batterham: Chairperson personally contacted the claimant's employer); CUB 40177A (Booth: During the proceedings . . . the Board's chairperson sought advice from one of the Commission's advisers); CUB 32283A (Lomann).

It is not uncommon for tribunals to consult general dictionaries and manuals.[440] Some say that specialized or technical publications in fields such as medicine, engineering or chemistry do not contain the kind of evidence that a tribunal can judicially notice. In our opinion, a clear distinction should be drawn between situations where such works are consulted to gain an understanding of expert evidence and situations in which they are used to refute it. In the latter cases, tribunals should be very careful. They should advise the parties and even reopen evidence if necessary.[441]

Visits made by tribunal members without the parties being present or knowing about the visits may be likened to judicial notice. They could be considered unfair or suspect if they are intended to serve as evidence rather than a means by which to understand the evidence tendered by the parties at the hearing.[442] If a visit is necessary, the parties should normally be allowed to attend so that it can be in the record as evidence. The tribunal could order it, if necessary. We doubt that it could be useful to a Board of Referees.

3.3.2 EVIDENCE OBTAINED UNDER CONDITIONS THAT BRING THE ADMINISTRATION OF JUSTICE INTO DISREPUTE

Evidence may have been obtained in violation of laws or human rights charters. Such evidence could include electronic surveillance, recording without permission or unreasonable searches or seizures. At common law, evidence obtained through illicit or irregular devices is generally admissible.[443] In Quebec, the Civil Code does not exclude illegal evidence as such but only "evidence obtained under such circumstances that fundamental rights and freedom are breached and its use would tend to bring the administration of justice into disrepute" (art. 2858).

Section 24 of the Charter, which applies to "any court," does not exclude evidence obtained illegally or in contravention of an ordinary statute. It excludes evidence obtained in a manner that infringed or denied a Charter right or freedom, if the admission of it would bring the administration of justice into disrepute.

440. *SKF Canada* v. *Deputy M.N.R.* (1983), 47 N.R. 61 (F.C.A.).

441. *Pfizer* v. *Deputy M.N.R.*, [1977] 1 S.C.R. 456.

442. Y. Ouellette, at 309-310.

443. *R.* v. *Wray*, [1971] S.C.R. 272; Sopinka, Lederman and Bryant, c. 9.

Does s. 24 apply to all administrative tribunals? On the one hand, the Supreme Court has held that a grievance arbitration tribunal is a competent court within the meaning of s. 24.[444] On the other hand, by reason of its structure and functioning, the language of its constituting statute, its composition, and the fact that it lacks the power to subpoena witnesses and is not required to base its decisions exclusively on the evidence adduced at the hearing but may also consider other available information, the Court has held that the National Parole Board is not such a court.[445] Where, between these two markers, does this place the Board of Referees?

We find it difficult to imagine that an administrative tribunal could admit documentary or testimonial evidence obtained in violation of the Charter if a court could not do so. The Charter applies to administrative tribunals and administrative tribunals must apply it. In our opinion, it applies to issues of admissibility. Although the criteria established by the Supreme Court to determine whether the admission of evidence would bring the administration of justice into disrepute are complex, this in itself is no reason to exempt administrative tribunals from applying them.[446] Situations placing this issue before a Board of Referees would of course be rare, but not impossible.

3.3.3 THE PUBLIC INTEREST ADMINISTRATIVE PRIVILEGE

Traditionally, the Crown, i.e., the Executive, enjoyed a privilege under which, even in judicial proceedings, it could choose not to disclose documents or information if it believed such disclosure would not be in the public interest. The case law has narrowed the scope of this privilege and it is now codified in the *Canada Evidence Act* (s. 37).

Under that Act, a minister or other person interested may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed "on the grounds of a specified public interest." Only a superior court may

444. *Weber* v. *Ontario Hydro*, [1995] 2 S.C.R. 929.

445. *Mooring* v. *Canada*, [1996] 1 S.C.R. 75.

446. They were mostly developed in criminal cases, but some of their development can be traced to civil cases: Royer, at 633 *et seq.*

determine whether the certification is well founded. Thus, if the affidavit is filed in an administrative tribunal, then depending on whether the tribunal is federal or provincial, the issue must either be referred to the Federal Court or a provincial superior court. If the objection was made on the basis that disclosure would be "injurious to international relations or national defence or security," the objection may be determined only by the Chief Justice of the Federal Court, or such other judge of that Court as the Chief Justice may designate (s. 38). Last, if the affidavit was filed by a minister of the Crown or the Clerk of the Privy Council, disclosure of the information must be "refused without examination or hearing of the information by the court, person or body." The Act specifies what is meant by confidential Privy Council information (s. 39).

Objections of this kind can only be heard by tribunals or bodies that have the power to compel the production of documents. Thus, boards of referees generally cannot hear them.

In a case involving the first category of objection, it was held the applicant must establish a relationship between the content of the documents and the objective sought. A court will dismiss the government's objection if the citizen needs to know the allegations against him or her in a disciplinary proceeding or a parole hearing, unless the disclosure would reveal an informant's identity.

The Federal Court has held it has the power to examine documents, and in some cases to dispense with such an examination, in cases involving objections to protect international relations or national defence or security. The claimant must show that the interests of justice outweigh the protection contemplated in the legislation. The court must consider the immediate purpose of the request for information, how important disclosure would be to achieve the objective sought, the relevance of that objective in the dispute, and the financial, social and moral interest at stake.

Based on the view that no public interest is more important than national security, the Federal Court has been disinclined to deny this protection.[447] It is in fact the minister, not the judge, who must invoke it, by means of a duly prepared certificate, not based on a practice rule. Unless the government pleads immunity, it is subject to the general rules that allow documents to be subpoenaed.

447. *Goguen and Albert* v. *Gibson* [1983] 2 F.C. 463 at 479; *Aurie* v. *Canada*, [1989] 2 F.C. 229.

In a case involving the protection of confidential Cabinet information under s. 37 of the Act, the Federal Court of Appeal distinguished between the disclosure of the information and its admission into evidence. The provision only contemplates disclosure. And Parliament's intent was to limit considerably the absolute discretion enjoyed by the Executive under the law as it existed beforehand. Parliament has specified the meaning of Cabinet documents and information and has provided for exceptions. Thus, the Court has a kind of supervisory function, which allows it, *inter alia*, to verify that objections comply with the letter of the law.

Canada also has an *Official Secrets Act* that applies to administrative tribunals and could prevent certain state secrets from being admitted.[448]

The Board of Referees does not have the power to compel the government to do anything. It must apply to the Federal Court if it wishes to do so. A claimant or other citizen who needs information which the government refuses to disclose may also make a request to the chairperson of the Board of Referees pursuant to s. 82 of the *EI Regulations*, and the chairperson may refer any issue in this regard to the Commission for investigation and report. The *Access to Information Act*[449] is also available to citizens.

3.3.4 PROFESSIONAL AND MEDICAL SECRECY

Administrative tribunals may be bound by a statutory duty of professional secrecy. However, the statutes that contain them are provincial. Are federal boards bound?

We have seen that provincial professions statutes do not apply to the federal Crown, but professional privileges designed to protect citizens from disclosure of information obtained by professionals as part of a confidential relationship are another question entirely. Moreover, at common law, there are equivalent principles governing professional confidentiality of lawyers and other professionals.

In Quebec, s. 9 of the *Charter of Human Rights and Freedoms* states that "[e]very person has a right to non-disclosure of confidential information" and that "[n]o person bound to professional secrecy by law . . . may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by

448. R.S.C. 1985, c. O-5.

449. R.S.C. 1985, c. A-1; CUB 10602 (Ramirez).

the person who confided such information to him or by an express provision of law." In addition, "[t]he Tribunal must, *ex officio*, ensure that professional secrecy is respected." Since common law rules in other provinces provide the same protection, we believe federal tribunals in Quebec must apply the province's professional secrecy framework.[450] In other provinces, the provincial statutory framework will also apply according to s. 40 of the *Canada Evidence Act.*

The confidentiality of medical records is addressed mainly in provincial statutes,[451] but the issue arises also before federal administrative tribunals. However, administrative tribunals may require the production of medical records, and patients may expressly or implicitly consent to the disclosure of such records. For example, any person who puts his medical condition in issue before a court or tribunal has implicitly waived the confidentiality of his medical records.[452]

3.3.5 SELF-INCRIMINATING TESTIMONY

The right against the use of self-incrimination testimony in other proceedings, guaranteed by s. 13 of the Charter, applies only to criminal cases. The *Canada Evidence Act* does confer similar protection to parties appearing before federal tribunals, although it does not allow a witness to refuse to answer a question on the grounds that the answer might tend to incriminate him or establish that he is liable in a civil suit. The right of a person charged with an offence not to be compelled to be a witness in proceedings against that person guaranteed under s. 11 of the Charter does not apply in employment insurance law.[453] The witness must answer, but that answer cannot thereafter be used against him in criminal proceedings, except for perjury or the giving of contradictory evidence (s. 9). The principles of natural justice require the Commission or the board to inform the witness that his or her testimony cannot be used against him or her before another tribunal.[454]

450. With regard to those rules, see Royer at 710 *et seq.*; Sopinka, Lederman and Bryant c. 14.

451. In Quebec: *An Act respecting health services and social services*, R.S.Q., c. S-4.2, s. 7; *An Act respecting work accidents and . . .* R.S.Q., c. A-3.001, ss. 38, 39.43 and 208. Each province has statutes to the same effect.

452. *Frenette* v. *La Metropolitaine*, [1992] 1 S.C.R. 647; *Pilorge* v. *Desgens*, [1987] R.D.J. 341 (C.A.); *Bongar* v. *Ontario (Health Professions Board)*, (1997), 147 D.L.R. (4th) 382 (Ont. Div. Ct.).

453. CUB 46026A (Piché).

454. CUB 41600 (Fontaine).

3.3.6 HEARSAY

Hearsay is testimony or written evidence in court of a statement made out of court, the statement being offered as an assertion to show the truth of the matter asserted therein, and thus relying for its value on the credibility of the out-of-court assertion.[455] Hearsay is commonly understood as "a statement of a fact made by a person who did not personally witness the fact, but was told about it by someone else".[456]

It is evidence given by a person but based on something that person heard another person (who either saw or heard the event) say. It includes facts or events based on a report or record the person read or a television program he or she watched. Hearsay evidence given to a tribunal is indirect evidence; the person who is giving it is conveying what direct witnesses of the event have said.

Since administrative tribunals are in charge of evidentiary matters, they may allow any evidence, even if it is indirect. As a general rule, hearsay evidence is admissible before quasi-judicial tribunals provided they comply with the rules of natural justice. As Lord Denning has said: "Hearsay is clearly admissible before a tribunal. No doubt in admitting it, the tribunal must observe the rules of natural justice."[457]

Based on this rule, courts have overruled objections to the admission of hearsay evidence.[458] Tribunals are in charge of evidence, and courts should only review the manner in which they deal with it if they have run afoul of the rules of natural justice.[459] Thus, tribunals must give a person who is challenging the evidence all the necessary opportunity to be heard and speak out against it.[460]

The admission of hearsay may be looked upon from a variety of perspectives. Some tend to associate it with cross-examination and hold that the natural justice is violated if cross-examination on hearsay

455. McCormick, *Evidence*, 2nd. ed. 1972, at 584; R. v. L. (D.O.), [1993] 4 S.C.R. 419, 456.

456. Law Reform Commission of Canada, *Report on Evidence*, 1975, at 69.

457. *T.A. Miller Ltd.* v. *Minister of Housing and Local Government*, [1968] 1 W.L.R. 992 at 995; *Teasdale* v. *Commission de contrôle des permis d'alcool du Québec*, [1974] C.S. 319 at 320; *Khan* v. *College of Physicians* (Ont.) (1992) 94 D.L.R. (4th) 193 (Ont. C.A.).

458. *Soccio* v. *Régie des alcools du Québec et al.*, [1972] C.A. 283; *Ness* v. *Côté*, [1976] C.S. 1016; *Journal de Montréal* v. *Syndicat des travailleurs*, [1995] R.D.J. 33 (C.A.).

459. *Journal de Montréal* v. *Syndicat des travailleurs*, *supra* at 42.

460. *Ibid*; *Charron* v. *Madras*, J.E. 83-1160 (C.A.).

evidence is not permitted: "Even though that evidence may well have been admissible we are all of the view that the employee did not receive a fair hearing in the circumstances. His counsel had no real opportunity to cross-examine on the evidence that was presented."[461]

Others believe that cross-examination is not necessary, and that the party need only have the opportunity to contradict the evidence in some way: "... the tribunal must observe the rules of natural justice, but this does not mean that it must be tested by cross-examination. It only means that the tribunal must give the other side a fair opportunity of commenting on it and of contradicting it."[462]

Thus, hearsay evidence is allowed in administrative law, but tribunals must ensure the opposing party has a fair opportunity to address that evidence, though not necessarily through cross-examination.

There is no problem securing the admission of hearsay admitted in proceedings before the Board of Referees,[463] but if it is the only evidence or the main evidence, the board would be well advised to state why it is satisfied by it.[464] The board must [TRANSLATION] "assess the probative value of such evidence in light of all the evidence".[465] The question of its weight will be discussed later.

461. *Re Girvin et al. and Consumers' Gas Co.* (1974), 40 D.L.R (3rd) 509 at 512 (Ont. H.C.); *Bombardier M.L.W. Ltée* v. *Métallurgistes unis d'Amérique*, [1978] C.S. 554 at 558; *Lischka* v. *Criminal Injuries Comp.Bd.* (1982), 37 O.R. (2d) 134 (Div. Ct.); CUB 23965 (De La Soie); CUB 18895 (Leblanc).

462. *T. A. Miller Ltd.* v. *Minister of Housing and Local Government*, [1968] 1 W.L.R. 992 at 995; *Re Public Accountancy Act and Stroller* (1961), 25 D.L.R (2d) 410 at 426 (Ont. C. A.).

463. A-1873-83 (Mills); A-44-91 (Harnish); CUB 39504 (Gagnon); CUB 47902 (Bisiri); CUB 4256 (Kokkoris); A-291-98 (Morris).

464. CUB 34446 (Desruisseaux).

465. CUB 47734 (Gendron).

3.4 TYPES OF EVIDENCE

It is not easy to categorize the kinds of evidence tendered in tribunals or admitted or considered by them. Evidence can be documentary, testimonial, or circumstantial; there is affidavit evidence, expert evidence, scientific evidence, physical evidence, representative evidence; also considered to be evidence are judicial notice, presumptions, admissions, confessions, etc.[466]

With direct evidence, the means (testimony, writings, admission, material evidence) is directly and closely linked with what one desires to demonstrate.[467] Indirect evidence is evidence whereby the means (testimony, writings, etc.) may be used to infer what one desires to demonstrate.[468] The common types of indirect evidence are hearsay, circumstantial evidence, similar fact evidence and factual presumptions.[469] Circumstantial evidence involves the use of clues of time, place or people to infer a fact or an occurrence.[470] Similar fact evidence involves presenting facts or situations that are comparable to the disputed fact.[471]

3.4.1 WRITINGS (DOCUMENTARY EVIDENCE)

Proof by writing is proof made by tendering documentary evidence that may or may not be in the form of an instrument.[472] Instruments are prepared to memorialize a fact. They include authentic acts prepared by public officer (e.g., orders, minutes, notarized contracts) and private writings (i.e., ordinary writings, such as contracts, which record an agreement to a juridical act). All other ordinary documents are writings,

466. Sopinka, Lederman and Bryant, at 9-20.

467. Example: the witness claims to have seen the claimant fight with another worker at a factory. Another example: the document produced describes the conditions of the employer's loan to the claimant. Another example: the claimant admits at the hearing that he took a vacation in Maine.

468. For example: using a written report of a telephone conversation a fact is inferred such as the claimant is not available to work, repeated refusals to accept suitable employment, or absence from Canada. Other examples: CUB 34500 (Klair); CUB 43398 (Daley); CUB (Frankle); CUB 11648 (Martin).

469. For hearsay see 3.3.6; for factual presumptions see 3.4.3.

470. Example: in a case of theft of materials from the employer resulting in dismissal for misconduct (the claimant's car was seen in the parking lot of the factory on the night of the robbery, the claimant is one of the only people with a key to the warehouse, his wife did not know where he was on the night of the robbery). Another example: CUB 43154A (Purda).

471. This would be used to demonstrate a person's bad reputation or lack of credibility, for example.

472. Sopinka, Lederman and Bryant, c. 18.

but not instruments. All kinds of writings are admitted by boards of referees subject to weight, and this includes documentation or reports issued by the Commission.[473]

3.4.2 TESTIMONY

Testimony is a statement by which a person relates facts of which he has personal knowledge, or by which an expert gives an opinion. Ordinary witnesses may also be allowed to state an opinion, or even testify about facts or situations of which they have no personal knowledge (i.e., hearsay). Lawyers cannot be considered expert witnesses because this would encroach on the function of the judge, who is supposed to know the law. It is up to each party to call and present its own witnesses.[474] The parties as well as their representatives may testify.[475]

3.4.3 PRESUMPTIONS

Proof by presumption must involve relevant facts that make it possible to infer the existence of a disputed fact by inductive reasoning. A presumption is an inference established from a known fact to an unknown fact. It is often established by operation of law or from facts left to the discretion of the court. Similar definitions are given in the common law provinces in statutes or the case law.[476]

Legal presumptions are created by law and may depend on certain facts being established and perhaps challenged by the other party.[477] Once those facts are established, the effects of the presumption, including a shifting of the burden of proof, are triggered. Presumptions may be absolute or simple; only simple presumptions may be rebutted by evidence to the contrary.[478]

473. CUB 15000B (Harnish).

474. CUB 26487 (Pelletier); CUB 10071 (Drul).

475. CUB 30792 (Gbessaya).

476. Sopinka, Lederman and Bryant, at 97 *et seq.*

477. The best example is the word "knowingly" in s. 38 of the EI Act: CUB 37761A (McInnes); CUB 20891 (Nivisi); CUB 12220 (Leppers); CUB 19933 (Barkley); and see A-336-94 (Jouan) and A 58-94 (Veillet); CUB 24001 (Morin). Another example, s. 36 of the Regulations regarding settlement monies in the allocation of earnings: CUB 44266 (McConnell); CUB 15122 (Mayor); A-1195-84 (Swallowell).

478. A-637-86 (Brière: an example of absolute presumption is s. 134 of the Act regarding documents that prove their content).

Factual presumptions are consequences a court or tribunal draws from one or more known facts to an unknown fact.[479] A single fact is often enough to trigger a presumption, as with the presumption reflected in the maxim *res ipsa loquitur* [the thing speaks for itself].[480]

Both types of presumption employ the same method: known facts are employed to get to unknown facts. The difference between the two lies in whether or not the court or tribunal has discretion: whereas absolute presumptions are binding, simple presumptions are not.

3.4.4 ADMISSIONS

An admission is an oral or written acknowledgement of a fact that produces adverse legal consequences for the person that made it. It may be judicial or extrajudicial. An admission is judicial if it was made by testimony or in pleadings filed with the court in the proceedings in which it is invoked.[481] An admission is extrajudicial if it is made outside the proceedings, usually in statements made to an investigator or public servant, or letters sent to the Commission or an employer.[482]

Only material facts and juridical (i.e., legally operative) acts can be admitted; the law cannot be admitted.[483] This implies a distinction between fact and law.[484] A distinction must also be drawn between admissions, and mere opinions or impressions.

The admission of a fact or conduct must be taken into consideration by the board. Ignoring an admission is a serious error that may lead to the Umpire's intervention.[485]

479. A-719-91 (Landry: a full-time student is presumed not to be available for work); CUB 26565A (Morissey); CUB 34086 (Boggs); A-27-94 (Zysman: a person who is setting up a business on a full-time basis is presumed to be working in a full-time basis); A-662-97 (Lemay); A-664-92 (Turcotte); CUB 8098 (Leblanc: someone who admits to being on vacation); CUB 7926 (Gagnon); *Brière* v. *CEIC*, [1989] 3 F.C. (F.C.A.); CUB 43119A (Oliver: admission before a criminal court).

480. For example, if the door was broken in, it may be presumed that that there was a forced entry.

481. A-841-96 (Fox: admission by the Commission); CUB 27484 (Food Group Inc.: a guilty plea).

482. A-909-96 (Reny: admission by the claimant).

483. Examples: an employer admits she lent money to her former employee (juridical act), or a claimant admits having taking a week off for a vacation (material fact).

484. An admission cannot pertain to the legality of an act, the likelihood of a claim's success or the failure to comply with a condition imposed by law. A legal opinion in an information bulletin issued by a government department is not an admission.

485. CUB 42922 (Raymond); CUB 43845 (Boisvert); CUB 42681 (Fontaine: [TRANSLATION] he ignored a specific piece of evidence, the admission); A-909-96 (Reny); A-355-96 (Rancourt); A-271-96 (Boucher).

An admission must pertain to facts that give rise to legal consequences against the person who made it.[486] Offers, attempts or measures to settle a dispute are therefore not considered admissions. Statements made with a view to settling litigation are considered privileged because they cannot be used against the party who made them or be considered a recognition of the weakness of his or her case.[487]

Admissions are either express or implied. An admission must be clear and unambiguous, and a person cannot generally be presumed to have made one. It has been held that in exceptional cases, a person may be deemed to have made an admission by conduct. Silence, however, cannot constitute an admission: "an admission may not be inferred from mere silence . . . except in the cases provided by law" (art. 2851 C.C.Q.). At times, failure to act for a certain period or under certain circumstances may constitute an implied admission. However, the admission is not the result of silence alone; certain circumstances are also required. Even then, the rule about silence cannot be rigidly applied in administrative matters in dealings between the bureaucracy and the public. To enforce laws and regulations, officials need information that can often be provided by members of the public. A refusal or omission to answer questions or complete forms can be logically interpreted as a tacit admission of a fact.

3.4.5 PHYSICAL EVIDENCE

Physical evidence is evidence that a judge or panel member can observe with his or her own senses, without the assistance of a witness or document. It enables the decision maker to make direct findings with regard to the state of a thing, place or person; this frequently involves listening to a sound or audio-visual recording.[488] Evidence may be real or representative: photographs or recordings are representative evidence.

486. A-168-93 (Floyd: "there was plain evidence, by way of her own admissions, that the respondent was not available for work"); A-1036-96 (Guay: the employer confessed that the breach was not connected with the contract of employment and was not of much importance to him); A-845-97 (Kenny: [TRANSLATION] the claimant admits to participating in an hour-bundling system); A-111-98 (Ajzachi).

487. The mere fact of a settlement with regard to a termination for misconduct is not decisive: ". . . the settlement agreement . . . neither expressly nor implicitly includes admissions": A-45-96 (Douglas Boulton); and see A-309-81 (Pérusse, 14/12/81). However, an agreement or arrangement between an employer and employee whereby the latter may return to his job or is paid compensation may be an element of evidence refuting the Commission's finding that the claimant lost his position because of misconduct: A-233-94 (Wile).

488. For example, a video recording of events that occurred during a strike: A-3-96 (Gagnon). On the concept of physical evidence, see J.W. Strong, *McCormick on Evidence*, 4th ed. 1992, West Publishing, nos. 212-217; Royer, nos. 927-963.

3.5 RELEVANCE OF EVIDENCE

Even if otherwise admissible, evidence must be relevant to be admitted in administrative proceedings. Evidence is relevant if it pertains, directly or indirectly, to a fact or issue to be determined and it moves the inquiry forward. The evidence must tend to make more or less probable the existence or non-existence of a fact or situation that must be proved.[489]

Relevance is a matter for the tribunal to decide. The tribunal must consider the extent of its jurisdiction, the object of the proceedings and the powers of redress or reparation granted by the law. The *Civil Code of Quebec* is more concise: "All evidence of any fact relevant to a dispute is admissible and may be presented by any means" (art. 2857 C.C.Q.). Refusal to admit relevant evidence is a violation of the principles of natural justice.[490]

There is no precise definition of relevance. This has occasionally caused relevance to be confused with weight. Facts that are not relevant have no real connection with the issues and tend to give rise to confusion, or to prolong the debate unduly or prejudice the opposing party. This is what some call logical relevance, whereas insufficient probative value is called legal relevance. We believe it is best to limit the use of the term "relevance" to situations in which the tribunal is excluding evidence because it is unrelated to the issues to be determined.[491] But even the Supreme Court has assimilated the two concepts: according to Sopinka J., "all relevant evidence" means "all facts which are logically probative of the issue."[492]

Similar fact evidence, which may be indirect evidence of the condition of a thing or situation, raises the issue of relevance. Character or reputation evidence, adduced to impeach the credibility of a witness, is another example of evidence that does so. Evidence of a witness' bad reputation is admissible if it goes to credibility, even if it is unrelated to the issues to be determined. The cases have tended to admit similar acts as evidence of a person's intent or objective when those matters are in issue.[493]

489. "Relevant evidence means evidence that has any tendency in reason to prove a fact in issue in a proceeding", Law Reform Commission, *Report on Evidence*, (Ottawa: 1977) at 19; Sopinka, Lederman and Bryant, at 22 *et seq.*

490. CUB 25398 (Marinaro); CUB 22905 (Neilson); CUB 22610 (Reykdal); CUB 31612A (McMurchy).

491. CUB 23188 (Allsop: "Sympathetic considerations" which the Board properly found to be irrelevant); CUB 24924 (Murray); CUB 37233 (Bourgeois: the fact that a person was confused, experiencing family problems and abusing alcohol, etc.); A-3-96 (Gagnon: the fact that the strike was illegal).

492. *R.* v. *Zeolkowski*, [1989] 1 S.C.R. 1378; *R.* v. *Morris*, [1983] 2 S.C.R. 190.

493. Sopinka, Lederman and Bryant, c. 11; *R.* v. *Cloutier*, [1979] 2 S.C.R. 709, 731.

Proof of acts subsequent to the event in issue also raise relevance questions. A tribunal may consider such proof to be relevant circumstantial evidence, or even the basis of a presumption as to a fact in issue.

3.6 DISCLOSURE OF EVIDENCE

Disclosure encompasses two situations. The first, commonly encountered in administrative law, is when a tribunal divulges the record before it to comply fully with the *audi alteram partem* rule. The second involves the disclosure of evidence between parties.

The *audi alteram partem* rule normally requires tribunals to disclose all the exhibits in the docket and all the evidence in their possession, including documents and reports. Parties are generally entitled to everything they need to present their case or defence.[494] This includes the record sent by the Commission and any document filed with the board by someone else.[495]

If the chairperson realizes that the docket is not complete or if at the hearing the chairperson is informed that an important item is missing or has not been disclosed, he or she must take the required action, including adjourning the proceedings if necessary.

Some administrative tribunals may not have to disclose everything. Evidence that a party has given on a confidential basis is one of the types of evidence that may be excluded.[496] We doubt this could happen before boards of referees, which obtain documents only from the Commission, employers or claimants. It is unlikely any of these parties could claim confidentiality. For example, natural justice was held to have been denied where a chairperson obtained a purportedly confidential Commission directive and the claimant had to resort to the *Access to Information Act* to obtain it.[497]

There is no requirement in administrative law that a party disclose information to the other parties if he or she does not intend to tender it and the tribunal will therefore not be considering it.[498]

494. *Radulesco* v. *Canadian Human Rights Commission*, [1984] 2 S.C.R. 407; *Assad* v. *Canada*, 671-86 (F.C.A.).

495. CUB 6208 (Kennedy); CUB 19373 (Vanderburg); CUB 18211 (Delparte: "before the hearing").

496. See Garant, vol. 2, at 282-285; Mullan, nos. 144-152.

497. CUB 10602 (Ramirez).

498. *Seafarers' International Union* v. *C.N.R.*, [1976] 2 F.C. 369-376 (F.C.A.).

If a party intends to submit evidence, must he or she disclose it in advance to the other party as required in criminal cases by the famous 1991 Supreme Court decision in *Stinchcombe*?[499] This duty of disclosure is based on the principles of fundamental justice guaranteed by s. 7 of the Charter. Certain cases have applied these principles to administrative tribunals, notably in disciplinary matters.[500]

In accusatory or similar justice systems, the prosecutor must disclose all relevant evidence in its possession to the defence, whether it tends to incriminate or exculpate the accused, unless it is evidence over which the prosecutor has no control, is patently irrelevant or is privileged.

Natural justice may require *Stinchcombe* disclosure where a person is alleged to have engaged in serious misconduct involving moral turpitude.[501] This may include cases in which claimants are suspected of fraud and might face a penalty, or cases where the employer is claiming that the claimant was dismissed for misconduct. Serious cases therefore require such disclosure in quasi-judicial cases given the circumstances. In such cases, the claimant is entitled to make full answer and defence against accusations, and must be sufficiently informed of the nature and basis of such accusations.

The case law in employment insurance adjudication is demanding of the Commission: the Commission must provide the board with a complete docket, including its correspondence with the claimant.[502] The Commission must also turn over a copy of all circulars and administrative documents that are germane to the proceedings, even if they are internal government documents.[503] Moreover, under the case law, the Commission's submissions must include both cases in favour of its position and those against it[504] — a requirement based on the fact that claimants are rarely represented by counsel and do not have access to free legal services.[505]

499. *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326.

500. *Notaires* v. *Delorme* [1994] D.D.C.P. 287 (Tribunal des professions); *Mallette* v. *Comité de déontologie policière*, [1995] R.J.Q. 862 (C.S.).

501. *Ontario (Human Rights Comm.)* v. *House* (1994), 115 D.L.R (4th) 279 (Dist. Ct.); *CIBA-Geigy Canada* v. *Canada (Patented Medicine Prices Review Board)*, [1994] 3 F.C. 425.

502. CUB 27404 (Marsh); CUB 10546 (Prentice); CUB 22207 (Adeodu: adequate documentation).

503. CUB 10602 (Ramirez); CUB 22222 (Mazur); CUB 21910 (Lin: memos).

504. CUB 15680 (Sicoli); CUB 15252 (Banks); CUB 13820 (Vanderheaghe); CUB 31164 (Bernardo); CUB 14196A (Post); CUB 22222 (Mazur: "The failure to cite balanced jurisprudence simply is not fair."); CUB 18060 (Young).

505. CUB 15816 (Robinson).

If an employer or any other person sends documents to the board, those documents must be given to the claimant and the claimant must be given enough time to review them.[506] A claimant who is taken by surprise by the filing of a document may be entitled to an adjournment.[507]

3.7 WEIGHT OR PROBATIVE VALUE

Administrative tribunals have the difficult task of assessing the weight, credibility and sufficiency of various elements of evidence. Frequently, the most important part of a case is determining an appellant's credibility. When considering a decision and the reasons therefore, it must be possible to verify whether there is intelligible evidence in the docket that rationally supports the tribunal's inference or conclusion.

Before determining whether the various pieces of evidence are persuasive, one must clearly understand what must be proven or shown.[508] Then, one must examine the forms of evidence the parties employed to persuade the tribunal of their respective positions. The five generally recognized forms of evidence are writings, testimony, presumptions, admissions and the presentation of material things. Two of these — writings and testimony — may be used either as direct or indirect (secondary) evidence.

In certain kinds of cases, including misconduct cases,[509] evidence must meet a certain level of detail. This also applies to cases where it must be shown that the claimant knowingly made a false or fraudulent statement. It is not enough to raise doubts about the claimant's credibility.[510]

As stated above, to discharge the litigant's burden to satisfy the tribunal, he or she must show the existence of a fact is more probable than its non-existence, unless the law requires more convincing proof (art. 2804

506. CUB 25228 (Snider); CUB 35722 (Roberts: 15 minutes before the hearing is insufficient).

507. CUB 26146 (Porter).

508. A-1677-92 (Désilets: true cause of voluntary departure); A-56-96 and A-57-96 (Faucher: the three-part test for availability); A-450-95 (Bell: whether the victim has effectively been harassed); A-1598-92 (Easson: was it misconduct or voluntary departure); A-3-96 (Gagnon: showing of strike); A-236-94 (Jewell: proof of an instance of misconduct); A-1458-84 (Tanguay: proof of valid reason, not honourable motive); A-349-95 (West); A-336-94 (Jouan: essential issue of time devoted to business); A-1692-92 (Michael: disentitlement and the disqualification schemes); A-800-80 (Moura: good cause to refuse suitable employment).

509. A-636-85 (Joseph); A-471-95 (Choinière); A-732-95 (Fakhari); A-130-96 (Meunier).

510. A-600-94 (Gates); CUB 47735 (Carbonneau).

C.C.Q.). The requisite degree of evidence is a matter of quality, not quantity. For example, testimonial evidence is not assessed in terms of the number of instances of testimony; rather, it is based on the credibility of testimony and persuasiveness. This does not mean that corroboration should be neglected, because it serves to reinforce testimony and make it more likely for the tribunal to believe it. Corroboration can be made by the testimony of another person, a writing, physical evidence, or a set of circumstances that cause the statement in respect of which corroboration is sought to be more believable

Tribunals must also take care to know whether an element of evidence has been contradicted, and to note this in their decisions when required. This also applies to corroboration.[511]

Direct evidence is generally preferred to indirect evidence.[512] For example, direct testimonial evidence is better than hearsay and proof by presumption.[513] But this rule is not absolute, and a tribunal may prefer highly credible indirect or secondary evidence to doubtful direct evidence.[514] There have been several cases in which boards of referees had to consider writings contradicted by testimony. Generally, if there is a reason to doubt that certain written evidence is credible and the evidence is contradicted by testimony, the board should not rely on the written evidence.[515] To determine the credibility to be accorded to such writings, their makers should have been heard or cross-examined,[516] because indirect evidence is confronted with direct. A board may give greater credibility to a witness despite contradictory statements in the written notes of Commission officials.[517]

Boards should make "every effort to obtain direct oral evidence".[518] It is not necessary to guarantee cross-examination of originators of hearsay evidence if the litigant has some other opportunity to comment and

511. A-714-88 (MacMillan); A-75-94 (Craig)

512. CUB 29688 (Sears); CUB 30012 (Hayes).

513. CUB 16791 (Wray); CUB 15680 (Sicoli); CUB 21943 (Hamonic); CUB 17649 (Fradette); CUB 24138 (Fredette); CUB 25506 (Au).

514. CUB 26426 (Gyall); CUB 14876 (Hayes); CUB 2130 (Dewart); CUB 13838 (Ferenc); CUB 47902 (Bissiri: the board preferred hearsay evidence to direct testimony).

515. CUB 13366 (McIvor); CUB 11346 (Nadeau); CUB 11746 (Bond); CUB 10720 (Wallace); CUB 21532 (Sabiston).

516. CUB 12897 (Pulzoni); CUB 17307 (Introwski).

517. A-418-97 (Childs).

518. CUB 10726 (Farsad); CUB 17649 (Fradette): in this misconduct case, the Board should have required that the employer's representative be present in order to comment on the dismissal letter; CUB 12430 (Smith).

contradict that evidence.[519] Proof by hearsay must always be conclusive and consistent with the admissions of the person who relates it.[520] It is important to use this type of proof carefully.[521]

Proof of a positive act is preferable to proof of a negative one. Generally, a person who affirms a fact must be preferred to a person who denies it if both witnesses are credible, for it is easier to forget a fact than to recall one that never was. In assessing all of the evidence, a tribunal may from time to time give more weight to testimony denying the existence of a fact.

Tribunals must always bear in mind that good faith is always presumed, unless the law expressly requires that it be proved (art. 2805 C.C.Q.). A witness who has testified or a person who has prepared something in writing is presumed to be acting in good faith unless the opposite is shown. Good faith does not necessarily mean credibility, however. People may be acting in the utmost good faith but not all that credible.

3.7.1 THE WEIGHT TO BE GIVEN TO WRITINGS OR DOCUMENTARY EVIDENCE

Authentic acts issued by a public officer make proof of their contents.[522] This applies only to facts the public officer had the task of establishing or recording. Even if court judgments can be considered authentic acts, they do not necessarily prove the facts the judge recites based on the testimony made. Improbation proceedings must be instituted in a superior court to contest the validity or content of an authentic act; thus, such acts are not contested before administrative tribunals.

Private writing setting forth a juridical act and bearing the signature of the parties may be a valid contract. A person who appears to have signed an act, and against whom the act is set up, is deemed to admit to it unless he or she challenges it by way of an affidavit. Private writing (e.g., a contract) may be set up against a third party whom it legally affects, but the third party may contest the truth or accuracy of the statements made therein and employ any type of evidence to do so. That person may show, through testimony, that there was a physical forgery or that the writing otherwise does not accurately reflect reality. For example, the Commission may wish

519. CUB 12281 (Liscombe).

520. CUB 10674 (Dubuisson); A-1873-83 (Mills); CUB 11648 (Ingrouville).

521. CUB 24777 (Wyder).

522. Sopinka, Lederman and Bryant, c. 18; in Quebec, see art. 2818, C.C.Q.

to contest a contract or agreement between an employer and an employee about the termination of an employment.

In Quebec, the traditional rule has been that written testimony and hearsay are not admissible in civil proceedings. It is not considered acceptable for a person to describe in a document the events he or she observed and then have that document tendered in court as a form of testimony, even if an affidavit is attached. In fact, art. 2843 C.C.Q. still requires that facts be proved by testimony and that testimony pertain only to "facts of which [the witness] has personal knowledge." In contrast, in administrative law, tribunals are free to attribute probative value to a writing that relates a fact, subject to the requirements of natural justice. They must ensure the other party has a fair opportunity to defend himself or herself having regard to the circumstances.[523]

Writings generally have the probative force of an out-of-court admission against those who made them. They may be equivalent to testimony if the facts related therein are ambiguous, equivocal or incomplete.

Personal or domestic papers or writings may be used against those who prepared them, but their probative force is equivalent to that of mere testimony.[524] According to some decisions, the notes taken by an official during an interview with a claimant have little probative value unless they are signed by the person interviewed.[525] However, the practice of obtaining such a signature does not appear to be widespread; it is felt that it makes people uncomfortable. These unsigned notes, such as an investigation report, are hearsay that can be contradicted by direct evidence. Business documents, company records and payroll records are admissible and often memorialize a juridical act, make proof of their contents as against those who prepared them and even in favour of those who drafted them. Such writings may be contested by any means: it is up to the court or tribunal to assess the evidence as a whole.

The original versions of writings or documents must generally be tendered except if they are printed (as with reports).[526] The original, signed versions of affidavits must be produced.[527]

523. It is not necessary to call the author of an affidavit as a witness: CUB 26487 (Pelletier).

524. As with personal notes made by an officer of the Commission during a meeting with the claimant: A-44-91 (Harnish).

525. CUB 19859 (Holditch); CUB 23897 (Mielke).

526. CUB 11004 (Schiml).

527. CUB 12732 (Smart).

The *Canada Evidence Act* contains some 15 sections on documentary evidence. Those provisions are considered additions to, not derogation from, the powers granted in other legislation (statutory or otherwise) respecting the proof of documents. In other words, they add to the common law or *droit commun*. Section 28 is one of the noteworthy provisions. It requires that reasonable notice be given of the tendering into evidence of a public document or notarized act. A copy of an entry in the book or record of a financial institution, made in the usual and ordinary course of business, is admissible upon affirmation or affidavit by a manager or accountant of the financial institution. In addition, where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence. The party producing the record must, at least seven days in advance, give notice to each other party to the legal proceeding of his or her intention to produce it and must, within five days after receiving any notice in that behalf given by any such party, produce it for inspection by that party.

In administrative law the best evidence rule which is even more restrictively applied in civil matters is inapplicable. This best evidence rule aims at preventing the litigant from establishing through secondary evidence the content of a written statement.[528] In administrative law, the tribunal is free to accept and admit such proof based on the balance of probabilities.

3.7.2 THE WEIGHT TO BE GIVEN TO TESTIMONY

In proceedings before administrative tribunals, testimony is a sworn or unsworn statement by which a person relates facts of which he or she has or does not have personal knowledge, or the person's opinion. We speak here of ordinary witnesses. Expert witnesses, on the other hand, do relate the facts they have observed, but more important, they state an opinion based on their personal observations or the evidence submitted to the tribunal, and their knowledge and experience.

The probative force of testimony is left to the appraisal of the court or tribunal. Of course, this also applies to the Board of Referees.[529]

528. Royer, at 786; art. 2860 C.C.Q.

529. A-418-97 (Childs).

3.7.2.1 *ORDINARY WITNESSES*

In the common law tradition, as a rule, any person is competent to testify but there are exceptions that could apply to administrative tribunals, such as children and persons with a mental incapacity. The *Canada Evidence Act* adds that a person is not incompetent to give evidence by reason of interest or crime (s. 13). Under the *Code of Civil Procedure* (art. 295), relationship, connection by marriage and interest are objections only to the credibility of a witness. The same rule is found in common law provinces.

An oath is not necessary to testify before a federal administrative tribunal, but any tribunal "has power to administer an oath to every witness who is legally called to give evidence before it" (*Canada Evidence Act*, s. 13). As we have already noted, no witness is compellable in administrative tribunals such as the Board of Referees.[530] However, the board may apply to the Federal Court for an order compelling a person to appear or produce documents. The application may be opposed on the grounds that the evidence sought is irrelevant or illegal. We know of no cases in which this Federal Court remedy was pursued. If the Court orders a witness to appear, that person becomes a witness to whom the chairperson can administer an oath, as he or she is called to give evidence before the board.

Where a witness is absent, a litigant may ask for an adjournment if he or she shows the efforts made to secure the witness' attendance and states that such attendance is necessary and that the absence is not the result of a scheme on his or her part. The court or tribunal will normally grant the adjournment if it finds the evidence the witness is likely to give will materially affect the outcome of the proceedings.[531]

A party may ask the court to exclude witnesses to ensure their testimony is not influenced by the evidence they hear before they give their version of the facts. Such exclusions are generally granted, except in respect of the parties, who cannot be excluded.[532] Exclusion is required in sexual harassment cases.[533]

530. T1689-85 (Bacon); CUB 21911 (Lavigne-Lincourt).

531. Royer, at 311-312.

532. CUB 28266 (Zmit).

533. CUB 29257 (Hince).

If a circumstance of sexual or other harassment is being considered, the chairperson may order that the proceedings be held in private pursuant to s. 114(2) of our Act. Where such an order is granted, the testimony in the hearing is given in the absence of the claimant or employer. Later that day or on the next working day, the chairperson directs that the evidence be provided to the excluded claimant or employer, as the case may be, by making available to that claimant or employer a copy of the audio recording of that evidence. The excluded claimant or employer, as the case may be, may then respond to that evidence orally at a hearing before the Board of Referees in the absence of all other persons excluded. The chairperson then directs that the response be communicated, in the same manner and within the same time, to the claimant or employer who did not provide that response. That person may then respond to that response (ss. 80-81 of the EI Regulations).

The chairperson determines the order in which testimony is given. The appellant is normally first to give evidence before appellate administrative tribunals, even if the burden of proof is reversed. Once a party has examined his or her witness, the other party cross-examines; thereafter the first party may re-examine his or her witness.

The chairperson may decide how many witnesses a party may call, especially where it is likely a new witness will repeat what a previous witness said.[534] However, the board must ensure it is not restricting the reasonable opportunity each party must be given to present all aspects of his or her case.[535]

Where a claimant intends to read from a document he or she has prepared, the chairperson may ask the claimant to put down the document and provide an oral summary of it.[536] However, the chairperson must give the claimant enough time to present his or her case adequately.[537]

534. CUB 12341 (Bélanger).

535. CUB 10071 (Drul: refusal to allow further witnesses to be called).

536. CUB 19057 (Annesty).

537. CUB 19057 (Annesty); CUB 17649 (Fradette); CUB 31523 (Marein).

3.7.2.1.1 Examination in Chief

Examination in chief generally involves the questioning of a witness on the facts of the appeal. The witness may also be questioned on collateral facts that add weight to his or her testimony. For example, it may be shown that a witness was in a good position to observe the fact he or she is speaking to, or that he or she has a special reason to remember it accurately. A witness may be called upon to give an opinion, or, since hearsay is admissible, to repeat what a third party told him or her. Administrative tribunals must take care to note whether the evidence is direct (something the witness saw, heard, etc.) or indirect (something the witness heard someone say, something reported to the witness, etc.).[538]

A party cannot generally ask leading questions of his or her witness. This common law rule, applicable to Quebec (art. 306 C.C.P.), is premised on the idea that a litigant generally knows what his or her witness will say and therefore has no cause to use creative means to suggest an answer. A leading question is one that states the answer the examining party desires to have confirmed with a yes or no.[539]

It is likewise considered inappropriate for tribunal members to ask leading questions, because this could give rise to an apprehension of bias, or at least the appearance thereof.

On the other hand, leading questions are allowed when the witness is clearly attempting to dodge a question or side with the opposing party, or when the witness is a party adverse in interest to the one examining him or her. Leading questions may also be allowed to refresh a witness' memory.

There are common law and civil law rules on refreshing the memory of a witness who is having trouble recalling precisely the facts about which he or she is being questioned. The person who is asking the questions may use the witness' prior written statements, notes and in some cases, the notes or testimony of another person. Leading questions may be asked with the permission of the tribunal. The tribunal may also ask any useful questions of the witness.

538. In one case, the Court of Appeal held the board "was not obliged to make subtle and needless distinctions between the direct and the indirect evidence": A-3-96 (R Gagnon). This position should not be regarded as the generally applicable one. In our opinion, the board must make the distinction and must be able to do so.

539. For example, "Is it not true that you applied for employment at Bombardier on January 5?" Examples of non-leading questioning: "Where did you apply for employment? On what date did you do so?"

The tribunal can allow a witness to use a document to refresh his or her memory or refer to personal notes if he or she cannot completely recall a fact. But the opposing party is entitled to examine any document used to refresh a witness' memory, even if it is privileged. Such documents have some probative value when the conditions under which they were drawn up provide sufficient guarantees of reliability.[540]

Under s. 9 of the *Canada Evidence Act* and art. 310 C.C.P., a party cannot impeach his or her own witness by evidence of dishonesty, bias, corruption or bad reputation. This occurs when a witness' version of events is substantially different from that expected by the party who called him or her. However, s. 9 provides that the party may contradict the witness with other testimony, or, with leave of the court, by proving that the witness made statements that are inconsistent with his or her testimony.

The circumstances in which the witness allegedly made the prior inconsistent statement must be told to him or her, and the witness must be asked whether or not he or she made it. If the statement was made in writing or is available on a video or other recording, the tribunal can allow the witness to be cross-examined on it. The statement can be tendered. If it was made orally before witnesses, it can be proven through witnesses with leave of the court.

Thus, alleged prior inconsistent statements are admissible not only to impeach the credibility of a witness but also as proof of their contents if they are facts relevant to the issues to be determined. A witness' prior inconsistent statements are admissible if their reliability is sufficiently guaranteed.[541]

The Commission often introduces claimants' prior inconsistent statements before boards of referees. According to some cases, a person's first statement is more credible than subsequent ones,[542] but this may only be a presumption or guideline.[543] The position is based on the idea that

540. "Personal" notes dictated by a lawyer or representative are apparently unreliable! The tribunal may look into them further.

541. Royer, at 322; Sopinka, Lederman and Bryant, at 920 *et seq.*

542. CUB 8741 (Louttit); CUB 10272 (Freake); CUB 39190 (Lalonde); CUB 16359 (St-Laurent); CUB 18671 (Lavoie); CUB 30578 (Lévesque); CUB 47426 (Deslandes); A-577-96 (Lévesque); CUB 45820 (Blouin).

543. CUB 14876 (Hayes); CUB 12577 (Finlay); 14000 (Brooks); CUB 25154 (Label); CUB 33677 (Deschênes); CUB 32454 (Gauthier).

the first statement was probably made spontaneously and is more sincere. In fact, the person may have been taken by surprise and answered questions asked by the Commission or its investigator too hastily without having understood the questions.[544]

The credibility to be given to a testimony or even documents is a question of fact that is up to the board to determine,[545] especially when there is conflicting testimony[546] or a conflict between documentary evidence and testimony.[547] The board is in the best position to assess credibility when there is conflicting evidence.[548]

It has been held that a telephone hearing is not appropriate when credibility is in issue.[549] In those situations, the hearing must be held in the presence of the parties, and perhaps even the witnesses.

3.7.2.1.2 Cross-Examination

The right to cross-examine an opposing party's witnesses stems from the principles of natural justice and is universally recognized, though it is not an absolute.[550] Cross-examination affords the adversary an opportunity to weaken the effect of testimony or to undermine the credibility of a witness. Any party adverse in interest may exercise this right. If the interests of the parties are sufficiently similar, a tribunal has the discretion to limit or refuse to hear further cross-examination as to facts pertaining to common interests.

Cross-examination may pertain to any fact in issue, even if no questions were asked about it in the examination in chief (art. 314 C.C.P.). Persons conducting a cross-examination are given significant breathing space with

544. CUB 18330 (Nix); CUB 18126 (Vien Luong); CUB 29477 (Littleton); CUB 28569 (Suralvo); CUB 14876 (Hayes).

545. CUB 34812 (Foster); CUB 4314 (Redding); CUB 12462 (Hjorleifson); CUB 3282 (Scott); CUB 12351A (Watson); A-115-94 (Ash: board members were in the best position and had the best opportunity to assess the evidence and make findings with regard to credibility).

546. CUB 24456 (Larkin).

547. A-355-96 (Rancourt); A-270-96 (Boucher); CUB 12897 (Pulzoni); CUB 13366 (McIvor); CUB 10720 (Wallace); CUB 14849 (Craig); CUB 43153A (Purba: circumstantial evidence taken from documents contradicted by testimony that was not credible).

548. CUB 17852 (Kingsman); CUB 43153A (Purba: "The Board, and it alone, is the trier of facts. I [the Umpire] am bound by its decision on credibility").

549. CUB 12430 (Smith: such a hearing was held to violate natural justice in that instance); CUB 11004 (Schiml).

550. Garant, vol. 2, at 286 *et seq.*; A-308-81 (Olivier); see generally: Royer, at 329 *et seq.*; Sopinka, Lederman and Bryant, at 934 *et seq.*; CUB 36362 (Lamontagne: the Commission has the right to cross-examine the claimant).

regard to the purpose and form of their questions. They may ask leading questions. However, it is the duty of the tribunal to protect witnesses who are being seriously mishandled. It may disallow questions that are irrelevant, useless, aggressive, vexatious or abusive, designed to badger a witness, or likely to bring the administration of justice into disrepute.

Another purpose of cross-examination is to enable a party to strengthen his or her case through the testimony of another party's witness or even the testimony of the other party, when that party testifies. A litigant may attempt to obtain an admission on certain points through a skilful cross-examination.

Cross-examination is often employed to weaken a witness' credibility. It serves to verify a witness' powers and opportunities for observation, description and recollection. Witnesses may be questioned about their background, lifestyle, associations and involvement in questionable activities, provided the questions are related to their credibility as witnesses and are not designed to humiliate or badger them. Under s. 12 of the *Canada Evidence Act*, a witness may be questioned as to whether he or she has been convicted of any criminal, federal or provincial offence. If the witness denies the conviction, the opposite party may tender a certificate of conviction.

Proof of prior inconsistent statements on cross-examination is permitted and governed by ss. 10 and 11 of the *Canada Evidence Act*. If the statement is written, the court or tribunal is entitled to examine it. If it is verbal, it may allow proof that it was really made. The witness must be made aware of the statement and the court must draw the witness' attention to the inconsistent portions of the statement.

Finally, a litigant may re-examine his or her witness to clarify, correct or explain answers given on cross-examination. The questions may pertain to new facts elicited by the cross-examination or may be aimed at restoring a witness' weakened credibility (art. 315 C.C.P.). Except insofar as it relates to the witness' credibility, re-examination must be limited to the facts elicited on cross-examination. The court or tribunal may, however, allow evidence neglected in the examination in chief to rectify an omission or when a situation that would have been difficult to foresee is discovered.

3.7.2.1.3 The Role of the Tribunal

A court or tribunal may question a witness directly or ask him or her to explain or complete his or her testimony.[551] In Quebec, art. 318 C.P.C. states that "the judge may ask the witness any question he deems useful according to the rules of evidence." If most parties before it are not represented by a lawyer, an administrative tribunal is in a position to play an enhanced role and bring out more detail in the case so that its decision is well informed. It may even have to test the credibility of the witnesses rather than make a decision based on rather unreliable evidence. To preserve its own credibility, a tribunal should avoid being too credulous.

We have mentioned that a tribunal chairperson or member must not ask leading questions or ask questions suggestive of bias. In one case,

> one referee appeared to be accusing him rather than questioning him. . . . The Board member did adopt an accusatorial attitude. His attitude is one that would raise a reasonable apprehension of bias . . . This constitutes a breach of natural justice. For the reasons given, the decision must be set aside.[552]

This shows how crucial it is for tribunal members to be objective and impartial when asking questions of a witness, even if the witness' answers are evasive, hesitant or outright contradictory.

3.7.2.1.4 Reply Evidence

The party who called witnesses first may ask the court or tribunal whether he or she may submit reply evidence to contradict or explain new facts brought out by the other party. Article 289 C.C.P. and the common law grant courts and tribunals broad discretion to admit such reply evidence and to allow other witnesses to be examined. Administrative tribunals generally comply with this rule.

3.7.2.2 EXPERT WITNESSES

As a general rule, expert witnesses have some specialized knowledge and their purpose is to provide the court or tribunal with impartial assistance on scientific or technical matters. Their uncontradicted testimony cannot

551. *Mahenran* v. *Canada (M.E.I.)* [1991] 134 N.R. 316 (F.C.A.).

552. CUB 39207 (Peter Murray: the Umpire was satisfied of this after hearing the tape of the hearing.)

be disregarded arbitrarily, and courts generally accept it. Some courts or tribunals may have the power to order that a fact be investigated, verified and determined by an expert whom it designates. Boards of referees do not have that power. Nevertheless, authors write that an administrative tribunal could, in appropriate circumstances, suggest an expert investigation.[553]

Experts testify to facts they have observed, but the opinions they express can carry considerable weight. They must remain within the bounds of their mandate. The ordinary rules of admissibility and relevance apply to them. Courts or tribunals assess the probative value of their testimony or report and are in no way bound by the report. The general criteria for assessing ordinary relevance apply to expert evidence. The court or tribunal will consider the nature and purpose of the expert testimony, the qualifications and impartiality of the expert, the scope and seriousness of its research, and the relationship between the opinions he or she proposes and the evidence.

Experts rarely testify before boards of referees, but their reports may be tendered in evidence. If the authenticity of an expert report is not question, it will be admitted subject to weight. Medical certificates are treated as expert reports;[554] they are often required to establish the claimant's state of health.[555]

3.7.3 PROBATIVE VALUE OF PRESUMPTIONS

A distinction has to be made between legal and factual presumptions.

3.7.3.1 LEGAL PRESUMPTIONS

A legal presumption is an inference established by statute or a common law rule. The probative value of legal presumptions differs depending on whether they are absolute or simple presumptions.

Absolute legal presumptions are mandatory and cannot be reversed, even by admission of the opposing party. Section 134 of the Act regarding documents that are proof of their content is an example of a presumption that cannot be reversed.

553. Y. Ouellette, at 365.

554. CUB 14852 (Jones); CUB 18783 (Macdougall); CUB 11721 (Kazibet); CUB 15818 (Catcheway); CUB 23802 (Connors); CUB 36362 (Lamontagne).

555. A-640-93 (Dietrich).

Res judicata is an example of such a presumption when the conditions precedent to its existence are met. At common law, the requirements of estoppel by *res judicata* are as follows: a final decision pronounced by a court of competent jurisdiction, or an identity of action or issue between the same parties in the same capacity.[556] Article 2848 C.C.Q. sets out those conditions: *res judicata* applies only to the object of the judgment, and only when the demand is based on the same cause and is between the same parties acting in the same qualities, and the thing applied for is the same. For boards of referees, s. 120 of the Act, which governs the power to amend decisions, limits the scope of *res judicata*; this also applies when the Umpire refers a case back to the same board or another board.[557] Furthermore, *res judicata* applies when an issue has been decided definitively by another board or by the Umpire between the same parties.[558] *Res judicata* does not apply to a judgment rendered by a criminal court, civil court, or an arbitration tribunal, even if the case involved identical facts.[559] *Res judicata* cannot be invoked against a decision by the Commission.[560] However, it seems that the *res judicata* rule should not be applied as strictly as in ordinary courts of law.[561]

Simple presumptions may be rebutted by contrary evidence. If they are not, the court or tribunal is bound by them. If the conditions of its existence are met, the court or tribunal must consider the unknown fact to be true, absent evidence to the contrary. These conditions are normally set out in the Act or Regulations; for example, s. 36 of the Regulations sets out all the conditions by which monies received from the employer upon separation from an employment are considered to be earnings that must be allocated as insurable earnings.

3.7.3.2 *FACTUAL PRESUMPTIONS*

A presumption is an inference established by a court or tribunal from a known fact to an unknown fact.[562] A juridical act cannot be established by factual presumption. For example, a loan (which is a juridical act) cannot

556. Sopinka, Lederman and Bryant, c. 19.53 to 97.

557. CUB 42412 (Radomsky).

558. CUB 33837 (Galarneau); CUB 38909 (Dumais); CUB 10323 (Bourcier); CUB 30791 (Gatambwe); CUB 21407 (Frappier).

559. T-1189-33 (Charest, 4/2/99: criminal court); CUB 33837 (Galarneau: Commission des normes du travail).

560. CUB 41230 (Donaldson).

561. CUB 38615 (Bains).

562. *R.* v. *Burdett* (1820), 106 E.R. 873 (K.B.). For Quebec, see Civil Code, art. 2846.

be inferred from the fact that an employee obtained a sum of money after he or she was dismissed. Physical facts from which another fact is inferred must be established by testimonial evidence.

A court shall only take serious, precise and concordant presumptions into consideration. Such presumptions cannot be based on pure hypothesis or speculation, vague suspicions or mere conjecture. The known indices need only make probable the existence of an unknown fact; they need not rule our any other possibility.

The Quebec Court of Appeal has articulated the hallmarks of factual presumptions that could apply in all provinces:

> [TRANSLATION] Presumptions are serious when the links between the known fact and unknown fact are such that the existence of the former establishes the existence of the latter by powerful induction. They are precise when that which is induced from the known fact tends directly and especially to establish the disputed unknown fact . . . .
>
> Finally, they are concordant when, as a whole, and by virtue of their agreement, they tend to establish the fact in issue, whether they stem from a common origin or from different origins.[563]

3.7.4 PROBATIVE VALUE OF ADMISSIONS

Admissions must involve facts that give rise to adverse legal consequences for those who make them.[564] Their probative value stems from a presumption that people generally do not make false statements that harm them. A statement of a neutral or self-serving fact is not an admission.

Out-of-court admissions must be alleged and proved; they may be established by witnesses. Formal admissions are those made in court, and they cannot be withdrawn except with leave of the court or the consent of the other party.

To be valid, admissions must be clear, unambiguous and unequivocal. They may be express, or they may be implied from a person's conduct.

563. *Longpré* v. *Thériault* [1979] C.A. 258 at 262 (Lamer J.A.).

564. See generally, Sopinka, Lederman and Bryant, at 971-973.

The probative force of judicial or quasi-judicial admissions can be expressed as follows: when made by a party or his or her authorized representatives, admissions are complete and sufficient proof of the facts to which they pertain. But such admissions may be withdrawn if they were based on an error of fact (not an error of law). In any event, courts or tribunals are not bound by admissions pertaining to the law. An admission cannot be withdrawn because the person was unaware of its legal consequences. It may only be withdrawn in cases involving a factual error, which means that a litigant may show, through any form of evidence, including testimony, that the person who made the admission was mistaken or under a misapprehension. In our opinion, a litigant may also show that the admission is invalid because it was not made freely, but instead because of trickery, ruse or threats. This showing must be made on a preponderance of the evidence. The court or tribunal has the discretion to choose between the version contained in the admission, and any evidence tendered to contradict, circumscribe or correct the admission.

The Civil Code contains a provision governing the indivisibility of admissions (art. 2853); similar provisions exist in provinces governed by common law. This principle of indivisibility means that parties must take admissions in their entirety; they cannot use the portion that is favourable and disregard the portion that is unfavourable. For example, if a claimant admitted having gone to the United States to seek work or receive medical treatment, the Commission cannot find simply that the claimant admitted he left Canada.

There are three exceptions to the indivisibility principle, however. An admission is divisible if it contains facts which are foreign to the issue, or where the part of the admission objected to is improbable or contradicted by indications of bad faith or by contrary evidence, or where the facts contained in the admission are unrelated to each other. A complex confession, or a qualified admission, is more easily divided than a simple admission.

3.7.5 PROBATIVE VALUE OF PHYSICAL EVIDENCE

For physical evidence to be probative at all, it must be authentic. Authenticity is generally proved by witnesses who say that the item (e.g., the object, plan, photograph, audio or video recording) is authentic and accurate. For example, a photograph may be authenticated by the photographer or by a witness who has personal knowledge of the thing or place in the photograph. A video recording may be authenticated by a witness who identifies the voices and images on the recording, etc.

At common law, the probative value of physical evidence has always been considered good because it allows judges to observe through their own senses rather than depend on the observations of a witness. The same situation prevails in Quebec: art. 2856 C.C.Q. provides that "the court may draw any inference it considers reasonable from the production of a material thing."

Not all physical evidence is of equal probative value. For example, conclusions drawn from fingerprints are practically impossible to refute, whereas amateur video will not be considered as reliable as video recordings made by official news agencies.

3.8 CLOSING OF THE HEARING

Once all the parties have given their evidence (i.e., called their witnesses, tendered their documents and made oral submissions), the chairperson or presiding judge closes the proceedings. Oral submissions may consist of a summary of the evidence, arguments and conclusions. This stage is much less formal in administrative tribunals than in courts. The formal order found in the courts is not acceptable before administrative tribunals because such tribunals do not really have separate evidence and argument stages. The most important thing is for each party to have a reasonable opportunity to advance its grounds, bearing in mind the reasons for administrative justice (such as promptness and informality).

It is customary for the chairperson to ask each party if he or she has anything to add before the court or tribunal is closed. Occasionally this elicits irrelevant statements from people, such as statements that the Act is too strict or the Commission is intransigent, threats to appeal a decision if one does not win, or calls for compassion or understanding. Chairpersons must politely shorten such statements if they become excessive. They must avoid getting involved in a debate on them. At the very most, they may preface their closing remarks with a brief restatement.

Chairpersons should announce that the board will take the matter under advisement and render a decision as quickly as possible based on the evidence, the Act and the relevant case law. They may refer to s. 83 of the Regulations. They should thank the parties and their representatives for their co-operation. They must avoid showing any special sympathy for a claimant (e.g., by wishing him or her good luck or dwelling on the understanding attitude of the board, or by making unflattering remarks about the attitude or behaviour of the Commission). Such statements are to be made in the decision, if at all.

CHAPTER 4

INTERPRETING THE ACT AND THE REGULATIONS

The primary role of a Board of Referees is unquestionably that of a trier of fact: the board must make findings on questions of material fact (s. 114(3) of the Act). However, like every tribunal, the board must apply statutes and regulations and occasionally interpret them. The error in law contemplated in s. 115(2)(*b*) of the Act can be an error in applying the law, but can also be an error in interpreting it. In fact, the Federal Court of Appeal and umpires frequently must determine whether the board properly or improperly interpreted a statute, regulation or collective agreement. The Board of Referees' interpretation has often been in issue.[565] The Federal Court of Appeal has held that the board did not err in its interpretation but that the "Umpire erred in law in his interpretation of the relevant legislation."[566] In another case, an Umpire held that the Board of Referees did not interpret s. 10(2) of the Act correctly.[567] The board may have to interpret ambiguous or difficult texts,[568] or enactments containing differences between the English and French versions.[569]

The leading rule of statutory interpretation is that if the meaning of a law is plain, there is no room for interpretation.[570] In such cases, the tribunal need only apply the law. But the problem lies in determining whether a law really is clear, or whether it is ambiguous enough for there to be room for interpretation. This is not a simple matter. For example, in the famous *Hills* case, Lamer J. held in dissent that the term "financing" in s. 44(2)(*a*) of the Act (now s. 36(4)) was clear, but the majority of the Supreme Court devoted several pages to its interpretation.[571] Interpretation is only triggered if the wording is ambiguous.

565. A-80-95 (St-Coeur); A-511-95 and A-512-95 (Dupuis-Johnson); A-106-96 (B. Tremblay); A-451-85 (Crupi); A-425-85 (Bissonnette); CUB 38449 (Lavery); A-704-95 (Savarie); A-378-96 (Lalonde); A-1028-91 (Hamel).

566. A-167-93 (Cameron Innes).

567. CUB 39567 (L.L. Johnson).

568. CUB 10387 (Crupi); CUB 23985 (Gall); A-178-86 (Côté); CUB 24276 (McLaughlin); CUB 20198 (Hamel: collective agreement).

569. CUB 12970 (Vigneault); A-527-88 (Giroux); CUB 24632 (Jouan).

570. P.A. Côté, *Interprétation des lois*, 3rd ed. (Cowansville: Yvon Blais), 1999, at 5 and 358.

571. *Hills* v. *Canada (Attorney General)*, [1988] 1 S.C.R. 513.

It is possible for the Board of Referees and the Federal Court of Appeal to consider a provision clear and unequivocal but for an Umpire to find the same provision ambiguous, and interpret it, thereby prompting the Court of Appeal to hold that "the Umpire erred in law in his interpretation of the relevant legislation."[572] The error was to consider the law ambiguous.

A provision is clear if its meaning and scope are clear from a mere reading of it. A law may be found not to be clear if the parties do not agree on its meaning and the tribunal finds that the disagreement is based on an ambiguity. But a decision as to whether a provision is clear should not be made in the abstract or based on a consultation of a dictionary to see whether the word or phrase has an easily definable meaning. According to the Court of Appeal:

> It must often be difficult to say that any terms are clear and unambiguous until they have been studied in their context. That is not to say that the warning is to be disregarded against creating or imagining an ambiguity . . . It means only that the elementary rule must be observed . . . .[573]

The case involved the meaning of the phrase "gaol, penitentiary or other similar institution". The majority of the Court held it should be interpreted in such a manner as to include a farm where a person released from a correctional institution resided under a temporary absence permit. The dissenting judge held that the expression was in no way ambiguous.

The purpose of interpretation, as understood and discussed below, is to ascribe a meaning to an ambiguously worded enactment. It should be borne in mind that the term "interpretation" is sometimes used in a broader sense to mean the process by which the glossator ascertains the meaning and scope of rules expressed in an enactment — even if that enactment is clear. Once this is done, the rule must be applied to facts so that consequences may result. This illustrates the close relationship between interpretation and application.

The goal of interpretation is to determine the legislator's intent, i.e., what the legislator wanted and continues to want. Every enactment is supposed to have one true meaning, and that is the meaning the court will ascribe. If the meaning of the enactment is clear, it will be easy to ascertain the

572. A-167-93 (Cameron Innes).

573. A 1132-84 (Douglas Garland); cited from *Attorney-General* v. *Prince Ernest Augustus of Hanover*, [1957] A.C. 436 at 463 (H.L.).

legislator's intent. If it is not, one must refer to rules of interpretation established by the legislator or by courts or tribunals. Some provisions of our Act have admittedly presented considerable problems of interpretation.[574]

4.1 STATUTE-BASED RULES OF INTERPRETATION

The main statutory source of rules of statutory and regulatory interpretation is the *Interpretation Act.* Tribunals should take note of several of its provisions.

One of the principal rules is embodied in the phrase "the law shall be considered as always speaking" ["la loi parle toujours"]. Section 10 of the *Interpretation Act* provides: "The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning." Courts and tribunals must always bear in mind that the effects of a law must accord with its purpose.

The second rule is complementary, and pertains to the remedial effect of legislation: "12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[575]

Social welfare legislation, as a whole, is considered remedial.[576]

The law normally creates obligations and grants powers, rights, authorizations and capacities. Depending on the case, it uses the terms "may" or "shall": "11. The expression 'shall' is to be construed as imperative and the expression 'may' as permissive." Obligations are generally expressed as the present indicative of the verb having the principal meaning and occasionally by verbs or phrases containing this concept. Grants of powers, rights, authorizations or capacities are essentially expressed with the verb "may" and occasionally with phrases containing these concepts.

574. For example: A-136-96 (Caron-Bernier).

575. See *Canadian National Railway* v. *Canada,* [1987] 1 S.C.R. 1114 ("every enactment is deemed remedial").

576. *Canadian Pacific* v. *Canada (A.G.),* [1986] 1 S.C.R. 678 (*Unemployment Insurance Act*).

Boards of referees would do well to consult s. 25, which provides:

> 25. (1) Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact is deemed to be established in the absence of any evidence to the contrary.

They should also refer to ss. 26-30 which pertain to the way time and age are computed. Finally, ss. 31, 32 and 33 should be cited here:

> 31. (2) Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given.
>
> 32. Where a form is prescribed, deviations from that form, not affecting the substance or calculated to mislead, do not invalidate the form used.
>
> 33. (1) Words importing female persons include male persons and corporations and words importing male persons include female persons and corporations [and in French, "Le masculin s'applique, le cas échéant, aux personnes physiques de l'un ou l'autre sexe et aux personnes morales"].
>
> (2) Words in the singular include the plural, and words in the plural include the singular.[577]
>
> (3) Where a word is defined, other parts of speech and grammatical forms of the same word have corresponding meanings.

In the *Interpretation Act*, the term "enactment" encompasses statutes and regulations. The definition of "regulation" in s. 2(1) includes an order, regulation, rule, rule of court, form, by-law, resolution or other instrument issued, made or established (*a*) in the execution of a power conferred by or under the authority of an Act, or (*b*) by or under the authority of the Governor in Council. Not all of these enactments are

577. A-80-95 (St-Cœur).

regulations as understood by administrative law, i.e., delegated legislation. A real regulation is an enactment of general and impersonal application made in the exercise of a legislative power expressly conferred by statute.[578] Regulations have the same binding effect as statutes, in respect of an indefinite number of people and situations. The EI Regulations qualify under this definition. They may be contrasted with a simple directive, circular, instruction or manual, which may be of general and impersonal application but is not made under an express and precise grant of legislative power like ss. 5(4), 7(4)(*c*), 24, 69, 109, 110, 123, etc., of the Act. Thus, c. 13 of the Benefit Manual, which pertains to appeal procedures, is neither a statute nor a regulation, although it contains extremely useful directives applicable to boards of referees.[579]

4.2 RULES OF INTERPRETATION IN THE CASE LAW

Rules of interpretation are associated with a variety of approaches or methods. The most important approaches or methods currently in use are as follows: the ordinary meaning rule or literal construction, systematic and logic, and purposive. An application of any of these methods must start from following principle, articulated by Driedger, and cited several times with approval by the Supreme Court: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[580]

4.2.1 ORDINARY MEANING OR LITERAL CONSTRUCTION RULE

This method was enunciated in an old case and is often considered the golden rule:

578. Garant, vol. 1, at 389 *et seq.*: The Supreme Court and Federal Court have held that the label is of little importance even if the term "regulation" is employed most of the time. A guide or instruction can be a true regulation if it falls within the essential definition.

579. The same applies to other directives the Commission might issue: T-615-92 (Burke 7/6/94).

580. Driedger, *Construction of Statutes*, 2d ed. (1983), quoted in *Rizzo & Rizzo Shoes*, [1998] 1 S.C.R. 27 at 41. Recent cases which have cited the above passage with approval include *R.* v. *Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada* v. *Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun* v. *Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; and *Friesen* v. *Canada*, [1995] 3 S.C.R. 103. In addition, see A-1132-84 (Douglas Garland) and A-167-93 (Cameron Innes).

> This "rule" can be divided into two principles: (a) the principle that requires that the words of a provision be interpreted in their grammatical and ordinary sense, and (b) the principle that the grammatical and ordinary sense of the words be followed unless it leads to an absurdity, repugnancy or inconsistency.[581]

Under this approach, words must be given the meaning ascribed to them in ordinary parlance. They must be given the meaning they had on the day of enactment; no additions should be made to the terms of the statute, and the effects of those terms should not be attenuated.[582]

The context in which the word is used — that is to say the statutory "environment" of a definition (the other provisions of the statute and related statutes) — must be taken into account. For example, if there can be two definitions of a term, the one that best suits the context should be used.

The ordinary meaning should not be followed if it leads to a patent absurdity or inconsistency.[583] Absurdity should be understood to mean an interpretation that leads to ridiculous or futile consequences.

4.2.2 THE SYSTEMATIC AND LOGICAL APPROACH

This method is based on the principle that lawmakers are rational and the law should reflect coherent and logical thought. "A statute is to be construed, if at all possible, so that there may be no repugnancy or inconsistency between its portions or members."[584]

The requirement of internal consistency and harmony causes one to ascribe the same meaning to a term used several times in a statute or regulation, unless another approach is clearly called for.[585]

It should be considered when interpreting bilingual enactments and comparing statutes that govern similar areas.

581. *Grey* v. *Pearson* (1857), 6 H.L.C. 60 at 104, as paraphrased in CUB 38323 (T. Benoit).

582. *Vachon* v. *CEIC*, [1985] 2 S.C.R. 417.

583. *R.* v. *Sommerville* [1974] S.C.R. 387 at 395.

584. *R.* v. *Sunny Brae (Town) Assessors*, [1952] 2 S.C.R. 76 at 97; A-511-95 and A-512-95 (Dupuis-Johnson).

585. Côté, at 388; Driedger, at 163; A-106-96 (B. Tremblay).

4.2.3 PURPOSIVE ANALYSIS

The purpose of this method, codified in s. 12 of the federal *Interpretation Act*, is to glean the legislator's true intent by focusing on the objectives of the enactment. The true meaning, spirit and purpose of a statute are to be found in the remedy Parliament intended. And if a law is to be remedial or corrective, it must be interpreted liberally. The purposive analysis therefore invites us to give it such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This stands contrary to restrictive interpretation.

Parliament's intent will be found in the statute itself. "What is said to be the paramount rule for the interpretation of statutes is 'that every statute is to be expounded according to its manifest or expressed intention.'"[586]

The purposive approach consists of a search for the objective the lawmaker was pursuing. By way of illustration, it has been held that our Act ". . . is an important piece of social welfare legislation. Social welfare is to be liberally construed so as to advance the benevolent purpose of the legislation."[587]

This search makes it possible to avoid a narrow interpretation restricted to the ordinary or literal meaning of words.

586. *R.* v. *Sommerville*, [1974] S.C.R. 387, at 390.

587. CUB 38323 (T.J. Benoit).

CHAPTER 5

DELIBERATIONS AND DECISION

Once the hearing is closed, the board must take the matter under advisement (consideration) and render a decision.

5.1 DELIBERATIONS

There is no reference to the deliberations in the statute law. During this stage, courts or tribunals consider the evidence, establish their reasoning and prepare a decision. If the tribunal has several members, it is assumed the members will consult or discuss the matter with each other. Section 83(2) of the EI Regulations implicitly refers to this consultation by providing that the reasons for a dissenting member's disagreement must be recorded in the minutes of the proceedings.

Neither the EI Act nor the Regulations establish a time period for deliberations or a time limit within which a decision must be rendered. The deliberations of boards of referees are generally very short. In administrative law, deliberations are secret or confidential.[588]

Certain enactments, such as art. 463 of the *Code of Civil Procedure* in Quebec, state that a judge who has taken a case under advisement may, even of his own motion, by a judgment giving reasons, order the reopening of the hearing, for such purposes and on such conditions as he or she may determine. This is certainly possible under administrative law, since tribunals are in charge of procedure. The cases suggest tribunals have the discretion to reopen the inquiry or hearing especially if one of the parties is requesting this measure to bring important facts to the tribunal's attention.[589] The chairperson may reopen the hearing even if the evidence could have been led at the hearing.

588. Garant, vol 2, at 345; *C.A.S.* v. *Tremblay*, [1989] R.J.Q. 2053, 2074 (C.A.Q.), [1992] 1 S.C.R. 952, at 965.

589. *Garba* v. *Lajeunesse* [1979] 1 F.C. 723 at 727; *Grewal* v. *Canada (M.E.I.)* [1992] F.C. 581 (F.C.A.).

Furthermore, while the case is under advisement, the chairperson may exercise his or her power to refer a question to the Commission for investigation and report pursuant to s. 82 of the EI Regulations. This means that upon receiving the report, the chairperson must reopen the hearing so that the parties may obtain the report and address it.

Subject to s. 82 of the EI Regulations, the deliberations must be secret. This rule is related to the principle of impartiality — one of the components of natural justice. It has been reaffirmed in two recent Supreme Court judgments that stand for the proposition that the independence of tribunal members depends on it. The members' deliberations must be conducted behind closed doors, and under no circumstances may the members communicate with any of the parties or anyone else other than each other, or accept any evidence if it is not or cannot be made part of the docket. They must be as discreet as possible with regard to the facts in issue. Naturally, neither the clerk nor the Commission officers may be privy to the deliberations.

This raises the issue of the technical or legal support or assistance that an administrative tribunal may benefit from insofar as its decision making is concerned. There is recent case law on this point and it applies to all tribunals, especially tribunals whose members are not lawyers.

In *Tremblay*, the Supreme Court considered an established practice pursuant to which draft decisions are sent on to the tribunal's legal counsel for verification and consultation.[590] The Court appears to find this practice acceptable. The practice it considered repugnant to natural justice was the "consensus table" process set up by the commissioners, to the extent that it was mandatory or compulsory.[591] Mr. Justice Monet was the only Justice of the Quebec Court of Appeal who expressly rejected the idea that the commissioners' consultations with legal services create systemic pressure.

In *Khan*,[592] a case decided in 1992, the Ontario Court of Appeal had to consider the precise question of the role of counsel for a professional discipline tribunal. An adviser had been closely involved with the decision but the members ultimately reviewed, adopted and signed it. Expressly citing the Supreme Court decision in *Tremblay*, the Court held this involvement does not run contrary to natural justice, provided no coercion

590. *Tremblay* v. *Québec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952 at 957 (*per* Gonthier J.).

591. *Ibid.* See also *IWA* v. *Consolidated Bathurst.*

592. *Khan* v. *College of Physicians and Surgeons*, [1992] 76 C.C.C. (3d) 10 (Ont. C.A.).

is involved. After referring to the fact that the lawyers' consultations and involvement were freely given and received, the Court wrote:

> The drafting process followed by the Committee maintained the responsibility of authorship with the Committee and avoided any inference that counsel had co-opted or had delegated to him the reason-writing function. In that regard, the following features of the process are significant, although none are determinative:
>
> (i) A Committee member prepared the first draft of the reasons.
>
> (ii) Counsel, with the chairman of the Committee, revised and clarified the first draft but did not write independently of that draft.
>
> (iii) The Committee met to consider and revise the draft as amended by counsel and the chairman; counsel played no role in this review and revision.
>
> (iv) The final product which emerged from the drafting process was signed by each member of the Committee.[593]

The Ontario Court of Appeal has also held that legal counsel may help quasi-judicial bodies draft decisions consistently with natural justice. Given the very broad spectrum of decision making, this assistance may be given in more than one fashion, but there are limits. To determine whether the involvement of counsel in the decision-making process compromises "the fairness of the proceedings or the integrity of the process," one must consider "the nature of the proceedings, the issues raised in those proceedings, the composition of the tribunal, the terms of the enabling legislation, the support structure available to the tribunal, the tribunal, the tribunal's workload and other factors."[594] The Court seems to have held that the way in which legal counsel is involved is unimportant provided the decision remains that of the tribunal. According to a 1988 divisional court judgment, this was also the crucial issue where a secretary to a disciplinary committee clerk wrote the decision.[595]

593. *Ibid.* at 42.

594. *Khan, supra,* at 40.

595. *Spring* v. *Law Society of Upper Canada* [1988], 64 O.R. (2d) 719 (Div. Ct.).

In a recent decision, the New Brunswick Court of Appeal was much more restrictive, holding that a legal counsel who was acting as a prosecutor before a disciplinary tribunal cannot assist the tribunal in preparing the reasons for its decision.[596] The Court's reasoning was based on two older Ontario cases. In one of the cases, which involved the Ontario Racing Commission, the Ontario Court of Appeal held that since the Commission counsel had acted as a prosecutor, the counsel should not have participated in drafting the decision — a role which improperly involved counsel "in the Commission's function."[597] It should be noted that the Court considered the role of Commission's counsel to be similar to that of a party in a *lis inter partes*: the counsel was also acting as a prosecuting lawyer.

In September 1993 and again in February 1994, the Federal Court examined the role of administrative tribunal legal advisers in great detail.[598] It allowed a tribunal to have a process whereby legal advisers review drafts of decisions. Tribunal members may submit their drafts and ask for the advice of legal advisers on any issue, and the advisers may have access to the entire docket and point out problems such as errors in law, inconsistent facts in the docket and divergent cases. Such a process may be abused, but it does not *per se* run contrary to natural justice.

In *Burke*, where the decision maker had consulted with other Commission staff and federal government counsel, the Court applied the Federal Court of Appeal's decision in *Weerasinge*. The Court held that an internal consultation process, established to ensure consistency in decision making and in compliance with legal requirements, may be in keeping with the principles which preclude delegation of authority and require a measure of natural justice and fairness.[599]

Clearly the chairperson and members of the Board of Referees cannot consult the Director or other Commission management officials, since the Commission is a party before the board. May they consult another unit that has legal advisers? The advisers would have to be independent of the people who prepared the Commission's submissions to the board and of the people who represented the Commission.

596. *Després* v. *New Brunswick Lands Surveyors Association*, [1992] 8 Admin. L.R. (2d) 136 (N.B.C.A.).

597. *Sawyer* v. *Ontario Racing Commission*, [1979] 24 O.R. (2d) 673 (C.A.).

598. *Bovbel* v. *Canada (M.E.I.)*, [1994] 2 F.C. 563 (F.C.A.); *Weerasinge* v. *Canada* (M.E.I.), [1994] 1 F.C. 330 (F.C.A.).

599. T-615-92 (Burke) where the Federal Court of Appeal had referred the matter back to the Commission so the Director could decide quasi-judicially: A-205-89 (Burke).

During the deliberations, which in principle are secret, the chairperson and the members of an administrative tribunal do not have to contact the representatives of the parties or the experts. [600]

Chapter 13 of the Benefit Manual reiterates what should normally happen during the deliberations. The chairperson should recapitulate the issues in the appeal. He or she should note what had to be proven, identifying the parties' oral and written submissions that are to be regarded as fact. He or she should suggest a reasoning or argument based on the preponderance of evidence and having regard to the provisions of the EI Act, the Regulations and the relevant case law. Where necessary, he or she should note the probative value of the items of evidence submitted. Once this has been done, the members must confer with the chairperson on those issues. Finally, if a consensus is reached, the chairperson must propose findings, and the board members must confer with the chairperson on those findings.

If one of the two members or the chairperson intends to exercise his or her right to dissent, that person must inform his or her colleagues during the deliberations.

5.2 DECISION

The decision is the essential step that ends the quasi-judicial process or exercise of jurisdiction. It is mandatory under the Act and must be recorded, i.e., written, together with a statement of the findings of the board on questions of fact material to the decision (s. 114(3) of the EI Act).

The decision may be unanimous or by the majority. In the latter situation, the person dissenting drafts the reasons for dissent and includes them with the decision. As s. 83(2) of the Regulations only gives "a member" and not the chairperson the right to dissent, it could be concluded that the chairperson must always belong to the majority. If there continued to be a disagreement between the chairperson and the two other members, the board would not be able to render a decision. However, since the tribunal must exercise its jurisdiction, the chairperson must be able to dissent.[601]

600. *Université de Montréal* v. *Cloutier* [1988] R.J.Q. 511 (C.S.Q.); *U.N.A. local 1* v. *Calgary Gen. Hospital* [1989] 63 D.L.R. (4th) 440 (Alta Q.B).

601. CUB 45820 (Blouin); CUB 23103 (Paul SKRLJ: right to dissent).

The general requirements of current administrative law are rather well expressed in s. 13 of Quebec's *Act respecting administrative justice*, which may be used as a guide:

> Every decision rendered by the body must be communicated in clear and concise terms to the parties and to every other person that the law indicates.
>
> Every decision terminating a matter, even a decision communicated orally to the parties, must be in writing together with the reasons on which it is based.

Section 83 of the EI Regulations provides that the board's decision must be given in writing, which seems to rule out any judgment being delivered orally. This applies to every decision terminating a matter.

Although it is collegial, the decision must be drafted by someone, usually the chairperson or someone he or she designates. This is merely a procedural matter. Neither the Act nor the Regulations forbid the drafting of concurrent or complementary reasons to accompany a unanimous or majority decision. The person who is dissenting must draft the minority decision.

5.2.1 REASONS FOR DECISION

At least at common law, tribunals are not absolutely bound to give reasons for their decisions (although it is considered desirable for them to do so).[602] In Quebec, however, art. 471 C.C.P., which applies to civil courts, specifies that a judgment "contains, in addition to the conclusions, a concise statement of the reasons on which the decision is based."

For an administrative tribunal to be under a duty to give reasons, the duty must be expressly provided for by law.[603] But there are several noteworthy exceptions to this rule:

(a) if a right of appeal to a higher tribunal or court exists, there is an implied duty to give reasons; for without reasons, the right of appeal would be illusory;

602. *R.* v. *Burns* [1994] 1 S.C.R. 656; *R.* v. *Barrett*, [1995] 1 S.C.R. 752; *MacDonald* v. *R.* [1977] 2 S.C.R. 665.

603. Garant, vol. 2, at 308 *et seq.*; Y. Ouellette, at 426 *et seq*; *Dagg* v. *Canada* [1997] 2 S.C.R. 403, at 459; *Supermarché Labrecque* v. *Flamand* [1987] 2 S.C.R. 219, at 233; *Les Arsenaux Canadiens Limitée* v. *Conseil canadien des relations de travail* [1979] 2 F.C. 393 (F.C.A.); *MacDonald*; *Northwestern Utilities Limited* v. *Edmonton* [1979] 1 S.C.R. 684.

(b) if no reasons are stated, it may be held that the citizen did not have a fair hearing or was not given an opportunity to make his or her submissions;

(c) a decision-making body that departs from its previous statements or has not complied with practices or decided cases on point is expected to explain itself; and

(d) it is expected that statements that a witness was not credible will be explained.

We believe it obvious that boards of referees are at least under an implied duty to give reasons. Umpires and the Court of Appeal have often taken this duty for granted.[604]

Where a duty to give reasons is found to exist, the case law requires adequate reasons, i.e., reasons that contain sufficiently detailed factual and legal grounds, and are sufficiently complete and clear.

The requisite degree of detail will depend on a number of factors, such as the complexity of the issues, the amount of evidence and the extent of controversy on certain issues.[605] It is not sufficient to state that one has considered the testimony, exhibits and submissions of the parties.[606] One must study the evidence and identify the relationship between that evidence and the findings and conclusions. One must explain why certain evidence was rejected[607] or accorded little credibility.[608]

604. A-3-96 (Gagnon: ". . . the board . . . is short on reasons dealing with the credibility of the evidence"); CUB 34446 (Desruisseaux); CUB 19940 (Desrochers); A-521-77 (Bouchard); A-402-96 (McKay-Eden); A-1036-96 (Guay); A-600-93 (McCarthy); CUB 19795 (Cloutier); CUB 43152 (Diana).

605. *Northwestern Utilities* v. *Edmonton* [1979] 1 S.C.R. 684 at 706; *Boyle* v. *New Brunswick* (1997), 39 Admin. L.R. (2d) 150 (N.B.C.A.); A-450-95 (Bell); A-115-94 (Ash).

606 CUB 14486 (Lambert: A Board that merely wrote that its members had considered and unanimously accepted the Notice of Refusal neither complied with the letter nor the spirit of the statute); CUB 6868 (Beynon: "The Board discussed the case of . . . . Based on the facts presented the claimant . . .").

607. A-177-94 (Graveline: "In our view the Board of Referees either ignored or overlooked very clear and uncontradicted evidence from the . . . "); A-521-77 (Bouchard: "[the board] omitted, on the other hand, to consider the evidence of the steps taken by applicant to find employment, or, at the very least, to state its findings as to whether these steps were sufficient."); A-904-96 (Ménard: "dismissed without explanation an initial statement in which the claimant . . . "); CUB 23053 (Babet).

608. CUB 32454 (Gauthier); CUB 24189 (Budinsky: when a tribunal makes a negative credibility finding, it has an obligation to give at least a few examples of the inconsistencies or contradictions).

For reasons to be sufficiently complete, they must include a statement of the questions of fact material to the decision, as required by the EI Act (s. 114(3)).[609] If the board draws its conclusion on the key issue of the relevant facts, it is not strictly required to draw conclusions on secondary issues.[610] If there is an issue of credibility, the board must at least briefly state whether it rejects some evidence on those grounds and why.[611] The board must also set forth sufficient legal grounds, in the sense that the grounds must show that all the criteria that must be considered under the Act and Regulations were indeed considered.[612] The legal grounds must be brief, but should not consist of boilerplate provisions that have little meaning.[613]

Finally, the reasons must be clear in the sense that they must enable the interested parties not only to know why they won or lost, but also to determine whether they have serious grounds to challenge or appeal the decision.[614] A decision in which the board contradicts itself is unclear and irrational.[615] However, the contradictions may only become apparent if the text is clear enough for one to understand the reasons for the conclusion.[616]

609. CUB 10220 (Thuotte: [UNOFFICIAL TRANSLATION] "The Board [was] completely silent as to the origin of the disqualification, which is the claimant's refusal, without a valid reason, to accept suitable employment"); A-355-96 (Rancourt): "The board's decision, which was extremely brief, was based solely on the claimant's testimony at the hearing and completely ignored the rest of the evidence in the file."); A-3-96 (Gagnon); A-521-77 (Bouchard); A-1-81 (Matheodakis); A-1036-96 (Guay: [UNOFFICIAL TRANSLATION] "the Board must indicate which factors the Commission took into account or should have taken into account in imposing the penalty."); CUB 32877 (Windsor: "the facts which it relies on as the underpinnings for the decision it reaches. It should indicate which assertions of fact it accepts as reliable"); CUB 15062 (Lavoie: [UNOFFICIAL TRANSLATION] " . . . the various elements that must be shown"); CUB 22082 (Stasiuk: it is not sufficient to echo the determination of the Commission or state an opinion).

610. A- 897-90 (McDonald: "Hearings before the Board and Board decisions are intended to be an informal process for resolving the problems of ordinary people, and their reasons should not be read microscopically", p.13); CUB 42710 (Koo: A Board is not required to set out, in its decision, all the evidence . . .).

611. A-321-97 (Parks).

612. A-225-94 (Summers: "[T]he Board of Referees properly considered the question of whether the Respondent's actions amounted to misconduct in law while ignoring the employer's subjective assessment . . . ").

613. A-1-81 (Matheodakis: "the Insurance Officer was justified to act as he did").

614. *Dome Petroleum* v. *Public Utilities Board* (1977), 13 N.R. 299; aff'd [1977] 2 S.C.R. 822; CUB 24192 (Farhat: in language that they can comprehend); CUB 24965 (Pauzé: "impossible to know what opinion the Board formed of the conflicting evidence").

615. CUB 36544 (J. Hamilton: "The employer was justified in bridling at the insubordination, and had some justification for terminating because of misconduct. The Board feels that, however justified the employer was, he was harsh in not protecting his authority with a suspension or some other discipline.").

616. A-168-97 (Cox) and CUB 31875A.

If a decision sets forth no reasons, it contains an error in law that may be pleaded on appeal before an Umpire.[617] Otherwise, s. 115(*e*) of the EI Act sets out the only grounds for attacking a decision.

The reasons may contain an error in law if the board wrongly interpreted a law or regulation; applied a principle or rule of law it should not have applied; refused or neglected to apply a principle or rule of law it should have applied; or if it contains grounds unrelated to the purpose of the law.[618]

Where the board has made a finding of fact in a perverse or capricious manner based on the material before it, it has abused its power and its decision may be brought before an Umpire by way of appeal, however detailed, complete and clear it may be. But if a finding of fact was made without regard to the evidence before the board, this will be reflected in incomplete or inaccurate reasons.

5.2.2 STRUCTURE OF DECISION

The decision of a board is above all addressed to ordinary people. Its structure must be simple, it must be concisely written and it must meet the following requirements: it must be sufficiently complete, precise and intelligible. This is not an easy task.

The form used by the boards (INS 2244 and 4006) contains two parts: the issue involved, and the reasoning and statements of the findings of the Board of Referees on questions of fact material to the decision.

Clearly, the second part actually contains two parts. The first part consists of the reasons.

The Handbook explains what the reasons should contain:

- all the evidence taken into account from the submission, and further oral and written evidence provided at the hearing; and
- how the evidence was analysed, what evidence was found to be fact and which sections of the *Employment Insurance Act*, Regulations and jurisprudence apply.

617. A-1466-84 (Sharma); A-521-77 (Bouchard); A-595-84 (Roberts); A- 321-97 (Parks).

618. CUB 117697 (Proulx: on grounds that had nothing to do with the jurisdiction of the Board and were not part of the case before it).

Umpires often overturn Board of Referees' decisions because the board failed to provide a statement of their finding of fact as required by the EI Act. A rule of thumb for board members might be to "expose all they know and all of their reasoning." For example:

- What was the gist of the oral testimony?
- What evidence was found to be fact?
- Where were these facts found in the evidence (exhibit numbers, oral testimony)?
- What evidence was contradictory, what does the board make of this, and why?
- Are there any facts or evidence missing which could lead to an adjournment?
- Did the board obtain all the evidence required to render a decision?

Once the facts are established and summarized in the board's decision, all parties to the appeal have a right to know the implications. In other words, the parties want to know why some evidence was given more weight than others, what the link was between the particular facts of the case and the legislation, what principles in the jurisprudence apply, and what CUB decisions and Federal and Supreme Court of Canada decisions were relied upon given the particular facts. This process allows parties to understand why the board decided as it did. It is here that the parties to the appeal may determine if the board has made an error in law or has been perverse or capricious.

As the foregoing discussion illustrates, drafting reasons is a demanding task. That reasons must be concise only adds to the complications.[619]

The third part of a decision is the conclusion. The conclusions can be legal (what rule of law or jurisprudence applies) or factual (the claimant voluntarily left his or her employment without just cause).

619. A-595-84 (Roberts).

5.3 AMENDING OR REHEARING OF DECISIONS UNDER S. 120 OF THE ACT

As mentioned, s. 120 of the EI Act sets out the only grounds for varying the decision of a board, except where the errors are purely clerical. The grounds for amendment or rehearing are as follows:

- new facts are presented;
- it is alleged that the decision was given without knowledge of a material fact; or
- it is alleged that the decision was based on a mistake as to a material fact.

A distinction should be drawn between the three grounds listed above and the grounds for appeal in s. 115(2) of the EI Act.[620] For example, a divergence or disagreement between the parties with regard to the interpretation to be given to a board decision is not a proper basis for the s. 120 remedy.[621]

What are "new facts"? The concept is best explained by examples. Testimony that was given in another case and contradicted the evidence submitted to the board was held to constitute new facts.[622] So were the minutes of settlement of a dispute before a labour relations commission.[623] It was held in a misconduct case that a plea of guilty to a charge of fraud, entered by the claimant after the board rendered its decision, constituted a new fact.[624] According to the Court of Appeal, new facts only arise in exceptional cases.[625]

New evidence or arguments stemming from the same facts do not constitute new facts.[626] Facts that a negligent, absent-minded or ill-advised appellant failed to bring to the board's attention at a first hearing

620. CUB 11800 (Jolicoeur).

621. A-463-90 (Severud).

622. A-109-92 (Pelletier).

623. A-369-88 (Bartone); CUB 22053A (Roopnarine); CUB 23146 (Ormrod); A-109-92 (Pelletier: testimony in another case); A-233-94 (Wile: out-of-court settlement of a grievance).

624. CUB 27484 (Food Group Inc.).

625. A-135-94 (Chan).

626. A-734-85 (Teodorescu); CUB 34213A (Gillingham).

are not new facts.[627] New facts are "facts that either happened after the decision was rendered or had happened prior to the decision but could not have been discovered by a claimant acting diligently." [628]

In addition to these cases, the Federal Court of Appeal has acknowledged that the board can be required to entertain an application for rescission or amendment if it failed to dispose of an issue that was lawfully raised before it,[629] or if it conducted a hearing in the absence of the claimant and rendered an *ex parte* decision.[630] However, the Court has recently ruled that where there has been a breach of natural justice, appeal should be made to the Umpire.[631] Furthermore, this is set out in c. 13 of the Benefit Manual.

Rehearing and amendment are unavailable if an appeal before an Umpire has been filed.[632]

A party who has been advised of a decision and wishes to submit new evidence that does not stem from new facts may do so on appeal before an Umpire.[633] The Umpire may either hear the evidence or order that it be heard by the Board of Referees.[634]

5.4 REHEARING OR HEARING *DE NOVO* BY ORDER OF AN UMPIRE

Umpires may direct that the matter be sent back to the Board of Referees from which the appeal was filed, or that it be referred to another board; in the first case, it is a rehearing but in the second, it is rather a new hearing or a hearing *de novo.*

627. CUB 36673 (Middleton); CUB 6882A (Richard).

628. A-185-94 (Chan); A-728-97 (Dubois); CUB 7723 (Penney: letter from employer received after hearing); CUB 7280 (Neron).

629. A-463-90 (Severud, 31/1/91); CUB 24011 (Chamberlain); CUB 26306 (Duvenaud).

630. A-100-95 (Paul).

631. T-1238-98 (Gemby).

632. A-737-82 (Von Findenigg).

633. A-369-88 (Bartone); CUB 10587 (Kshyk).

634. CUB 20505 (Leblanc).

Where a party was denied natural justice because he or she was not given sufficient notice of a hearing date and could not be heard, and the party complains, it is established practice for the Commission officer to take such measures as are required to have the matter tried *de novo*, i.e., heard completely anew. This happens when the Commission forgot to issue the notice or issued it late, or where, through no fault of his or her own, the party clearly did not receive the notice.[635] Since September 1998, this practice has been modified by the Benefit Manual (c. 13). Allegations of this kind will be processed as an appeal to the Umpire on the same basis as other allegations of a breach of natural justice (A. 115(2)(*a*)). These appeals will receive special treatment (disposal within 30 days of their receipt at the office of the Umpire), considered on the record unless the appellant insists on having an oral hearing. If the Umpire concludes that natural justice has been violated, he or she will order that the matter be referred back to a newly constituted board to be heard *de novo*. A rehearing will be ordered when the Umpire finds that the board failed completely to consider the question at issue and give reasons for its conclusion.[636]

5.5 APPEALS TO THE UMPIRE

The Umpire appeal procedure is an avenue for Board of Referees' decisions to be reviewed by an administrative tribunal created by the EI Act and presided by a judge appointed from among the judges of the Federal Court. Together, the umpires (who are appointed by the Governor in Council and are under the authority of a chief Umpire), are a true appellate administrative tribunal. Only the Federal Court of Appeal may review their decisions.[637]

Any party who is subject to a decision of the Board of Referees may appeal the decision as of right. This includes the Commission, the claimant, an employer, a union or an employers' association. The grounds for appeal are set out in s. 115:

635. CUB 19582 (McDonald).

636. CUB 43105 (de Santis).

637. See the study of that institution in Issalys, at 169 *et seq.*

- failure to observe the principles of natural justice;
- acting beyond or refusal to exercise jurisdiction;
- erring in law, whether or not the error appears [on the face of the record]; and
- a decision based on an erroneous finding of fact that was made in a perverse or capricious manner or without regard to the material before it.

The appeal must be brought within 60 days after the board's decision is communicated to the appellant, or within such further time as the Umpire may allow for special reasons. The appellant or any other interested person may ask for a hearing; the Umpire may order one at any time. A notice is sent to the interested parties 14 days in advance.

An Umpire may decide any question of law or fact that is necessary for the disposition of an appeal (s. 117 of the EI Act). It may dismiss the appeal, confirm, rescind or vary the decision of the Board of Referees in whole or in part, give the decision that the Board of Referees should have given, or refer the matter back to the same or another board for a rehearing or redetermination in accordance with such directions as the Umpire considers appropriate.

It is of the utmost importance to understand the extent to which an Umpire may intervene. The Umpire will dismiss the appeal unless the appellant shows that the board has made certain errors in law or in fact. Although any error of law[638] (including a violation of natural justice and an excess of jurisdiction) is reviewable, only the errors of fact contemplated in s. 115(2)(*c*) are reviewable.

An abundance of case law has settled the basic principle in this area: umpires cannot substitute their opinion for that of the board with regard to a question of fact unless one of the abuses of power set out in s. 115(2)(*c*) of the EI Act has occurred. They must not substitute their opinion for that of the board on a question that is essentially one of fact,[639] unless the decision is absurd or capricious or the board did not have regard to the evidence in the record.[640]

638. A-819-95 (Furey).

639. A-357-81 (Ouellette); A-20-82 (Cole); A-600-93 (McCarthy); A-1036-96 (Guay); A-868-96 (Montreuil); CUB 24945 (Penno); CUB 3282 (Scott).

640. CUB 23623 (Henderson, 21/9/93); CUB 15316 (Fleming); CUB 34812 (Foster); CUB 33759 (Hannays).

Since the board is the trier of fact, issues of credibility are for it to decide[641] and it is up to it to assess the evidence. Even if the Umpire is inclined to have a different opinion of the evidence, he or she must not substitute this opinion for that of the board.[642]

5.6 JUDICIAL REVIEW BEFORE THE FEDERAL COURT OF APPEAL

Section 118 of the EI Act provides that the decision of the Umpire is final and not subject to appeal or review by any court, but that judicial review may be sought therefrom under s. 28 of the *Federal Court Act* in the Federal Court of Appeal. Thus, according to administrative law, it is not possible to appeal Commission decisions directly to the Federal Court of Appeal.[643]

Judicial review before the Federal Court of Appeal is not an appeal. It is only available if the Umpire:

- had no jurisdiction or exceeded his or her jurisdiction;
- failed to comply with a principle of natural justice;
- made an error of law, whether or not the error was on the face of the record;
- made a decision based on an erroneous finding of fact that was made in a perverse or capricious manner or without regard to the material before it;
- acted or failed to act on fraud or false testimony; or
- acted in any other way that was illegal.

The recourses to the Federal Court of Appeal are important to boards of referees because the Court defines the case law or confirms Umpire case

641. CUB 1823 (Dagleigh); CUB 38613 (Anderson, 6/8/97).

642. There is ample case law on this point. For example, see: A-0075-81 (Métivier, 8/4/81); A-0429-83 (Coupal 26/9/83); A-0440-83 (St-Laurent, 29/11/83); A-582-93 (St-Amand, 4/7/94); A-0645-94 (John Murray, 8/5/95); A-87-94 (Feere, 23/1/95); A-480-94, (Freeman, 9/6/95); A-732-95 (Fakhari 6/5/96); A-355-96 (L. Rancourt; 3/9/96) A-943-96 (Gendron) 8/10/97; A-138-96 (Falconar 5/9/97); A-868-96 (Montreuil 16/5/97).

643. Garant, vol. 2 at 526.

law. The Court must ensure the limits upon appeals, set out in s. 115(2) of the Act, are heeded. By choosing between their respective interpretations, the Court of Appeal is often a kind of arbitrator between the Board of Referees and an Umpire.[644]

5.7 REMEDIES IN THE FEDERAL COURT (TRIAL DIVISION)

Although the normal route for challenges runs from the Board of Referees to the Umpire to the Court of Appeal, the Federal Court (Trial Division) sometimes has jurisdiction to entertain certain proceedings connected with the application of the EI Act.

First, any provision of the EI Act or Regulations may be challenged in the Trial Division on constitutional grounds. This is what happened in *Schacter*, where it was argued that the former s. 32 violated s. 15 of the Charter.[645]

Furthermore, the Trial Division may entertain applications for a declaratory judgment as to whether a regulation or decision is valid.[646] It may also hear *mandamus* or *certiorari* applications in respect of any interlocutory decision, including a decision of a chairperson on a procedural issue.[647] Finally, it may hear civil damage claims filed against the Commission,[648] for example when the claimant suffers injury from receiving misinformation from an official.[649] This is important because, in general, misinformation does not exempt anyone from the requirements of the Act.[650] The Court may also be referred to or asked for an opinion under s. 17 of the *Federal Court Act*.[651]

644. A-50-94 (Tremblay); A-841-96 (Fox); A-1716-83 (Bedell); *M.E.I.* v. *Carrozella* [1983] 1 F.C. 909 (F.C.A.).

645. *Schacter* v. *Canada* (1992), 93 D.L.R (4th) 1 (S.C.C.); a remedy of this kind may also be sought before a provincial superior court: *Goldstein* v. *Canada (M.E.I)* (1988), 51 D.L.R (4th) 583 (O.H.C.); T-744-95 (Gonzalez: validity under the *Canadian Human Rights Act*).

646. Garant, vol. 2, at 515; T-2094-92 (Newfoundland Hospital); *R.* v. *Robertson*, [1972] F.C. 796.

647. T-1689-85 (Bacon); *Lemieux* v. *C.E.I.C.* [1987] 2 F.C. 246; T-1766-89 (Houle); T-2979-81 (Paidel); T-1136-95 (St-Onge); T-621-87 (Beauchemin: refusal to grant an extension).

648. Garant, vol. 2, at 634 *et seq.*; *Granger* v. *CEIC*, [1986] 3 F.C. 70, affirmed by [1989] 1 S.C.R. 141.

649. *CEIC* v. *Dallialian* [1980] 2 S.C.R. 582 (*per* Pigeon J.).

650. T-387-81 (Gosselin); CUB 6549A (Desrosiers); CUB 7010 (Chan); *Granger* v. *CEIC*, [1989] 1 S.C.R. 141.

651. A-121-99 (S. 108 of the *Customs Act*) appeal from the Trial Division.

CONCLUSION

The administration of justice, even at the trial level, has always been a difficult task; this is especially true of administrative justice.

There are several reasons for this situation. First, the administrative body whose decisions are challenged certainly renders a very large number of decisions, although these decisions are made by officials who are generally competent and have a sense of duty to the government and the public service. Thus, it is not always easy to show that they have erred in law or in fact. Second, the Act and the regulations are complex and often use technical language and vocabulary that is not very familiar to the litigants. Third, no matter how relaxed the judicial or quasi-judicial process may be, it is nevertheless enshrouded in principles and rules that are foreign to the experience of everyday life.

The mission of an administrative trier of fact is demanding. It is not sufficient merely to listen passively to the parties make their arguments and to decide for one side or the other on the basis of a momentary whim and to satisfy one's conscience in this way. A judge or arbitrator must first be fully familiar with the Act, the Regulations and even the case law relating to his or her specialized jurisdiction. He or she must know the principles and rules of procedure and evidence to be applied during the hearing. After listening attentively and impartially to the arguments and evidence of the parties, the judge or arbitrator must consider everything and render a decision for which factual and legal reasons are given. In doing so, he or she must be aware that the decision could be appealed by the unsuccessful party if that party has a feeling or an impression that justice has not been done.

It is not sufficient to be well intentioned, oblivious to human suffering, to be a good judge or arbitrator. It is necessary to know one's job and to be well trained. The ancients used to say *Nascuntur poetae, fiunt orates* [poets are born but orators are made]. Similarly, judges are not born . . . they are made! We hope that all those who strive to do justice as humanely as possible, as well as litigants and their representatives, will find this little study useful.

APPENDIX: CASE LAW SUMMARIES

A: THE BOARD: its status and jurisdiction

MCNAIR, J. IN CUB 20783 (CRAWFORD)

Boards of referees sitting on appeals from decisions of the Commission are required to act as independent, impartial tribunals in determining the rights of the matter before them. The proceeding is appellate in nature and must never be permitted to degenerate into something akin to an inquisitorial process. Boards of referees are generally masters of their own procedure. However, they are bound to observe the principles of natural justice and follow the rules of procedure of fair play with a view to ensuring that the appellant knows the case he has to meet and is afforded full and adequate opportunity to answer the same. Any bias or reasonable apprehension thereof on the part of the chairperson and board members will suffice to taint the whole proceeding and render the decision illegal.

MAHONEY, J. IN A-175-87 (HAMILTON)

It is trite law that what a Board of Referees, an Umpire and this Court must deal with is the decision that the Commission made, not that which it might and perhaps, in an exercise of common sense, should have made. Boards of Referees, being forums of common sense, sometimes expose its initial absence by dealing with a decision that was not made.

L. MARCEAU, J. IN A-708-95 (DUNHAM)

There is no reason to think that the Unemployment Insurance Act is unique and that the powers it confers on the agency given the task of administering it must be analyzed in isolation, without regard for the general principles of our legal system. The discretion given to the Commission is no different from the discretionary powers given to any other lower tribunal or body of the same sort. We are quite familiar with the situations in which a tribunal hearing an appeal or review of a discretionary decision of an authority subject to such review may intervene. A discretionary decision made on the basis of irrelevant considerations, or without regard for all of the relevant considerations, must be disapproved and set aside by the appeal or review tribunal. The

Court has repeatedly stated that discretionary decisions of the Commission do not fall outside that rule.

PRATTE, J. IN A-42-90 (CHARTIER)

The decisions of the Commission refusing to extend time for appeal were made under section 79 of the Unemployment Insurance Act, which gives the Commission the discretionary power to extend time for appeal "for special reasons". Even if we assume that these decisions could be appealed, as was held in the *Nixon-Nixon* v. *CEIC*, A-649-86, December 14, 1987 case, nonetheless they were appeals from decisions made in the exercise of a discretionary power, which appeals the board of referees could not allow unless it believed that the Commission had not exercised its discretion judicially, had considered irrelevant matters or had failed to consider relevant matters. The board of referees could not, as it did in this case, simply substitute its discretion for that of the Commission.

MARIN, J. IN CUB 44584A (CARDUCCI)

Contrary to the opinion expressed by the Board regarding the Commission's discretion, I believe that discretion is not at issue and that section 7 above does not vest the Commission with any discretionary authority.

I now refer to three excerpts taken from volume 1 of the 3rd edition of *Droit administratif* (1991) by Patrice Garant. He defines discretionary authority on page 306:

> According to De Laubadere, discretionary authority exists when, in the presence of given questions of fact, the administrative authority is free to make any decisions, can choose from these decisions, in other words, when his conduct has not been prescribed to him beforehand by law. [TRANSLATION]

He adds the following on page 308:

> Therefore, the courts shall not consider discretionary authority which involves the enforcement of predetermined standards in the act or regulations, nor that which involves determination whether the factual circumstances required for the standard to be enforced do exist. [TRANSLATION]

On page 314, he discusses the assignment of discretionary authority as follows:

> In legislation, binding authority exists when the word "must" or "shall" is used, while discretionary authority generally exists when the word "may" is used. Other expressions include "if deemed suitable", "if he deems advisable", "if he believes such is in the public interest", "if necessary", "may at his discretion" or "can when he deems advisable".
>
> When nothing in the act indicates a contrary intention, the term "can" vests discretionary authority, i.e., an option and not a duty. However, the term "can" may be omitted, and the context shall indicate that Parliament has nonetheless conferred true discretionary authority. [TRANSLATION]

I subscribe to the reasoning in these excerpts.

JOYAL, J. IN CUB 12280 (ALARIE)

Upon reading the subsection, I find it obvious that a Board of Referees has proper jurisdiction if with the consent of the parties involved, the Chairman and one other member are present.

A court's jurisdiction always rests upon the strictest provisions. In order to maintain the integrity of the justice administration system and respect for laws and procedures, form is as important as content. Furthermore, the jurisprudence has always adopted that principle.

In the decision in *Grillas* vs. *the Minister of M & I*, (1972) S.C.R. 577, Judge Pigeon wrote on page 594:

> As Judge Cartwright (puisne judge at the time) had believed in the case of *Mehr* vs. *The Law Society of Upper Canada* (955) S.C.R. 344, I am inclined to believe that, in the case of commissions with quasi-judiciary powers, no member who has not heard all the evidence may participate validly in the decision. [TRANSLATION]

THURLOW, J. IN A-737-82 (VON FINDENIGG)

Nowhere is there any provision defining what powers are exercisable by the Board in disposing of an appeal. Parliament, in providing for appeals to such a Board, must be taken to have intended to confer an effective right

of appeal and implicitly to have authorized the Board to give any decision that in the circumstances of the case before it is necessary to ensure that the result is in accordance with the law. Where that result follows from the facts before the Board, the Board, in my opinion, can and must give judgment accordingly. But where, as here, the correct application of the law to the situation is such that the matter cannot be finally resolved until the Commission has properly exercised a power reserved by the statute only for its determination it seems to me to be necessarily implied that the Board can and should refer the matter back to the Commission for the exercise by it of that power.

PRATTE, J. IN A-684-85 (GRANGER), CONFIRMED BY THE SUPREME COURT

It is beyond question that the Commission and its representatives have no power to amend the Act, and that therefore the interpretation which they may make of the Act does not by itself have the force of law. It is equally certain that any commitment which the Commission or its representatives may make, whether in good or bad faith, to act in a way other than that prescribed by the Act would be absolutely void and contrary to public order.

Once the applicant's argument is seen in its true light it is clear that it must be dismissed. A judge is bound by the law. He cannot refuse to apply it, even on grounds of equity.

LEDAIN, J. IN A-108-76 (PIROTTE)

It is a fundamental principle that ignorance of law does not excuse failure to comply with a statutory provision. *Mihm* vs *The Minister of Manpower and Immigration*, (1970) S.C.R., 348, at p. 353. The principle is sometimes criticized as implying an unreasonable imputation of knowledge but it has long been recognized as essential to the maintenance and operation of the legal order. Because of its very fundamental character I am unable to conclude, without more specific indication, that Parliament intended that "good cause" in s. 20(4) should include ignorance of law.

The admission of ignorance of the law as good cause for delay would, as the umpire has said, introduce considerable uncertainty into the administration of the Act without the possibility of any clear and reliable criteria to determine when it should apply in particular cases.

B: NATURAL JUSTICE

DUBINSKY, J. IN CUB 8202 (GAUTHIER)

The principles of natural justice are the fundamental rules of fair procedure, which require:

(1) A power of decision exempt from all subjectivity in the legal sense of the term and

(2) For those affected by the decision, the right to a fair hearing.

A fair hearing presupposes:

(1) Sufficient notice of the holding of the hearing

(2) The right to be heard

(3) The right to know the allegations made against a party, and

(4) The opportunity to plead one's case.

The appellant had excellent knowledge of the allegations made against her and she was given a full opportunity to reply to them, which she did. She was given appropriate notice of the time and place of the hearing of the board. She was present and pleaded her case.

MARCEAU, J. IN CUB 45671 (MOREAU)

We wish to emphasize the decision in *Jean-Yves Thibault* (CUB 20370A), where Rouleau J. quoted Professor Garant and the Supreme Court as follows:

> Faced with a situation that might compromise the impartiality of a tribunal, doctrine and the case law are clear, and provide as follows. If one of the parties to a dispute had knowledge, at the time of the hearing, of a situation giving rise to a reasonable apprehension of bias, that party must raise the issue or otherwise will be presumed to have waived the right to invoke it. It will then be presumed that the party did not fear that the tribunal was biased. The case law seems to be clear on this point. [TRANSLATION] (1)

> There is no doubt that, generally speaking, an award will not be set aside if the circumstances alleged to disqualify an arbitrator were known to both parties before the arbitration commenced and they proceeded without objections. (2)

P. Garant, *Droit administratif*, 3rd ed., Cowansville, Les Éditions Yvon Blais Inc., 1991.

Ghirardosi v. *Minister of Highway: for British Columbia*, (1966) S.C.R. 367, 372.

REED, J. IN CUB 21324 (PAQUETTE)

I have listened to the tape and am convinced that the claimant did not receive an adequate hearing. The Chairman continually interrupted the claimant in the presentation of his case, preventing him from completing the thought he was putting forward. The Chairman almost seemed to be playing the role of advocate for the Commission's position rather than attempting to make an independent and objective decision. When the claimant offered to produce copies of his job search, evidence which is relevant to the issue of availability, the Chairman declined to receive it.

ROULEAU, J. IN CUB 12699 (SUPRUNIUK)

The concept of "natural justice" includes the right of a claimant to a fair hearing. So fundamentally important is this right, that there must not exist even the appearance of prejudice to the right of any claimant to make a full presentation before an unbiased Board of Referees. The law requires that not only must justice be done, it must manifestly and undoubtedly be seen to be done The mere suspicion that a claimant has been denied his right is justification in itself for an order returning the matter to the Board of Referees.

MCNAIR, J. IN CUB 22082 (STASIUK)

I have since listened to the tape of the proceedings before the Board of Referees. Like Strayer J. in CUB 21445, *Basi*, I am satisfied that the claimant did not have a fair hearing. The impatient, argumentative and confrontational attitude displayed by one member of the Board, whom I am unable to positively identify, leads me to conclude that the whole proceeding was tainted by bias in the sense that a reasonably well-informed person would conclude from the comments or statements of that member that the full panel would exercise a biased judgment on the

issue to be resolved, namely, whether the claimant lost his employment with Canada Post by reason of his own misconduct.

MCNAIR, J. IN CUB 14677 (KAASGAARD)

On reviewing the record, I am left with little doubt that the chairperson's aggressive and hostile questioning of the claimant at the hearing raised a reasonable apprehension of bias by creating in the claimant's mind the distinct impression that he was not going to get from the Board of Referees a fair and impartial hearing of his appeal. It is my opinion that hearings of unemployment insurance appeals before boards of referees must preserve at all times a reasonable standard of detachment and the appearance of justice being seen to be done, and that this standard is not well served by embarking on a confrontational question and answer type of inquisitorial proceeding.

I find that the Board refused the claimant's right to cross-examine except through the chairperson, who mentioned on page 20 that he did not want to have any cross-examinations. Either of these comments is a restriction on a party's right to cross-examine and is an impediment that I find to be neither necessary nor justified.

C: EVIDENCE

L. MARCEAU, J. IN A-1036-96 (GUAY)

In any event, it is the Board of Referees – the pivot of the entire system put in place by the Act for the purpose of verifying and interpreting the facts – that must make this assessment.

GIBSON, J. IN CUB 42124 (WALCOTT)

Credibility determinations are at the centre of the role of a Board of Referees. It is the Board of Referees that has witnesses before it and has the opportunity to observe the demeanour of the witnesses. In the absence of evidence that the Board ignored evidence that was before it or took into account irrelevant considerations in arriving at a credibility determination, it is not open to an Umpire, on appeal from a decision of the Board, to interfere with a credibility determination. Here, despite the detailed argument on behalf of the claimant, I find no such error. While counsel for the claimant demonstrated a number of contradictions and inconsistencies in the evidence on behalf of the claimant's former employer, I can find no reason to conclude that those inconsistencies and contradictions were so central to the Board's credibility finding as to render it unsupportable.

MACGUIGAN, J. IN A-897-90 (MCDONALD)

I cannot, however, take such a benign view of the effect of the Board's finding of non-credibility with respect to the issue of misrepresentation. Merely disbelieving the applicant's testimony is not a sufficient basis for the Board's conclusion that he knowingly made false or misleading statements. There is another element of proof required, relating to his state of mind, one on which the onus, as I have already said, rests with the Commission. The Board's finding that the applicant's credibility was "in doubt" does not amount to a finding that the Commission has discharged its burden.

STRAYER, J. IN CUB 13366 (MCIVOR)

Where a Board of Referees ignores clear oral evidence, in this case corroborated by other oral evidence, and prefers instead hearsay statements on the record (double hearsay in this case, being a record by the

Insurance Officer of a conversation with the Office Manager of the employer who in turn was relating what she had been told by the Operations Manager) then the Board can be found to have made an erroneous finding of fact without regard for the material before it. I would therefore allow the appeal, set aside the decision of the Board of Referees, and order a new hearing by a different Board. While it is not for me to dictate how that hearing can be conducted, it appears to me to be important that the Board should not readily ignore direct, oral evidence, which is subject to cross-examination, in favour of indirect hearsay that is subject to no cross-examination.

MULDOON, J. IN CUB 15252 (BANKS)

An employer is not entitled to be presumed more credible than an employee. Credibility is to be found upon the material, both documentary and oral, before the board of referees. Neither side starts with any favourable (or unfavourable) presumption of credibility.

CULLEN, J. IN CUB 10726 (FARSAD)

In my view this is a clear case of credibility, properly to be decided by a Board of Referees and further, every effort should be made by the Board of Referees to secure the direct oral evidence. I appreciate that the Board is allowed to use hearsay evidence and that procedures are relaxed to keep hearings as informal as possible. Here, however, the Board of Referees is forced to consider hearsay from a person who got that information second hand.

REED, J. IN CUB 12897 (PULZONI)

Where there is reason to doubt the credibility of written evidence, a Board should not rely on that evidence in the face of oral testimony contradicting the written statements. The individuals should have been called and questioned on their written statements, in order to assess the credibility of their evidence if that evidence was going to be relied on.

MULDOON, J. IN CUB 15252 (BANKS)

If the Commission is going to cite jurisprudence to referees, it must make balanced citations of jurisprudence. To submit selectively slanted jurisprudence is highly improper and unfair, since almost all referees are not lawyers, as all claimants are not lawyers, and neither category of participants in the system has access to the kind of researchers mentioned above, or any at all. On the other hand the Commission's agents, by virtue of the scope of their employment and their work experience, do have access to catalogued unemployment insurance jurisprudence.

REED, J. IN CUB 14876 (HAYES)

I would note that Boards of Referees should not apply in a mechanical fashion "verbal formulae" which the Commission throws at them. For example, the Commission is overly quick to quote the statement in CUB 8741, that the first statements made by an individual have more credibility than those made subsequently. This is a presumption; it is a guideline; but, it is not a rule to be applied mechanically and woodenly. In many situations, a person's first explanation is likely to be truer because they have not had time to adjust it to fit what are later discovered to be the requirements of the unemployment insurance system. But, in many instances, the first statements are given in response to Commission questionnaires, which themselves are not clear or which claimants approach with certain preconceptions. These preconceptions can lead claimants to answer in a more restrictive way than truly reflects their intentions. Also, when a claimant gives an explanation concerning the context of an earlier statement, the Board must take the explanation into account in assessing whether the later statements are indeed contradictory to the earlier statements or whether a credible explanation exists.

ROBERTSON, J. IN A-418-97 (CHILDS)

In concluding that Commission employees need not present themselves for cross-examination before a Board in circumstances where alleged admissions by claimants are found within notes prepared by the former, I do not want to be taken as holding that such written evidence of oral admissions must be accepted at face value. The Board is entitled to make a specific finding that a claimant was a credible witness notwithstanding conflicting statements found within notes taken by Commission staff during an interview. Such statements are intrinsically unreliable when not approved by claimants at the time made, but in the end it is the role of the Board to determine what weight, if any, should be given to same.

Here, both the Board and the Umpire assumed that making a legally false statement led inevitably to a finding that it was subjectively known to be so. They were wrong in law in that they did not properly consider the question of whether the claimant subjectively knew that the statements he made were false, as required by *Gates* (supra).

D: THE DECISION

REED, J. IN CUB 13852 (DALGLEISH)

This requirement for written reasons is designed to serve at least two purposes: to enable a reviewing body (the Umpire or the Federal Court of Appeal) to know the basis for the reasons why a decision was made. Without such knowledge a claimant's right of appeal is meaningless. And, to give some assurance to the claimant that his position has been listened to and understood - to demonstrate that a fair hearing was held. Statements to the effect that Boards after having examined all the evidence agree with the Commission's decision do not meet this test. I make reference to two recent comments of Mr. Justice Beetz of the Supreme Court, albeit in a different context. In *Blanchard* v. *Control Data Canada Ltée.*, [1984] 2 S.C.R. 476 he stated that a failure to provide adequate reasons would constitute a breach of natural justice. In *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177. Mr. Justice Beetz again commented on the need for reasons, to demonstrate the basis of the decision given and to demonstrate that it was made in conformity with fundamental justice.

MARIN, J. IN CUB 31057A (GAGNON)[1]

While I do not necessarily want to place the Board's decision under a microscope, I must admit that I find it rather sparse as concerns the reasons bearing on the credibility of the evidence. The Board did not make a distinction between or reject the items in the file, it did not indicate whether its appreciation of the hearsay was scant or considerable, and it did not indicate whether the members leaned toward the direct evidence rather than the evidence on file. In fact, the Board's silence on these unanswered questions leaves the reader wanting more and, in my opinion, does not meet the requirements of subsection (2) of section 79. On the contrary, this decision is very much incomplete.

1. Note that the case identifier has been changed from Huguesson, J. in A-3-96 (Gagnon). The passage that follows is actually from the decision by the Umpire (Marin, J.) in CUB 31057A, which Huguesson, J. cites in a Federal Court of Appeal case. -TR

I also direct the Board of Referees to indicate clearly the reasons for each finding of fact and law made. A bald statement that the Board makes a finding of law or fact without indicating the basis for the finding is not sufficient. I would also like to add that the requirement of sufficiency of reasons given for a decision has nothing to do with their length, it refers exclusively to their content. In my view, this particular Board decision illustrates that six pages of reasons may not be sufficient.

INDEX