

Tribunal's independent legal research not procedurally unfair

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24 June 2021

When a judge or an adjudicator renders a decision that is not anchored in the pleadings, evidence, positions or submissions of the parties, appellate courts have overturned the underlying decision on the grounds that an error of law has been committed: *Labatt Brewing Co. v. NHL Enterprises Canada L.P.*, 2011 ONCA 511; *Moore v. Sweet*, 2017 ONCA 182, leave to appeal S.C.C. allowed with judgment reversed 2018 SCC 52 (CanLII); and *Rodaro v. Royal Bank of Canada*, 2002 CanLII 41834 (ON CA). The error of law is that the losing party has been denied natural justice or procedural fairness.

However as seen in the recent Alberta case of *Sysco Canada, Inc. v. Miscellaneous Employees*, 2021 ABQB 459 (CanLII), an administrative tribunal can rely on cases that neither party expressly raised in argument to support a decision, without breaching procedural fairness.

This case concerned a judicial review of a decision in which the Alberta Labour Relations Board approved an application for certification of a bargaining unit consisting of a group of truck drivers who provided services to the applicant. The Board found that all of the drivers who performed services for the applicant were “dependent contractors” within the meaning of s. 1(1)(h.01) of the Alberta *Labour Relations Code* and therefore were included as “employees” in the bargaining unit.

Among other grounds for the judicial review, the applicant contended that it had been denied procedural fairness and natural justice because the Board relied on certain authorities which had not been raised by either party during the hearing. The applicant submitted that it did not have an opportunity to respond to those cases.

On the judicial review, the applicant identified two authorities in particular which it contended had not been presented at the hearing. By relying on these decisions, the applicant argued that the Board breached the *audi alteram partem* principle by deciding the case on a basis not raised by the parties and by failing to give the parties a reasonable opportunity to address case law and a line of argument that the Board relied upon, but that was not raised at the hearing.

In contrast, the respondent argued that the cases were before the Board because they were referred to in authorities that were placed before it.

The application judge rejected the applicant’s argument because there was no suggestion that the cases had raised a new issue. Under Alberta law it had been determined that it is not improper for a decision-maker to refer to case law not provided by the parties, provided that doing so does not raise any new issues not addressed by the parties: *Grenon v. Canada Revenue Agency* 2017 ABCA 96 at para. 41.

In *Edmonton (City) Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10, the court stated at para. 172:

A tribunal is not bound by the authorities cited by parties. By raising an issue, a party opens the door to the existing jurisprudence governing that issue. Put another way, a tribunal is not constrained by the parties’ legal research. Tribunal (and judicial) economy extends latitude to decided based on the law rather than on the specific authorities invoked by the parties...I agree with the IPC that an adjudicator is not obligated “to update or request submissions from the parties on every aspect of the Adjudicator’s reasoning process, including references to case law.” [...].

In finding that the Board’s reliance on the two decisions did not cause procedural unfairness, the applications judge also concluded that the cases did not raise new issues based on the findings of the Supreme Court of Canada in *R. v. Mian*, 2014 SCC 54 (CanLII). One of the central issues raised before the Board was whether the truck drivers at issue were employees under the Code or dependent contractors. This issue for determination in the impugned two cases was how to assess whether an owner-operator was a “dependent contractor”. According to *Mian*, at para. 33, where issues are rooted in, or components of, an existing issue,

they are not “new issues”.

This case is important because it supports the ability of an adjudicator to consider authorities that the parties may not have themselves raised in argument. Provided that the adjudicator does not make a determination on a new theory or a new issue that the parties never raised before him or her, then relying on authorities never raised in argument or cited in a factum should not result in a denial of natural justice. After all, an adjudicator, particularly a judge, is entitled to know the law and has a duty to apply the law. This, however, may not apply to a newly released decision that might impact a case that has already been argued. In this instance, the adjudicator should seek the views of the parties before making a decision. In other cases, the parties would be wise to at first instance thoroughly canvass the law to ensure that all relevant decisions are placed before an adjudicator and that unfavourable decisions are distinguished. Otherwise an appellate court will be compelled to dismiss an appellant's complaint that the adjudicator relied on relevant authorities that had never been cited in oral or written argument.

Although *Sysco Canada, Inc.* is an Alberta case, a similar result would likely have been reached in Ontario: see, for example, *Tall Ships Landing Devt. Inc. v. Brockville (City)*, 2019 ONSC 6597 (CanLII) at para. 34. A PDF version is available to download [here](#).

If you require any litigation assistance, our **Dispute Resolution Group** lawyers are available to assist you. Please contact [Stephen Thiele](#) at 416.865.6651.

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