



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Kennedy v. Central Regional Integrated Health Authority (Board of Trustees)*, 2024 NLCA 32

Date: September 23, 2024

Docket Number: 202101H0056 and 202101H0063

BETWEEN:

PAULA KENNEDY

APPELLANT/RESPONDENT
BY CROSS-APPEAL

AND:

BOARD OF TRUSTEES, CENTRAL
REGIONAL INTEGRATED HEALTH
AUTHORITY

RESPONDENT/APPELLANT
BY CROSS-APPEAL

Coram: F.P. O'Brien, W.H. Goodridge and F.J. Knickle JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division 201901G3470
(2021 NLSC 102)

Appeal Heard: November 22, 2023

Judgment Rendered: September 23, 2024

Reasons for Judgment by: F.J. Knickle J.A.

Concurred in by: F.P. O'Brien and W.H. Goodridge JJ.A.

Counsel for the Appellant/Respondent by Cross-Appeal: Jerome P. Kennedy K.C.

Counsel for the Respondent/Appellant by Cross-Appeal: Michelle A. Willette

Authorities Cited:

CASES CITED: *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502; *T.R. v. Newfoundland and Labrador (Child, Youth and Family Services)*, 2014 NLCA 19; *Seraj v. Memorial University of Newfoundland*, 2022 NLCA 42; *Young v. Central Health*, 2016 NLTD(G) 145; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Regional Health Authority B, doing business as Horizon Health Network v. Dr. deVries*, 2022 NBCA 20; *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.

TEXTS CONSIDERED: Donald J.M. Brown, John M. Evans & Adam J. Beatty, with the assistance of David Fairlie, *Judicial Review of Administrative Action in Canada*, (Toronto, ON: Thomson Reuters, 2009) (loose-leaf updated 2021, release 1).

F.J. Knickle J.A.:

INTRODUCTION

[1] This appeal addresses whether the appellant, Dr. Paula Kennedy, was denied procedural fairness in relation to her employment with the respondent, the Central Regional Integrated Health Authority (Central Health).

[2] Dr. Kennedy alleges she was denied procedural fairness in two ways. Firstly, she alleges that the procedure used in the hearing of her appeal of Central Health's refusal to renew her hospital privileges, was inadequate. Dr. Kennedy alleges that the procedure used by the appeal committee hearing the appeal prevented her from fully addressing her grounds of appeal. She argues that given the issues to be addressed and the impact on her, the appeal hearing should have been conducted in the manner of a full trial-like proceeding.

[3] Secondly, Dr. Kennedy alleges that she was denied procedural fairness when, some 17 months after the appeal decision had been rendered, the Board of Trustees for Central Health (the Board) refused her request to reconsider that appeal decision.

[4] Dr. Kennedy brought an application for judicial review of both these events. The applications judge dismissed her application finding that there had been no

breach of procedural fairness owed to Dr. Kennedy in either instance (*Kennedy v. Central Regional Integrated Health Authority (Board of Trustees)*, 2021 NLSC 102, (the Decision)). The applications judge found that the procedures employed at Dr. Kennedy's appeal hearing and in the response to Dr. Kennedy's request to reconsider the appeal decision, adequately met the duty of procedural fairness owed to Dr. Kennedy.

[5] Dr. Kennedy now appeals the applications judge's decision and requests that decision be set aside.

[6] Although successful before the applications judge, Central Health has cross-appealed the applications judge's decision respecting the second alleged breach of the duty of procedural fairness. Central Health alleges that the applications judge erred in concluding that the Board's refusal to reconsider the appeal decision constituted an administrative decision that triggered the duty of procedural fairness. Central Health asserts that because the Board had no authority to reconsider the appeal decision, the fact that they did not so do, and then communicated that to Dr. Kennedy, did not constitute a "decision" that would trigger the duty of procedural fairness.

[7] I would dismiss the appeal but allow the cross-appeal.

BACKGROUND FACTS

[8] Dr. Kennedy is a fee for service radiologist. She has been employed with Central Health since 2009. She has been stationed at the hospital in Gander, NL. In order to work at the hospital, it is necessary for Dr. Kennedy to possess hospital privileges. The typical duration for such privileges is a period of five years. Dr. Kennedy was able to maintain her privileges until July 2017 when her application to renew these privileges for a further period of five years was denied by Central Health. The Chief Executive Officer (CEO) of the hospital at the time, Rosemarie Goodyear, was charged with making the final decision on renewal of privileges. She decided that Dr. Kennedy's privileges should not be renewed.

[9] While there was no concern with Dr. Kennedy's qualifications or clinical skills or that Dr. Kennedy had put any individual patient at risk, the CEO concluded that Dr. Kennedy had failed to "meet the standards" of four by-laws that related to how medical professionals were expected to conduct themselves in relation to other medical professionals and/or the organization itself. On that basis, she refused to

renew Dr. Kennedy's privileges. The CEO refused to renew the privileges even though two committees who assessed Dr. Kennedy's application to renew recommended renewal of her privileges, albeit on a conditional basis and for one year only.

The appeal from the refusal to grant Dr. Kennedy hospital privileges

[10] Dr. Kennedy appealed the CEO's decision to refuse renewal of her hospital privileges. According to the governing by-laws, the appeal procedures entitled Dr. Kennedy to a hearing. The appeal hearing was to be before the appeal committee which would be composed of five members of the Board for Central Health. Dr. Kennedy was entitled to be represented by counsel and to present both written material and oral argument. The appeal committee was also entitled to hear from other medical professionals who made recommendations to the CEO regarding whether to renew Dr. Kennedy's privileges. The CEO was also entitled to make representations to the appeal committee.

[11] Prior to the appeal hearing, Dr. Kennedy's counsel made a written request to the appeal committee to hold what he described as a "*de novo*" hearing. As there had been no initial hearing, what Dr. Kennedy sought was not a "*de novo*" hearing, but a full formal trial-like hearing in which witnesses could be compelled and cross-examined and other evidence tendered beyond what was permitted by the relevant by-laws. Dr. Kennedy alleged that the CEO's refusal to renew her hospital privileges raised issues of "potential bias" and allegations of "bad faith". Dr. Kennedy submitted a formal trial-like process, including cross-examination of the CEO, was necessary to ensure that she could fully argue why the decision to deny renewal of hospital privileges should be overturned.

[12] The appeal committee denied the request for the "*de novo*" hearing and Dr. Kennedy was notified of the decision in advance of the appeal hearing. In their written decision on the appeal, the appeal committee explained their reasons for denying the request (Appeal Committee Decision, October 2017, Appeal Book, Tab 20, at paras. 19-38).

[13] While the appeal committee agreed that the by-laws were silent as to exactly the procedure to be used, the by-laws nonetheless provided direction that, in the appeal committee's view, was inconsistent with holding a trial-like process. The appeal committee observed that the by-laws authorized them to "invite" certain individuals (including the CEO), who were relevant to the initial decision making

process, to “present” their “position” to the appeal committee. Dr. Kennedy was also entitled to appear alone or with counsel. The appeal committee concluded that this kind of language suggested a less formal hearing than that of a trial. The appeal committee further noted that there was no authority in the by-laws to “compel” witnesses or receive “sworn testimony” or permit “cross-examination” of witnesses.

[14] After reviewing the by-laws, the appeal committee was not satisfied that the language supported the formal trial-like hearing Dr. Kennedy had requested. They concluded that because they obtained their jurisdiction from the by-laws, they had to “observe and respect” the direction given by those by-laws and so denied the request. The appeal committee concluded that the appeal was to be based on the record of information that had been before the CEO and supplemented as need be by the parties (Appeal Committee Decision, at paras. 36-37).

[15] The appeal committee also observed that much of the information Dr. Kennedy wanted to present was already permitted by the procedures in the by-laws, or was not relevant to the issues that had to be decided on the appeal. In their view, Dr. Kennedy’s concerns could be addressed without a full trial-like procedure.

[16] Notwithstanding their conclusion that the appeal hearing would not involve compelling witnesses with sworn testimony and cross-examination, the appeal committee allowed Dr. Kennedy “latitude” in the presentation of her appeal, including the extent of the information she presented. For example, letters of recommendation relating to Dr. Kennedy were filed even though not strictly permitted by the by-laws. She was also permitted to present information in a questioning format by her counsel, akin to a direct examination.

[17] Dr. Kennedy’s appeal was allowed in part (Appeal Committee Decision, at para. 101). The CEO’s refusal to renew Dr. Kennedy’s hospital privileges was set aside. However, the appeal committee reinstated the renewal for a period of one year, as recommended by the medical committee, rather than the customary five years as requested by Dr. Kennedy. The appeal committee further directed that a reassessment of Dr. Kennedy’s privileges be conducted after she completed the one-year renewal period (Appeal Committee Decision, at para. 101). At that time, Dr. Kennedy would be permitted to seek renewal of her privileges for the full five years.

[18] After the partial success on her appeal, Dr. Kennedy did not return to her employment with the hospital but was on medical leave. Nor did Dr. Kennedy take any steps to seek judicial review of the decision of the appeal committee, as was

permitted by the by-laws, until after the events in the Spring of 2019, approximately 17 months after the appeal decision had been rendered.

The events in the Spring of 2019

[19] On March 26, 2019, the Board was scheduled to meet for purposes unrelated to Dr. Kennedy. However, Dr. Kennedy became aware of this meeting and, according to her, understood that her situation would be discussed at this meeting. At this point, Dr. Kennedy was still on medical leave and had not yet returned to work. Dr. Kennedy's counsel wrote a letter to the Board that day requesting that they reconsider the appeal decision from October 2017. On April 1, 2019, legal counsel for the Board responded to Dr. Kennedy's counsel with a letter advising that the appeal decision would not be reconsidered as there was no legal authority to so do. There was some further correspondence between counsel.

[20] In May 2019, Dr. Kennedy commenced her application for judicial review of both the appeal decision in October 2017 and the failure of the Board to reconsider the appeal decision as requested in March 2019. As stated, the applications judge dismissed the application for judicial review.

ISSUES

[21] The issues on appeal can be framed as follows:

- 1) Did the applications judge err in concluding that the appeal procedure used by the appeal committee in the October 2017 hearing fulfilled their duty of procedural fairness owed to Dr. Kennedy?
- 2) Did the applications judge err in concluding that the conduct of the Board of Trustees in the Spring of 2019 constituted a "decision" which triggered a duty of procedural fairness towards Dr. Kennedy?
- 3) If so, did the applications judge err in concluding that there was no breach of that duty of procedural fairness owed by the Board to Dr. Kennedy?

[22] The cross-appeal (Issue 2) will be addressed prior to addressing Issue 3 of the appeal as its resolution also resolves Issue 3.

Standard of Review

[23] In these circumstances, all of the issues involve questions of law and are, therefore, assessed on a standard of correctness: whether there was a duty of procedural fairness owed to Dr. Kennedy and whether there was a denial of procedural fairness (*Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at para. 79). As stated by Mercer J.A. in *T.R. v. Newfoundland and Labrador (Child, Youth and Family Services)*, 2014 NLCA 19, at paragraph 18:

Whether procedural fairness was observed is an issue of law and accordingly the applicable standard of review is correctness.

(See also *Seraj v. Memorial University of Newfoundland*, 2022 NLCA 42, at paras. 47-52; and *Young v. Central Health*, 2016 NLTD(G) 145, at para. 17).

[24] Whether the Board’s conduct constituted a “decision” that attracted a duty of procedural fairness is part of the analysis as to whether there was a denial of procedural fairness and is, therefore, also a question of law.

The principles governing the duty of procedural fairness

[25] The principles governing whether there has been a denial of procedural fairness are well established. Where an administrative decision by a delegated authority affects the legal rights, privileges, or interests of an individual, that decision will attract a duty of procedural fairness towards that individual.

[26] The scope or content of that duty will depend on several considerations: the nature of the decision made, the legitimate expectation of the parties, the statutory scheme under which the decision was made, the importance of the decision to those affected, and the choices made by the decision maker about the procedures to be used, especially where the governing legislation allows for discretion on the part of the decision maker as to what procedures they will use (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 23-27). The list of considerations is not exhaustive. All of the circumstances must be taken into account and the analysis of the circumstances must recognize that the duty of fairness is “flexible and variable” and “depends on an appreciation of the context of the particular statute and the rights affected” (*Baker*, at para. 22).

[27] As described by Goodridge J., as he then was, in *Young*, at paragraph 28:

[28] Procedural fairness, in simplest terms, refers to the right to a fair hearing by an unbiased decision maker, where a decision affects the individual's rights or legitimate expectations. There can be a wide range on the spectrum of 'procedural fairness' and the level will vary depending on the particular context in which the administrative decision was made. The variable level ensures that "administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker" (para. 22 of *Baker*). There cannot be a full hearing with witnesses and lawyers every time an individual right or privilege is being decided. But occasionally the context may require a full hearing with witnesses and lawyers. It always depends on the circumstances. A simple matter, such as application for beginner driver's permit, may attract only a minimal level of procedural fairness, while complex matter, such as discipline hearing that could end one's career, may attract a very high level of procedural fairness.

[28] An open and fair procedure will be a procedure that is "appropriate to the decision being made" (*Baker*, at para. 22). The greater the impact of the decision on the individual, the greater the extent of the duty of procedural fairness (*Baker*, at para. 25). For example, what may be required to ensure fairness in the context of possible deportation, as was the issue in *Baker*, may not require the same extent of procedural fairness as deciding whether someone should be issued a permit.

[29] It is through this lens that whether the procedures employed by the appeal committee in 2017, or the Board in 2019, were in keeping with the duty of procedural fairness owed to Dr. Kennedy must be assessed.

ISSUE 1: Did the applications judge err in concluding that the appeal procedure used by the appeal committee in the October 2017 hearing fulfilled their duty of procedural fairness owed to Dr. Kennedy?

[30] Applying the principles in *Baker*, and as applied in *Young*, the applications judge concluded that the level of procedural fairness owed to Dr. Kennedy was adequate notwithstanding that she was refused a full trial-like hearing. The applications judge stated:

[72] Dr. Kennedy does not allege any bias, reasonable apprehension of bias, or partiality by the Appeal Committee. There is no evidence to suggest that in rendering the October 2017 Decision the Appeal Committee was biased. Nor is there any evidence to suggest that in coming to the October 2017 Decision the Board relied upon any evidence or information that was not known to Dr. Kennedy. The Appeal

Committee did not only rely upon the record that had been considered by the CEO. It supplemented and informed that record with presentations by: the Chairs of the Credentials Committee and the Medical Advisory Committee; Dr. Kennedy and her counsel; the then-CEO; and the counsel for Central Health Administration. It also supplemented the record with the Marsh Report.

[73] The Appeal Committee gave written reasons for its decision that included reasons for its denial of Dr. Kennedy's request for a *de novo* hearing. The decision justifies the Appeal Committee's decision in an intelligible and transparent manner. I find that it fulfills the requirements of duty of procedural fairness. The reasonableness of the decision has not been challenged.

[31] I find no error in the applications judge's reasoning that there was no denial of procedural fairness as it related to the hearing of Dr. Kennedy's appeal. The applications judge applied the factors in *Baker* to determine the extent of the duty for someone in Dr. Kennedy's circumstances; that is, someone who was dissatisfied with the decision to refuse to renew her hospital privileges (Decision, at paras. 60-69).

[32] The applications judge properly observed that the extent of procedural fairness provided to Dr. Kennedy safeguarded her ability to address whether she should face the impact of a denial of hospital privileges: she was entitled to be "considered by an unbiased and impartial decision maker"; she was entitled "to disclosure" of information considered by the appeal committee; she was entitled to "make representations"; and she was entitled to "reasons for that decision in writing" (Decision, at para. 71). As observed by the applications judge, these hallmarks of procedural fairness were adhered to by the appeal committee in the handling of Dr. Kennedy's appeal.

[33] The applications judge also relied on the decision in *Young* in which the circumstances were similar to that of Dr. Kennedy. Like Dr. Kennedy, Dr. Young appealed a refusal of a grant of hospital privileges by Central Health alleging, like Dr. Kennedy, a denial of procedural fairness (the difference was, although Dr. Kennedy had sought a renewal of her privileges, Dr. Young had been seeking an initial grant of privileges).

[34] After noting the different procedures in the governing by-laws between Dr. Young's appeal from an initial refusal of privileges and Dr. Kennedy's appeal of a refusal to renew privileges, the applications judge concluded that Dr. Kennedy was entitled to an even more elevated level of procedural fairness than Dr. Young, but not a full trial-like proceeding.

[35] The applications judge concluded that while the denial of hospital privileges was a decision that was important to Dr. Kennedy and affected her employment, the determination of whether she should have hospital privileges, similar to Dr. Young, was more inquisitorial than adversarial. The circumstances did not require the full panoply of procedures (Decision, at para. 71). For example, as concluded by the applications judge, Dr. Kennedy's circumstances did not require that she be able to compel and cross examine witnesses.

[36] As well, given the latitude afforded the appeal committee to determine their appeal procedures, the applications judge properly concluded, similar to the court in *Young*, that she should show deference to the appeal committee's choices as to the procedures to be used in the appeal hearing. The appeal committee was not required to have imposed further procedural protections (Decision, at paras. 66, 69). I would agree. As stated in *Baker* at paragraph 27, analysis of what procedures the duty of fairness requires in a given situation must:

... respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, *supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, per Gonthier J.

[37] Here, the appeal committee was not satisfied that a full trial-like hearing was permitted or required to fairly address Dr. Kennedy's arguments on the appeal. Dr. Kennedy has shown no error in the appeal committee's choices as to the appropriate procedure, or the applications judge's reasoning in showing deference to these choices in the circumstances.

[38] I would agree with the applications judge that the procedure used, while less formal than a full trial-like hearing as requested by Dr. Kennedy, was in keeping with the level of procedural fairness owed to Dr. Kennedy. The procedure employed by the Board permitted Dr. Kennedy to fully and fairly address why her appeal should have been allowed and went beyond the procedure contemplated by the governing by-laws. The appeal committee was cognizant of and addressed Dr. Kennedy's complaints, including the basis for the CEO's decision (Appeal Committee Decision, at para. 89(11-14)).

[39] I would dismiss this ground of appeal.

ISSUE 2: Did the applications judge err in concluding that the conduct of the Board of Trustees in the Spring of 2019 constituted a “decision” which triggered a duty of procedural fairness towards Dr. Kennedy?

[40] The applications judge found that in the Spring of 2019, the Board made a “decision” that triggered a duty of procedural fairness owed to Dr. Kennedy.

[41] The applications judge found that the “decision” that triggered the Board’s duty of fairness towards Dr. Kennedy was its refusal to reconsider the October 2017 appeal decision (Decision, at paras. 28 and 32). I would respectfully disagree that this conduct constituted a “decision” that triggered a duty of procedural fairness to Dr. Kennedy. The Board responded to unsolicited correspondence from Dr. Kennedy’s counsel, that it could not fulfill Dr. Kennedy’s request because it lacked authority to so do. This did not constitute a decision that attracted the duty of procedural fairness towards Dr. Kennedy.

[42] Not every administrative action or statement constitutes a decision that will trigger a duty of procedural fairness.

[43] While the nature of the relationship pointed towards a duty of procedural fairness given that the relationship was governed by legislation and by-laws created under that legislation, there still had to be a decision in the sequence of events that impacted Dr. Kennedy’s rights, privileges or interests (*Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at page 653; and *Baker*, at para. 20). As stated in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at page 677:

There is a right to procedural fairness only if the decision is a significant one and has an impact on the individual.

[44] There is nothing that happened on March 26 or April 1, 2019 in the Board’s conduct that affected the rights, privileges or interests of Dr. Kennedy. The Board met under its appropriate statutory authority regarding matters unrelated to Dr. Kennedy. Dr. Kennedy was in exactly the same place after the March 26 meeting and April 1 communication from the Board, as she was prior to those events. She possessed privileges at the hospital for one year, as per the October 2017 appeal decision, and was entitled to return to her employment as the appeal committee’s decision had established.

[45] The conduct of the Board was not that it made any decision, but that it communicated to Dr. Kennedy's counsel, in response to his unsolicited correspondence, that it could not reconsider the October 2017 appeal decision. The communication of a fact does not constitute a decision (*Regional Health Authority B, doing business as Horizon Health Network v. Dr. deVries*, 2022 NBCA 20).

[46] Although the applications judge acknowledged that the Board did not have the authority to reconsider the October 2017 appeal decision (Decision, at para. 34), and that there was no change to Dr. Kennedy's status by the refusal to reconsider the appeal decision, the applications judge did not assess these facts as relevant to whether the Board had made a "decision" that triggered a duty of procedural fairness. Instead, the applications judge assumed the conduct constituted a decision and considered these facts as part of the assessment of the extent of the duty. This was an error.

[47] At paragraph 100 of her factum, Dr. Kennedy argued that if the Board decided that it did not have the authority to reconsider the October 2017 appeal decision, the duty of procedural fairness required it to hear from Dr. Kennedy on this point. I disagree. Upon receiving the request from Dr. Kennedy's counsel, the Board had no authority to choose between inaction or action. In my view, their failure to do something for which they lacked authority cannot be a decision that triggered the duty of procedural fairness.

[48] That a discretionary administrative decision attracts a duty of procedural fairness presupposes not only that the decision maker makes a decision that affects the rights, privileges or interests of the individual, but that the decision maker has the authority to make the decision in question. As stated in *Baker*, the exercise of discretion is a decision that is made in accordance with the law:

52 The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. As K.C. Davis wrote in *Discretionary Justice* (1969), at p. 4:

A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.

[49] Dr. Kennedy conceded that she could point to no authority that would permit the Board to act as she had requested and does not dispute the Board's position that they did not possess the authority to reconsider the October 2017 appeal decision.

Further, contrary to Dr. Kennedy's assertion at paragraph 89 of her factum, she was not left without a remedy in relation to the October 2017 appeal decision. It was always open to Dr. Kennedy to seek judicial review of the appeal decision and she did indeed seek judicial review. In other words, this is not a situation in which it might be necessary to imply authority of the Board to reconsider the appeal decision in order to ensure that justice would be done on behalf of Dr. Kennedy: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, (see also, Donald J.M. Brown, John M. Evans & Adam J. Beatty, with the assistance of David Fairlie, *Judicial Review of Administrative Action in Canada*, (Toronto, ON: Thomson Reuters, 2009) (loose-leaf updated 2021, release 1) vol 2, ch 12 at 111-114, 116-118).

[50] For these reasons, while I would agree with the applications judge that there was no breach of the duty of procedural fairness in relation to the events in the Spring of 2019, it was not because the duty had been fulfilled. In my view, respectfully, there was no breach because there was no duty triggered by the Board's conduct. There was no decision that impacted the rights, privileges, or interests of Dr. Kennedy.

[51] In summary, when the Board communicated that it could not reconsider the October 2017 decision, it did not make a decision that triggered a duty of procedural fairness owed to Dr. Kennedy. It communicated a fact and nothing more. The applications judge's conclusion that the Board had made a decision in the Spring of 2019 that triggered a duty of procedural fairness, was an error in law and must be set aside.

[52] I would allow the cross-appeal by Central Health.

ISSUE 3: Did the applications judge err in concluding that there was no breach of that duty of procedural fairness owed by the Board to Dr. Kennedy?

[53] Having concluded that there was no decision respecting the March and April 2019 events that triggered the duty of procedural of fairness towards Dr. Kennedy, there is no need to address further whether there was a breach of that duty. There was no breach because there was no duty of fairness triggered.

CONCLUSION

[54] The applications judge properly concluded that there was no breach of the duty of procedural fairness in denying the appellant a trial-like procedure in the hearing of her appeal in October 2017.

[55] However, while the applications judge correctly found there was no breach of the duty of fairness, the applications judge erred in concluding that the conduct of the Board during the events of March and April 2019 constituted a “decision” that triggered a duty of procedural fairness towards Dr. Kennedy.

[56] I would dismiss the appeal and allow the cross-appeal, with costs under Column 3 to Central Health in both appeals.

F.J. Knickle J.A.

I concur: _____
F.P. O’Brien J.A.

I concur: _____
W.H. Goodridge J.A.