GILBERT BRIÈRE
APPELANT-requérant

c.

SERGE LABERGE
INTIMÉ

et

COMMISSION DE LA SANTÉ ET DE LA SÉCURITÉ DU TRAVAIL
MISE EN CAUSE

COUR D'APPEL DU QUÉBEC
n° 200-09-000272-846
Québec, le 30 août 1985

Présents : Les juges Beauregard, Tyndale et Rothman

***LIMITES AU DROIT DE SE DÉSISTER D'UNE DEMANDE DE RÉVISION D'UNE INDEMNITÉ OCTROYÉE EN VERTU DE LA* LOI SUR LES ACCIDENTS DU TRAVAIL**

APPLICATION DES RÈGLES DU* CODE DE PROCÉDURE CIVILE *DEVANT LES TRIBUNAUX ADMINISTRATIFS ET QUASI JUDICIAIRES

v. J.E. 85-905
C.S.Q. n° 200-05-00039-847,
13 mars 1984, j. Robert Lafrenière

Évocation — Loi sur les accidents du travail — *Demande de révision du taux d'incapacité accordé par l'organisme compétent — Avis de désistement du recours après audition — Application des règles du* Code de procédure civile — *Qualification de l'audition d'une demande de révision — Droit pour celui qui révise de réduire d'office le taux d'incapacité — Limite à l'intervention des tribunaux avant épuisement des droits d'appel.*

C.P. art. **262**, 264, 834, **846**.
Loi sur les accidents du travail, L.R.Q., c. A-3, art. 3(1), 23(1), 26, 63, 64, 65.
Loi sur la fiscalité municipale, L.R.Q., c. F-2.1
Loi sur la santé et la sécurité du travail, L.R.Q., c. S-2.1, art. 223(37).
Règles de preuve, de procédure et de pratique des bureaux de révision de la Commission de la santé et de la sécurité du travail, R.R.Q., 1981, c. S-2.1, r. 17, art. **21**.

JURISPRUDENCE SUIVIE

— *Syndicat des professeurs du Collège de Lévis-Lauzon* c. *Collège d'enseignement général et professionnel de Lévis-Lauzon*, [1985] 1 R.C.S. 596; [1985] R.D.J. 235 (C.S.C.).
— *Blanchard* c. *Control Data Canada Limitée*, [1984] 2 R.C.S. 476.
— *Boutet* c. *Bureau de révision de la Commission de la santé et de la sécurité du travail*, [1985] R.D.J. 335 (C.A.).
— *Métallurgistes unis d'Amérique, section locale 7443* c. *Artopex Inc.*, C.A.M. n° 500-09-001040-831, le 29 janvier 1985.
— *Khanna* c. *Procureur général du Québec*, [1984] C.A. 591.
— *Ville de Salaberry-de-Valleyfield* c. *Commission des affaires sociales*, [1984] C.S. 193.

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LES FAITS

Par suite d'un accident de travail, l'appelant s'est vu octroyer par la mise en cause une indemnité pour une incapacité totale temporaire mais il n'en reçut aucune pour une incapacité partielle permanente. Quelques années plus tard, s'appuyant sur un rapport d'un chirurgien-orthopédiste, il a obtenu que lui soit reconnue une incapacité partielle permanente de 12,5%. Insatisfait de cette décision, il en a demandé la révision afin que cette incapacité soit portée à 35%. Le lendemain de l'audition de sa demande de révision par l'intimé, l'appelant a produit un avis de désistement mais l'intimé lui a alors répondu, par lettre, qu'il ne pouvait l'accorder puisque le règlement de la Commission sur ses règles de preuve ne lui permettait pas de tenir compte de désistements survenus après qu'une audition ait été tenue. Quelque temps plus tard, l'intimé a rendu une décision fixant l'incapacité partielle permanente de l'appelant à 8% plutôt qu'à 12,5%. Celui-ci a alors présenté une requête en évocation de la décision de l'intimé qui fut rejetée par la Cour supérieure. D'où le présent appel.

LES MOTIFS

Par le juge Tyndale:

Relativement au désistement, le juge de première instance a eu raison de refuser d'appliquer les règles du *Code de procédure civile* selon lesquelles un tel désistement prive le tribunal de sa juridiction. En effet, la jurisprudence a clairement établi que le Code ne s'applique pas aux tribunaux administratifs et quasi judiciaires, à moins qu'il n'y ait une disposition expresse au contraire. Or, en vertu de la *Loi sur la santé et la sécurité du travail*, la Commission mise en cause a adopté des règles de preuve et de procédure et l'une d'elles, l'article 21, permet le désistement d'une demande de révision avant ou pendant l'audition seulement. D'ailleurs, cette réglementation se justifie lorsqu'on a à l'esprit la nature et les fonctions particulières de la Commission et de ses délégués ; ainsi, devant elle, la procédure n'est pas réellement contradictoire et la demande de révision ne constitue pas un appel au sens usuel du terme mais elle constitue plutôt un procès *de novo*. Aussi, la décision de l'intimé de demeurer saisi du dossier ne semble nullement déraisonnable.

D'autre part, l'appelant ne peut reprocher à l'intimé d'avoir diminué le taux de son incapacité partielle permanente puisque celui-ci conduisait une audition *de novo*. Dans les circonstances, il importait peu que sa demande de révision n'ait pas été contestée ou que personne n'ait demandé la réduction de ce taux.

Enfin, l'appelant possédait un droit d'appel de la décision de l'intimé devant la Commission des affaires sociales. Il a choisi de ne pas exercer ce droit. Dans de tels cas, les tribunaux deviennent de plus en plus réfractaires à toute intervention de leur part.

Par le juge Rothman :

Comme l'a souligné le juge Tyndale, l'interprétation qu'a donnée l'intimé de la Règle 21 est loin d'être déraisonnable.

Par contre, l'appelant a soutenu que le Bureau de révision ne lui a jamais indiqué qu'il était question de réduire le taux fixé précédemment et qu'il n'avait pas eu l'opportunité de se faire entendre à cet égard. Même si tel est le cas, l'appelant a certes eu la possibilité d'être entendu concernant l'incapacité dont il prétendait souffrir. Il a été convoqué, il a été entendu et il n'existe aucun indice de quelque préjudice à son endroit.

LA DÉCISION

L'appel est rejeté avec dépens.

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OPINION DU JUGE TYNDALE

This is an appeal by Brière against a judgment of the Superior court rendered at Quebec on 13 March 1984 which dismissed his motion in evocation of a decision of Respondent Laberge, sitting as the Review Board established by the Commission Mise en cause in accordance with subsection (5) of section 63 of the *Workmen's Compensation Act* (the Act)[1] rendered on 16 November 1983. By that decision, the Board reduced to 8% the permanent partial incapacity of 12.5% initially awarded by a functionary (the "assessor") on 9 May 1983.

The Commission, in matters such as the one here involved, usually acts through delegates. For better comprehension of the issues in this case, it is convenient to quote pertinent parts of the Act and other provisions.

3. (1) A worker injured by reason of an accident is entitled to the benefits provided for by this act, except... (irrelevant).

23. (1) A worker who claims benefit, or to whom benefit is payable under this act, shall, if so required by his employer, submit himself for examination by a duly qualified medical practitioner chosen and paid for by the employer, and shall, in addition, if so required by the Commission, submit himself for examination by the expert chosen by the latter.

26. The Commission may, at the request of the employer or of the worker, if the benefit is payable by the employer individually, or, if the benefit is payable out of the accident fund, of the Commission's own motion or at the request of the worker, review any weekly or other periodical payment and may put an end to or diminish such payment or may increase it to a sum not beyond the maximum hereinafter prescribed.

(1) R.S.Q., c. A-3.

63. (1) Subject to section 70 and to the appeal provided for in section 65, the Commission has exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this act and to dispose of any other matter or thing in respect of which any power, authority or discretion is conferred upon the Commission.

None of the extraordinary recourses provided in articles 834 to 850 of the Code of Civil Procedure shall be exercised and no injunction shall be granted against the proceedings and decisions of the Commission or against the Superior Court or any judge thereof homologating such decisions.

(3) Except in those cases in which it has delegated its powers in accordance with subsections 4 and 5, the Commission may at any time, with respect to matters within its jurisdiction, reconsider any question decided by it, and rescind, amend or alter its decisions and orders.

(4) The Commission may delegate generally, to such of its functionaries as it may designate, its powers to examine into, hear and determine, in first instance, all matters and questions respecting the right to an indemnity, the quantum of an indemnity and the degree of impairment of earning capacity.

(5) The Commission may delegate generally to a review board established pursuant to section 171 of the Act respecting occupational health and safety (chapter S-2.1) its powers to examine, hear and decide, in second instance, all matters and questions respecting any matter in subsection 4.

(6) Decisions rendered by persons and boards under subsection 5 are governed by subsection 8 and are valid as decisions of the Commission.

(8) The Commission shall render its decisions according to equity and upon the real merits and justice of the case, and shall not be bound to follow the ordinary rules of evidence in civil matters; it may, by all legal means which it deems best, inquire into the matters the investigation whereof is attributed to it. Its decisions shall state the grounds on which they are based.

64. Every person who believes he has been wronged by a decision rendered by a functionary designated under subsection 4 of section 63 may apply to a review board established under subsection 5 of the said section to have the decision reviewed.

The application shall be made in writing to the review board within thirty days of notification of the decision, if the decision regards the right to an indemnity or the quantum of an indemnity, or within ninety days of notification of the decision, if the decision regards the degree of impairment of earning capacity.

A review board may allow a person to act after the expiry of the delays fixed in the preceding paragraph if that person shows that it was in fact impossible for him to act sooner.

65. Every person who believes he has been wronged by a decision rendered by a review board may appeal from it to the Commission des Affaires sociales, which shall dispose of the appeal in accordance with its rules of proof, procedure and practice.

The delays for appeal are those fixed in the second paragraph of section 64, and the third paragraph of the said section applies, mutatis mutandis.

An Act respecting Occupational Health and Safety [2], Section 223, paragraph 37:

"The Commission may make regulations...

(2) R.S.Q., c. S-2.1.

(37) enacting rules of proof, procedure and practice applicable to the examination, hearing and decision of matters under the authority of an inspector, the regional chief inspector or the Commission itself or matters on which persons, executive committees or review boards have authority pursuant to section 172;..."

Rules of Proof, Procedure and Practice of the Review Boards of the Commission de la santé et de la sécurité du travail (3):

Rule 21:

21. Une demande, requête, opposition ou intervention peut être retirée en tout temps avant ou pendant l'audition, en tout ou en partie, au moyen d'un avis écrit transmis au bureau de révision et signé par la partie.	**21.** An application, petition, opposition or intervention may be withdrawn, in whole or in part, at any time before or during the hearing, by means of a written notice sent to the Board and signed by the party.

The facts

On 26 January 1972, when Brière was employed as a trucker by P.E. Pépin Transport Inc., he injured his back in a fall while at work. The Commission granted a period of temporary total incapacity ending on 25 March 1972, and no permanent partial incapacity. In 1973 he left the employer and set up his own firm, and was soon managing a fleet of 21 trucks.

On 23 February 1981, Brière submitted to the Commission a report by an orthopaedic surgeon to the effect that Brière's continuing back trouble, including a recent disc operation, resulted from the accident of 1972. (By this time Brière was not driving; from 1973 until 1980 he had managed his fleet of trucks; in 1980 he sold his business.)

After various proceedings including rejection and review, on 9 May 1983 the Commission, by its assessor, awarded a permanent partial incapacity of 12.5%.

Brière applied to Respondent in accordance with Section 64 of the Act to have the decision of the assessor reviewed; he submitted a medical opinion estimating his permanent partial incapacity at 35%.

Respondent (the Review Board) heard the application at a one-day session on 10 November 1983, and reserved his decision.

The next day, Brière filed a notice of withdrawal of his application, a "desistment" (4). On 29 November Respondent wrote to appellant's attorney a letter reading in part:

> "... La présente fait suite à votre lettre du 11 novembre 1983 nous informant qu'après l'audition tenue dans le présent dossier le 10 novembre 1983, vous aviez reçu instructions de votre client, M. Gilbert Brière, de vous désister des contestations antérieurement logées les 2 mai 1983 et 16 mai 1983.
>
> Nous tenons à vous informer que l'article 21 du règlement sur les règles de preuve, de procédure et de pratique du bureau de Révision ne nous permet pas de tenir compte de désistements survenant après qu'une audition ait été tenue.
>
> ...

(3) R.R.Q., 1981, c. S-2.1, r. 17.

(4) This incorrect (indeed non-existent) word is so common and so well understood by lawyers in Quebec that I shall make use of it.

21. Une demande, requête, opposition ou intervention peut être retirée en tout temps avant ou pendant l'audition, en tout ou en partie, au moyen d'un avis écrit transmis au bureau de Révision et signé par la partie.

Dans ce cas particulier, le bureau de Révision accepte le désistement concernant la demande de révision produite le 2 mai 1983 et se rapportant à la base salariale servant au calcul des indemnités puisque lors de l'audition, il était permis de croire que les corrections envisagées avaient été effectuées et que vous aviez clairement manifesté l'intention de vous désister sur ce point. Toutefois en ce qui concerne la demande de révision du 16 mai 1983 portant sur le taux d'incapacité partielle permanente, nous ne pouvons accepter votre désistement.

En conséquence, sur ce dernier point, vous recevrez donc au cours des prochaines semaines, une décision écrite et motivée de notre bureau de Révision.

..."

On 16 December, Respondent issued his decision; after a careful review of the evidence, which included Brière's history as shown by the file including the report of the Commission's expert, and the evidence presented by Brière at the hearing on 10 November, he fixed Brière's permanent partial incapacity at 8%.

Brière then made a motion in evocation (art. 834 et 846 C.P.) dated 28 December 1983 alleging want and excess of jurisdiction by Respondent because:

"...

a) Il a sciemment excédé sa juridiction en rendant une décision en seconde instance sur l'incapacité partielle permanente du requérant, sans en être requis par aucune partie intéressée;

b) Il s'est même prononcé au-delà des conclusions recherchées par le requérant dans sa contestation initiale du 16 mai 1983;

..."

On 13 March 1984 the Superior court dismissed the motion in evocation. As to the desistment, the trial judge decided that it was governed, not by the rules of the *Code of Civil Procedure*, but by Rule 21 of the Review Board [5], and did not deprive the Board of jurisdiction. As to the reduction, he found that the Board had jurisdiction to do that too; he said that even if the figure of 8% was wrong, "... ce n'est pas à la Cour supérieure de corriger l'erreur dès qu'il lui est démontré que le tribunal concerné a agi à l'intérieur de sa juridiction." I agree.

Discussion

In appeal, Brière urges the same two grounds. In his factum, the questions in issue are stated thus:

"A) Le désistement du 11 novembre 1983 a-t-il fait perdre à l'intimé sa juridiction?

B) En abaissant le taux d'incapacité permanente de 12.5% à 8% sans en être requis, l'intimé a-t-il excédé sa juridiction?"

At the hearing, we raised another issue, namely, Brière's right of appeal to the Commission des Affaires Sociales under Section 65 of the Act.

(5) V. *supra*.

A) Desistment

I think there can be no doubt that the trial judge was right in refusing to apply the rules of the *Code of Civil Procedure*, under which a desistment would indeed deprive a court of jurisdiction (6). Section 223 of the *Act respecting Occupational Health and Safety* (7) authorizes the Commission to enact rules of proof, procedure, and practice, and it has in the required manner done so for the Review Board, including rule 21 dealing specifically with desistment. The following extract from the Superior court judgment settles the point to my satisfaction:

"...

Sur ce point litigieux, la Cour rappelle le principe exprimé par Patrice Garant, dans son volume intitulé, 'La preuve devant les tribunaux administratifs', p. 831:

'La jurisprudence a par contre clairement établi que le Code ne s'applique pas aux tribunaux administratifs et quasi judiciaires, sauf disposition expresse au contraire. Récemment, la Cour supérieure l'affirmait ainsi:

De plus, les règles de preuve auxquelles la Commission des affaires sociales doit se soumettre sont totalement différentes de celles du Code de procédure civile. (*Aide sociale-78*, (1979) C.A.S. 594, p. 596 (J. Masson).

Et encore:

Le législateur, en créant cette Commission, n'a pas voulu l'astreindre aux règles du Code de procédure civile. (*Dame Gagnon* c. *C.A.S.*, (1978) C.A.S. 191, p. 192).

On peut également citer la célèbre phrase du juge Pigeon dans l'arrêt *Komo Construction*:

Il faut se garder d'imposer un code de procédure à un organisme que la loi a voulu rendre maître de sa procédure. (1968) R.C.S. 172, 176.'

Dans ce cas sous étude, la Cour croit devoir en arriver à cette conclusion que s'appliquent ici les règles de la preuve telles que formulées pour le tribunal administratif concerné..."

So Rule 21 applies. In studying its interpretation and application, it is important to bear in mind the nature and functions of the Commission and its delegates, as revealed in part by the provisions quoted above. It is true that, in fixing the percentage of permanent partial incapacity to which an injured worker is entitled, the functionary whom I call the assessor in first instance, and the Review Board in second instance, are exercising quasi-judicial functions; but their rôle is different from that of most other tribunals which decide a conflict of rights or of interests between two opposed parties. As the trial judge pointed out, it is the duty of the Commission to see that work get what they deserve and no less — but also no more.

Employers are entitled to take part in the proceedings, but they often do not; in this case the employer did not. In a sense, there is always another interested party — the public, represented by the Commission; note that the Commission may, of its own motion, review at any time a worker's benefits payable out of the accident fund (8), as Brière's benefits

(6) Art. 262, 264 C.P.

(7) V. *supra*.

(8) V. article 26 of the *Workmen's Compensation Act, supra*, note 1.

were. The procedure is not really adversarial. Respondent submits that this explains the provision that a desistment can only be effective before or during the hearing; that seems to me a good point.

The application to the Board for review is not an appeal in the usual sense; it is not a trial of the first decision; it is like a trial *de novo*, or rather *ab origine* because there is no hearing at all before the assessor.

Such considerations as these lead me to the opinion that the Respondent, in deciding that he remained seized of the case, in spite of the desistment, because it had no effect unless filed "before or during the hearing", adopted an interpretation of Rule 21 that is far from being manifestly unreasonable (9).

B) Reduction

Mots lawyers are aware, some painfully so, that a property owner who files a complaint with the Board of Revision under the *Act respecting Municipal Taxation* (10), contesting the municipal valuation of his property because he thinks it too high, runs the risk of a decision increasing the valuation because the Board thinks it too low. The procedure is similar, in that there is no hearing before the assessor concerning the original assessment, and the board conducts a hearing *de novo* or *ab origine*; similarly also, there is an appeal from the Board's decision.

Appellant complains that there was no contestation of his application, no "incidental appeal", no request by anyone for a reduction. Nevertheless, because of the considerations already discussed above, including the quasi-participation as a party by the Commission for the public, and the duty of the Commission in its particular rôle to fix the correct amount (even sometimes on its own motion) I am of the opinion that Respondent in the circumstances had the right and the duty to fix the amount he considered just, whether the same as, higher than, or lower than the amount fixed by the assessor.

C) Right of Appeal

Section 65 of the Act (11) gave Brière a right of appeal to the Commission des Affaires sociales if he "believes he has been wronged" by Respondent's decision; he chose not to exercise that right. In such cases, the courts are even more reluctant to intervene than usual (12).

(9) *Blanchard* v. *Control Data Canada Ltd.*, [1984] 2 S.C.R. 476; *Syndicat des professeurs du Collège de Lévis-Lauzon* v. *Collège d'enseignement général et professionnel de Lévis-Lauzon*, [1985] 1 R.C.S. 596.

(10) R.S.Q., c. F-2.1.

(11) V. *supra*, note 1.

(12) *Khanna* v. *Procureur général du Québec*, [1984] C.A. 591; *Boutet* v. *Bureau de révision*, C.A.Q. nº 200-09-000347-846, 10 June 1985. **N.D.L.R.** Ce jugement est rapporté à [1985] R.D.J. 335.
See also *Metallurgistes unis d'Amérique, section locale 7443* v. *Artopex Inc.*, C.A.M. nº 500-09-001040-831, 29 January 1985, for a criticism by Owen, JA of abuse of the remedy of evocation. As to the effectiveness of an appeal to the C.A.S., see *Ville de*

This is a further, and perhaps sufficient, reason to refuse evocation.

Conclusion

For these reasons, I would dismiss this appeal, with costs.

OPINION DU JUGE ROTHMAN

Having had the benefit of reading the opinion of my colleague, Mr. Justice Tyndale, I agree with his conclusion that the Respondent adopted an interpretation of Rule 21 that was far from unreasonable.

I would simply add a few words on a question which, though not specifically raised in the Inscription in Appeal or in Appellant's factum, was argued before us on the hearing of this appeal.

Appellant contends that the Review Board never indicated that there was any question of reducing the permanent partial incapacity fixed by the assessor, that he was not given an opportunity to be heard on that issue and that he was not able to confront the reduction that was ultimately decided by the Review Board.

But even if Appellant was not specifically apprised of the possibility of a reduction in the incapacity that had been previously fixed, he was certainly given an opportunity to be heard on the issue of his incapacity. Having submitted a medical opinion with a view to having the incapacity increased from 12% to 35%, it is difficult to see what more he would have said or done at the hearing to convince the Review Board that the incapacity ought not to be reduced.

Perhaps he might have desisted earlier had he had any indication of the possibility of a reduction, but that does not mean that he was deprived of his right to a fair hearing. He did receive notice, he was heard and there is not the slightest suggestion that any prejudicial evidence or information was not disclosed to him.

I would therefore dismiss the appeal with costs.

M. le juge Beauregard partage les opinions exprimées par messieurs les juges Tyndale et Rothman.

Paré, Daigle et Boyer, pour l'appelant.
Dallaire, Joly-Ryan et associés, pour l'intimé et la mise en cause.

Salaberry-de-Valleyfield v. *Commission des Affaires sociales*, [1984] C.S. 193 at 195 : "De ce qui précède, je conclus que la C.A.S. est compétente pour réviser le dossier de la C.S.S.T. tel que constitué et, s'il y a lieu, elle peut le faire à la lumière d'une preuve nouvelle, et à ce sujet je dirais que tout ce qui touche l'état de santé du travailleur est *a priori* pertinent."