

PRINCIPLES OF ADMINISTRATIVE LAW

Fifth Edition

by

David Phillip Jones, Q.C.

B.A.(Hons.) (McGill), B.C.L., M.A. (Oxon.)

and

Anne S. de Villars, Q.C.

B.Sc. (Southampton), LL.B. (Alberta)

both of
de Villars Jones
Barristers and Solicitors
Edmonton

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1. Introduction¹

As discussed in Chapter 8, following *Nicholson*, the old distinction between quasi-judicial and administrative decisions has been rendered unimportant and of little use "... since both the duty to act fairly and the duty to act judicially have their roots in the same general principles of natural justice."² We now refer to the "duty to be fair" or "procedural fairness" as overarching

¹ This chapter has been updated with the very capable assistance of Krista Lidstone, a summer student with our office.

² *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.); *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police* (1978), [1979] 1 S.C.R. 311 (S.C.C.). For a discussion of the historical development of these principles see Chapter

terms which incorporate all of the rules of natural justice and which apply to all quasi-judicial and administrative decisions.

Thus, the duty to be fair has evolved so that it now applies to every public authority making an administrative decision which affects the rights, privileges or interests of an individual³ (but not an administrative decision that is legislative in nature).⁴ In Canada today, this includes a myriad of authorities ranging from the single delegate issuing dog licenses to major boards wielding great power over Canadian people and business.⁵ This chapter and the next will consider the *content* of the duty to be fair and its two fundamental principles: *audi alteram partem* (the right to hear the other side – discussed in this chapter) and *nemo judex in sua causa debet esse* (the rule against bias – discussed in the next chapter).

The principle *audi alteram partem* is an imperative which translated means “hear the other side!” More generally, it refers to the requirement in administrative law that a person must know the case being made against him or her and be given an opportunity to answer it before the person or agency that will make the decision. Beyond that, however, the content of the principle is often difficult to determine in particular circumstances, and what fairness requires has altered over time and continues to evolve.⁶

Overall, the scope and extent of the duty to be fair depends on the subject matter.⁷ Since fairness depends on the specific context of the case, it is impossible to lay down hard and fast requirements about what does and does not constitute a fair hearing. In some cases, the enabling statute will provide a code of conduct for the hearing.⁸ However, in many other cases, the statute is silent and the tribunal, and court if called upon, must determine what procedure is fair in the circumstances.

As noted by Madame Justice L’Heureux-Dubé in *Baker v. Canada (Minister of Citizenship & Immigration)*⁹ (with four other judges concurring) “... the duty of fairness is flexible and variable, and depends on an appreciation of

3 *Cardinal v. Kent Institution* (1985), 16 Admin. L.R. 233 (S.C.C.).

4 See *Authorson (Litigation Guardian of) v. Canada (Attorney General)*, 2003 SCC 39 (S.C.C.) and discussion in Chapter 8.

5 This was recognized by the Supreme Court of Canada in *C.U.P.E. v. Ontario (Minister of Labour)* (2003), 50 Admin. L.R. (3d) 1 (S.C.C.), where Justice Binnie stated at para. 149: “Given the immense range of discretionary decision makers and administrative bodies, the test [for determining the standard of review] is necessarily flexible, and proceeds by principled analysis rather than categories, seeking the polar star of legislative intent.” Similarly, Justice Bastarache noted at para. 13: “[The pragmatic and functional approach] recognizes that the diversity of the contemporary administrative state includes different types of decision makers.”

6 See R.F. Reid and H. David, *Administrative Law and Practice*, 2d ed. (Toronto: Butterworths, 1978) at 49-104.

7 Although the content of the rule has also varied with then current notions of the importance of individual rights as against the greater public good and vice versa and with the prevailing fashion of more or less judicial activism.

8 See for example the *Regulated Health Professions Act*, S.O. 1991, c. 18, sch. 2 and the *Police Act*, R.S.A. 2000, c. P-17, s. 20.

9 (2000), 14 Admin. L.R. (2d) 172 (S.C.C.).

the context of the particular statute and the rights affected ...".¹⁰ She observed that:¹¹

The existence of a duty of fairness does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, *per* Sopinka J.

She then went on, however, to enunciate certain factors relevant to determining the content of fairness:¹²

Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of participatory rights contained within the duty of procedural fairness is to ensure 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.

The factors identified by Justice L'Heureux-Dubé J. include:

1. The nature of the decision being made and the process followed in making it. The closer the administrative process is to judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required.
2. The nature of the statutory scheme and the terms of the statute pursuant to which the body operates. The role of the decision in the statutory scheme helps determine the content of the duty of fairness. Greater procedural protections are required when there is no appeal procedure or the decision determines the issue and further requests cannot be submitted.
3. The importance of the decision to the individual or individuals affected. The more important or the greater impact the decision has, the

¹⁰ *Ibid.* at 192.

¹¹ *Ibid.* at 191-92.

more stringent are the procedural protections. This is a significant factor. The court commented:

The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. University of British Columbia* [1980] 1 S.C.R. 1105 (S.C.C.) at p. 1113:

A high standard of justice is required when the right to continue in one's profession or employment is at stake... . A disciplinary suspension can have grave and permanent consequences upon a professional career.¹³

4. The legitimate expectations of the person challenging the decision. The doctrine of legitimate expectations is part of the doctrine of procedural fairness. If a claimant has a legitimate expectation that a certain procedure will be followed, the duty of fairness requires this procedure to be followed. If a claimant has a legitimate expectation that a certain result will be reached, fairness may require more extensive procedural rights than might otherwise be accorded. The doctrine of legitimate expectations does not create substantive rights outside the procedural domain. The "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers. It will be generally unfair of the decision-makers to act contrary to their representations as to procedure or to go back on substantive promises without giving the person affected significant procedural rights.
5. The choices of procedure made by the agency itself, particularly if procedure is a matter of discretion or if the agency possesses expertise in determining appropriate procedures. Important weight must be given to the choice of procedures made by the agency and its institutional restraints.¹⁴

This list of factors is not exhaustive. Generally, however, it is imperative that individuals who are affected by administrative decisions be given the opportunity to present their case in some fashion. They are entitled to have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process which is appropriate to the statutory, institutional, and social context of the decision being made.¹⁵ With those factors enunciated in *Baker* in mind, a court must determine whether the procedure that was used

¹³ *Ibid.*

¹⁴ *Ibid.* at 192-94.

¹⁵ See also: *Ruby v. Canada (Solicitor General)*, 2002 SCC 75 (S.C.C.) at 39; *Chiarelli v. Canada (Minister of Employment & Immigration)*, [1992] 1 S.C.R. 711 (S.C.C.) at 743; *Therrien v. Quebec (Ministre de la Justice)*, 2001 SCC 35 (S.C.C.) at 87.

in reaching any given decision was, in fact, fair, impartial, and open. This involves a detailed review of the circumstances of each case and a determination of whether the factors were applied properly.

Although it is clear that what constitutes a fair procedure depends on the context and the circumstances of each case, and although the concept is eminently variable, this chapter will attempt to flesh out the elements which go to make up a fair procedure. The chapter is divided into three main parts: the first part deals with the procedural steps taken by an administrative tribunal which lead up to a hearing, including a discussion of how the form of the hearing is determined; the second part discusses the elements of fair procedure during the course of an oral hearing; and the third part considers how a tribunal should handle any procedural post-hearing matters in a fair way.

It should be noted at this point that the standard of review analysis, required in all other administrative law cases coming before the courts for scrutiny, is not required in cases dealing with procedural fairness.¹⁶ The standard of review deals with the intensity of scrutiny which a reviewing or appellate court must bring to a tribunal's decision; or conversely, how deferential the court will be to tribunal decisions. This analysis applies to the review of decisions for substantive errors. It does not apply to issues of procedural fairness.

The fairness of a proceeding is not measured by the standards of "correctness" or "reasonableness". It is measured by whether the proceedings have met the level of fairness required by law. Confusion has arisen because when the court considers whether a proceeding has been procedurally fair, the court makes this decision. In other words, the court decides whether the proceedings were correctly held. There is no deference to the tribunal's way of proceeding. It was either correct or it was not.

The use of the word "correct" in these two circumstances must not be confused. Where the court is reviewing for substantive errors, the standard of review – correctness or reasonableness – is applied and the court will defer to the tribunal's decision accordingly. Where the court is reviewing for procedural errors, the tribunal must have proceeded correctly as the court will determine. There is no deference.¹⁷

2. Pre-Hearing Procedures

In many administrative structures, there are several stages in the decision-making process. For example, very often prior to the hearing itself, there is a pre-hearing investigation which can range from merely an information gathering exercise to a full blown investigation. In addition to an investigation before the hearing, there are other pre-hearing procedures including the giving of notice and the requirement of disclosure. All of these procedural steps raise issues concerning the duty of fairness, such as the nature of the notice required and the necessary extent of disclosure, including a consideration of whether the delegate's file is available to the person affected. Of course, there is also

¹⁶ See Chapter 12.