

# PROCEDURAL FAIRNESS IN ADMINISTRATIVE HEARINGS

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## What are administrative tribunals?

- Tribunals make decisions on behalf of federal and provincial governments when it is impractical or inappropriate for the government to do so itself.
- Tribunals are set up by federal or provincial legislation; this is known as “empowering legislation.”
- Administrative bodies are an integral and important part of the public system.
- Tribunals are often seen as “quasi-judicial” because they engage in fact-finding and have the power to impact personal rights.
- The impact of administrative agencies on the lives of individual Canadians is great and likely surpasses the direct impact of the judiciary – Chief Justice Lamer.

# What are administrative tribunals?

- How could we have all the benefits of tribunal justice, and still maintain the rule of law? How, it was asked, could the public be sure that government-appointed tribunal members would hold fair hearings and stay within the ambit of their administrative powers?
- The principles of natural justice encompass the following: the right to be heard (*audi alteram partem*) and the right to a coherent procedure and a reasoned decision (*nemo iudex in sua causa debet esse*).
- Administrative tribunals are also at times inefficient, backlogged and under-funded. Regardless of the conditions under which they operate, administrative boards and tribunals executing a public duty are expected to do so in a procedurally fair manner.

# The Threshold Question

- Is this the kind of decision that should attract some procedural right?
- Generally, if as a result a decision is made that affects an individual's rights or interests, there will be some minimal entitlement to procedural fairness.
- Traditionally, the determination whether this threshold had been passed was carried out at common law.
- In *Ndachena v Nguyen*, 2018 BCSC 1468 at para 59, the Court acknowledged that the Residential Tenancy Branch Rules of Procedure contemplate a high level of procedural fairness:
  - “The RTB Rules govern dispute resolution proceedings. They contemplate a high level of procedural fairness. Any person dealing with the RTB would have a reasonable expectation that the RTB Rules would be complied with.”

# The Content of Procedural Fairness

- Pursuant to *Baker v. Canada (Minister of Citizenship & Immigration)* 2 S.C.R. 817, [Baker] the SCC further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given case, the Court set out five factors to be considered:
  - *the nature of the decision being made and the process followed in making it;*
  - *The nature of the statutory scheme and the terms of the statutes pursuant to which the body operates;*
  - *the importance of the decision to individual affected;*
  - *the legitimate expectations of the person challenging the relevant decision;*  
*and*
  - *The choices of procedure made by the agency itself.*

## Applying the *Baker* Factors: The Nature of the Decision Being Made and the Process Followed in Making it

- Decisions that are considered judicial or quasi judicial in nature are likely to demand more extensive procedural protection than purely administrative decision.
- In *Baker* at para 23, Justice L'Heureaux-Dube stated:
  - *“The more the process provided for, the function of the tribunal, the nature of the decision making body, and the determination that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial mode will be required by the duty of fairness.”*
- The nature of the decision will often be uncontroversial. Greater procedural protection is likely to be required in an adjudicative context than in a regulatory one.

## Applying the *Baker* Factors: The Nature of the Statutory Scheme and the Terms of the Statutes Pursuant to which the Body Operates

- Important to pay close attention to the legislation that authorizes a particular decision to be made.
- The requirements of fairness may be minimal in the context of steps that are preliminary to a formal decision making process.
- Greater fairness protection will usually be required if a final decision must be made, but a decision need not be final in order to attract a high degree of fairness protection.
- The existence of a right of appeal is an important consideration in deciding whether and to what extent reasons for a first level decision are required.

## Applying the *Baker* Factors: The Importance of the Decision to the Individual Affected

- The content of the duty of fairness increases in proportion to the importance of the particular decision to the person it affects.
- In *Baker*, L'Heureaux-Dube J. Cited Justice Dickson's observations in *In Kane v Bd. Of Governors of U.B.C.*, 1980 CanLII 10 (SCC), [1980] 1 SCR 1105:
  - *A high standard of justice is required when the right to continue in one's profession or employment is at stake.*

## Applying the *Baker* Factors: The Legitimate Expectations of the Person Challenging the Relevant Legislation

- The doctrine of legitimate expectation may extend the content of the duty of fairness on the basis of the conduct of public authorities in particular circumstances.
- Legitimate expectations of procedural protections may arise out of conduct such as representations, promises or undertakings, or past practice or current policy of a decision maker.
- More controversially, a legitimate expectation of procedural protections may also arise if a person is led to expect a particular outcome from a decision making process. However, public authorities must be entitled to change their minds. As a result, the doctrine of legitimate expectation does not require that expectations of a particular substantive outcome must be fulfilled.

## Applying the *Baker* Factors: The Choices of Procedure Made by the Agency Itself

- The content of the duty of fairness does not just affect the persons whose rights, privileges or interests are at stake, it also affects the decision maker.
- An important task of tribunals in responding to applications for judicial review is to educate the court on their processes, which may reflect compromises necessary to allow decisions to be made within a reasonable time frame at a reasonable cost.
- In *Baker* at para 27, L'Heureaux-Dube stated:
  - *“The ‘important weight’ must be given to the decision maker’s choice of procedure, but this provides little meaningful guidance, especially if the other factors support claims to greater procedural protection.”*
- This factor can create a “back-door”, importing deference to institutional choice of procedures into the very test for common law procedural fairness. This is an area ripe for consideration by the Court in the future.

# Specific Components of the Procedural Fairness

- Having determined the general level of procedural fairness, the Court will then decide from a range of possibilities what specific procedures are required, there are many possibilities:
  - *Notice that the decision is going to be made;*
  - *Disclosure of the information on which the tribunal will base its decision;*
  - *Right to an oral hearing;*
  - *Some opportunity to participate or make views known (the right to be heard);*
  - *Right to counsel;*
  - *An opportunity to give evidence and cross examine;*
  - *Timelines and delay; and*
  - *Oral or written reasons for the decision.*

# Specific Components of the Procedural Fairness: *Notice*

- Notice is the most basic aspect of the duty of procedural fairness. It is the starting point for participation to any decision making process and involves consideration of the following:
  - *Who is proposing to make a decision?*
  - *What is the nature of the decision being made?*
  - *When will the decision be made?*
  - *Where will the decision be made?*
  - *Why is the decision being made?*
  - *How is the decision being made?*
- The general rule is stated as follows: Notice must be adequate in all circumstances in order to afford those to those concerned a reasonable opportunity to present proofs and arguments, and to respond to those presented in opposition.
- The requirement to provide notice should be understood as an ongoing duty.

## Specific Components of the Procedural Fairness: *Disclosure*

- The concept of disclosure is more of an issue in the criminal context.
- In *R v Stinchcombe* 1991 CanLII 45 (SCC), [1991] 3 SCR 326 [*Stinchcombe*], the SCC held that the Crown must disclose all relevant material to the defence in a criminal prosecution.
- Proponents of administrative justice soon argued that the *Stinchcombe* disclosure principle ought to apply in administrative law, but this was rejected in *May v Ferndale Institution* 2005 SCC 82 at para 91:
  - *It is important to bear in mind that the Stinchcombe principles were enunciated in the articular context of criminal proceedings where the innocence of the accused was t stake. Given the severity of the potential consequences the appropriate level of disclosure was quite high. In these cases, the impugned decisions are purely administrative. These cases do not involve a criminal trial and innocence is not at stake. The Stinchcombe principles do not apply in the administrative context.*

## Specific Components of the Procedural Fairness: *Disclosure*

- Although this appears to be categorical rejection of the *Stinchcombe* principle in administrative law, the court made clear that the duty of procedural fairness generally requires that the decision maker discloses the information they relied upon.
- The question is not *whether* disclosure is required in administrative proceedings, but *how much* disclosure is required in a particular proceeding.
- Tribunals required to conduct oral hearings are likely to have disclosure obligations spelled out in the rules of procedure.
- Courts have held that in some circumstances, such as the possibility of loss of livelihood, require a high level of disclosure (see *Sheriff and Attorney General for Canada*, 2006 FCA 139).
- In *Suri v Vahra*, 2019 BCSC 675 at para 54, the Court confirmed that the landlord's decision not to disclose to the petitioner a key piece of evidence, which the respondent relied on at the hearing, resulted in a denial of procedural fairness.

## Specific Components of the Procedural Fairness: *Oral Hearings*

- The right to a hearing does not mean that formal, oral hearings are required.
- An oral hearing might be required in some cases, involving processes similar to those in the judicial system. In other contexts, the requirement to provide a hearing may be satisfied by as little as an exchange of a written correspondence prior to a decision being made.
- Whether an oral hearing is required depends on the relevant circumstances. However, some of the circumstances that require an oral hearing are well settled:
  - *Where a decision depends on findings of witness credibility (see Singh v Minister of Employment and Immigration [1985] 1 S.C.R. 177).*
- In *Kikals v. British Columbia (Residential Tenancy Branch)*, [2009 BCSC 1642](#), the Court set aside both an initial decision and the refusal to reconsider that decision where the dispute resolution officers did not hear from one of the parties.

## Specific Components of the Procedural Fairness: *Oral Hearings*

- In *Ganitano v. Metro Vancouver Housing Corporation*, [2009 BCSC 787](#) The petitioner had encountered problems connecting to a telephone hearing as a result of a mix-up in the telephone conference system. As a result, much of the hearing was conducted in her absence and the high degree of fairness owed to the petitioner was not discharged.
- In *Johnson v. Patry*, [2014 BCSC 540](#), the dispute resolution officer had abruptly terminated a telephone hearing without allowing any further evidence or submissions, and rendered a decision four days later. The petitioner had not been given the opportunity to call several witnesses and the petitioner's legal advocate was not permitted to make submissions on whether the existence of a tenancy agreement had been established.
- In *Suri v Vahra*, 2019 BCSC 675 at para 43 there will be a breach of procedural fairness if interpretation is inaccurate and that there is a reasonable apprehension that the interpreter was biased.
- In *Potecho v. Red Door Housing Society*, 2014 BCSC 36 at para 84, although the arbitrator may have been entitled to rule he would not admit the evidence contained in the evidence they were not entitled to do so without first giving the parties an opportunity to be heard and to make whatever arguments were available to them, as contemplated by Rule 11.5.

## Specific Components of the Procedural Fairness: *Right to Counsel*

- There is no right to counsel in the context of an administrative proceeding.
- In *British Columbia v Christie* 2007 SCC 21 t para 27, the Court noted that the right to counsel was understood historically as relevant only in the context of the criminal law and there was no general constitutional right to counsel.
- The court has held that where there is a deprivation of life, liberty or security of the person is at stake, the principles of fundamental justice may in some cases require the provision of counsel in administrative processes (see *New Brunswick (Minister of Health and Community Services) v G.(J.)*, [1999] 3 S.C.R. 46.
- *Weileby v. LaFleur et al*, 2006 BCSC 1852 suggests that if a party demonstrates an inability to present their case without assistance, they may be entitled to the opportunity to obtain assistance before the hearing proceeds.

## Specific Components of the Procedural Fairness: *Right to Call Evidence and Cross-Examine a Witness*

- The right to call and cross-examine witnesses is normally a part of the right to an oral hearing.
- the right to cross-examine is not absolute. Administrative actors control their own procedures and may limit the exercise of that right.
- The guiding principle is that parties must be afforded a reasonable opportunity to present their cases (see *Innisfil (Township) v Vespra (Township)* [1981 2 S.C.R. 145 at 171[*Innisfil*] at para 171).
  - *In Innisfil, Etsey J. emphasized that the right of cross- examination is not to be withheld on the basis of a judgement by the tribunal that it is of limited utility.*

## Specific Components of the Procedural Fairness: *Timelines and Delay*

- Not all administrative decision makers under statutory timelines for holding hearing or making decision.
- Delay in the administrative process can have significant consequences (see *Blencoe v British Columbia (Human Rights Commission)* 2000 SCC 44 [*Blencoe*]).
- In *Blencoe* at para 160, the minority of the court set out three considerations that had to be balanced in considering complaints of administrative delay:
  - *The time taken compared to the inherent time requirements of the matter;*
  - *The cause of delay beyond the inherent time requirements of the matter, and*
  - *The impact of the delay.*
- Although delay in rendering a decision may breach the duty of fairness, the normal remedy for delay is likely to be an order requiring the tribunal to exercise its duty expeditiously.

## Specific Components of the Procedural Fairness: *The Duty to Give Reasons*

- Historically, there was no duty on administrative decision makers to give reasons. This changed in *Baker*, and several subsequent decisions.
- When there is a statutory requirement to give reasons, the standard of patent unreasonableness applies to the consideration of the adequacy of reasons with a focus on an assessment of the "justification, transparency and intelligibility" in the decision making process (see *Laverdure v. First United Church Social Housing Society*, 2014 BCSC 2232 [*Laverdure*], at para. 31).
- The principle that the individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard (see *Baker*, at para. 28).
- The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties (see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] at para 127).

# Bias, Independence and Institutional Decision Making

## INDEPENDENCE

- Independence, impartiality and bias all centre on the notion of fairness in the administrative decision making process. A key characteristic of fair proceeding before an administrative body is that the decision maker and the decision making process not grant undue preferential treatment or be driven by preconceived notions.
- Impartiality refers to the ideal state of the decision maker. An impartial decision maker is one who is able to make judgements with an “open mind” without their mind being “already made up”.
- Independence is the means to achieve impartiality. For example, by ensuring that an administrative tribunal is not too dependent on government for the necessities of its day to day function.

# Bias, Independence and Institutional Decision Making

- Most tribunals have a link with the executive branch of government through a Minister.
- Three objective structural conditions have been identified as necessary to guarantee decision making independence (judiciary):
  - *Security of tenure;*
  - *Financial security; and*
  - *Administrative or institutional control.*
- Over time, the criteria guaranteeing independence of the judiciary, has served as the foundation from which courts have determined whether administrative tribunals are also sufficiently independent (see *Valente v The Queen* [1985] 2 S.C.R. 673).

# Bias, Independence and Institutional Decision Making

- The test for adequate tribunal independence is whether a reasonable, well-informed person having thought the matter through would conclude that an administrative decision maker is sufficiently free of factors that could interfere with the ability to make impartial judgements (The “ Reasonable Apprehension of Bias Test”).
- The methodological approach taken by the courts when the independence of an administrative tribunal is challenged, consists of applying the guarantees of tribunal independence in a flexible way to account for the function performed by the tribunal under scrutiny (see *Canadian Pacific Ltd. V Matsqui Indian Band* [1995] S.C.R. 3 at para 83).
- There has been considerable jurisprudence regarding appointments of tribunal members, and in the early 2000s, some provincial jurisdictions reinforced their legislative enactments to ensure tribunal members have fixed-term appointments (see s 3 of the *Administrative Tribunals Act*).

# Bias, Independence and Institutional Decision Making

- There is no free standing constitutional guarantee of independence for administrative tribunals (see *Ocean Port Hotel v British Columbia (General Manager, Liquor Control and Licensing Branch* 2001 SCC 52).
- In *McKenzie v. Minister of Public Safety and Solicitor General et al.*, 2006 BCSC 1372, Court found:
  - *Judicial independence not only stemmed from specific provisions of the Charter, but also derived from unwritten constitutional principles;*
  - *SCC, in Alberta v Elie, determined the unwritten constitutional principles served to protect judicial independence of justice of the peace; and*
  - *Judicial independence should apply to Residential Tenancy Branch arbitrators.*

# Bias, Independence and Institutional Decision Making

## REASONABLE APPREHENSION OF BIAS

- Allegations of reasonable apprehension of bias exist in two major forms:
  - *Perceptions of individual bias; and*
  - *Perceptions of institutional bias.*
- **Perception of individual bias** are situations where the decision maker may reasonably be perceived to have:
  - *A pecuniary or material interest in the outcome of the matter being decided;*
    - *Standing to receive monetary gain (see Dimes v Grand Junction Canal Co. [1852 Eng. R. 786]); and*
  - *A personal relationship with those involved in the dispute;*
    - This include relationships to witnesses and counsel;
    - Time is a key factor to consider—is the relationship current enough to affect impartiality?

# Bias, Independence and Institutional Decision Making

- *Prior knowledge or information about the matter in dispute; and*
  - Focus on the nature and extent of previous involvement
- *An attitudinal predisposition toward an outcome;*
  - Predispositions giving rise to reasonable apprehension of bias have been gleaned from decision makers comments and attitude in both the course of the hearing and outside the proceedings. Eg. Antagonisms towards litigants, ex parte communications, irrelevant or vexatious comments and taking an unauthorized role as advocate.

# Bias, Independence and Institutional Decision Making

- An allegation of perceived bias must be brought to the decision maker by the party alleging it on the first available occasion.
- The test for reasonable apprehension of bias (see *Committee for Justice and Liberty v National Energy Board* [1978] 1 S.C.R. 369):
  - *What would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude.*
- The grounds for reasonable apprehension of bias must be substantial. Mere suspicion of bias is insufficient for the test to be met.

# Bias, Independence and Institutional Decision Making

- *Perceptions of institutional bias* refers to institutional practices.
- Three modes of policy making by administrative tribunals:
  - *Decision making;*
  - *Informal rule making;*
  - *Formal rule making through delegated legislation.*
- Tensions arise when the methods used by tribunals in their policy making activities appear to infringe adjudicative independence. Of an individual tribunal decision maker.