PROCEDURAL FAIRNESS IN ONTARIO
THE PARAMETERS OF THE RIGHT TO BE HEARD:
AN OVERVIEW

submitted by:

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“*At its best, administrative justice is something like a cat – quick, elegant, agile and independent-minded.*”¹

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I. Introduction

From social benefits to correctional services, labour disputes to energy regulation, administrative boards and tribunals are everywhere. These public and quasi-public agencies administer, process, enforce, regulate, investigate, adjudicate and supervise. Individuals challenge them if they are refused a license and may seek them out if they are injured at work or discriminated against. Administrative bodies are an integral and important part of the public system. They 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 dictates of procedural fairness and in particular the right to be heard, have and continue to evolve in light of legislation, the Charter of Rights and Freedoms and the common law. This paper will explore and contextualize the developing scope of the right to be heard as it applies to tribunals and other administrative bodies in the province of Ontario by canvassing a sampling of recent judicial review cases in which the reviewing Court found a breach of the right to be heard by the administrative body.

II. The Content of Procedural Fairness

1. Introduction

The content of common law procedural fairness is generally divided into two separate categories. The first finds its origin in the Latin term audi alteram partem, meaning “hear the other side” or more commonly, “the right to be heard.” As will become evident later in this paper, the right to be heard has been interpreted quite broadly, conferring on individuals a variety of procedural entitlements. The second element of procedural fairness, which will not be addressed in this paper, is derived from the Latin term nemo judex in sua propria causa debet esse, essentially meaning that no one should be a judge in their own case.2

2. Procedural Fairness and Administrative Bodies

Procedural fairness has come to be regarded as the “bedrock of administrative law.”3 The prominence of this principle in the administrative context can be traced back to the Supreme Court’s landmark decision in Nicholson v. Haldimond-Norfolk (Regional Municipality).4 Mr. Nicholson was a probationary police officer who was terminated. His employer provided no reasons for terminating him but claimed that the Police Act allowed it to do so. The Court found that Mr. Nicholson had a common law right to be treated fairly. Mr. Nicholson should have been advised why his services were no longer needed and should also have been given the opportunity to respond. The effect of Nicholson was to impose on public authorities a duty to act fairly when

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3 Ibid at 7.
making decisions. The threshold for triggering the duty of procedural fairness was and remains quite low, requiring only that an individuals’ “rights, privileges or interests” be at issue.5


A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court in Baker:

The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.7

The Court 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 in case, the court set out five factors to be considered:

(1) the nature of the decision;
(2) the nature of the statutory scheme;
(3) the importance of the decision to the affected person;
(4) the presence of any legitimate expectations; and
(5) the choice of procedure made by the decision-maker.8

In many of the cases, including some of those set out below, one or two of these factors become dominant in determining the degree of procedural fairness. Further it is important to note that reviewing courts do not defer to administrative bodies on matters of procedural fairness. Where a breach is found, the decision will generally be rendered void by the reviewing Court and will require reconsideration by the administrative body.

III. Recent Case Law in Ontario on the Right to be Heard

1. Introduction

Since Nicholson, the right to be heard has been held to include everything from the right to reasons and formal notice, to the right to an oral hearing. The parameters of this principle continue to change. As the Baker decision underscores, procedural entitlements are contingent on context. What is a breach of procedural fairness in one context may be a fair and acceptable practice in another.

7 Ibid. at para 21-28
8 Ibid. at para 28.
In order to provide a sense of where and in what circumstances these and other entitlements have been provided, this paper will canvass recent judicial review cases in Ontario in which the reviewing Court found a breach of the right to be heard.

2. Principles Emerging from Recent Case Law

(a) Parties must be free to conduct their own case

In some contexts, the right to be heard requires that an individual or group have the freedom to put forward their case in the manner in which they choose to. In the normal course of things, an administrative body would not tell a party what witnesses they are required to tender or provide statements for.

In *International Union of North America Local 183 v. Ontario (Human Rights Commission)* 9 an employee and union steward, Mr. Tubbs, made comments during a union meeting about the treatment of minority union members, such as himself. Mr. Tubbs was black. On the night of the meeting, Mr. Tubbs comments were challenged by other Union members. The attack was a personal one. As a result, Mr. Tubbs filed a complaint under the Ontario *Human Rights Code*10 alleging discrimination on the basis of race and color. The Commission investigated and was of the view that Mr. Tubbs’ rights under the *Code* had been violated. The matter was referred to the Tribunal. During the hearing and despite the objections of the Union, the Tribunal permitted Mr. Tubbs to amend his complaint and plead seven occasions of reprisal in addition to the original grounds. In granting the amendments, the Tribunal rendered an interim order requiring the Union to present evidence, including will-say statements for 10 witnesses, some of whom the Union had no intention of calling. The Union appealed and argued that the decision was procedurally unfair. Upon reviewing the *Code* and in distinguishing between the inquisitorial function of the Commission, and the *adjudicative* function of the tribunal, the Court held that the tribunal had breached the principles of procedural justice by not allowing the Union to conduct their case in the manner they saw fit. In result, the interim order of the Tribunal was set aside.

(b) Obligation to provide reasons

In *Baker* the Supreme Court recognized that in certain circumstances statutory authorities had a common law duty to provide reasons for their decisions. Neither *Baker* nor subsequent case law have required that reasons be provided for all decisions made by administrative bodies. The entitlement for reasons, is like all procedural entitlements, contingent on the circumstances of each case. The Divisional Court has recently rendered a series of decisions which provide insight into circumstances in which an administrative body must provide reasons for its decision:

(i) The decision is highly important to the applicant’s career;
(ii) The decision will have a profound impact on the applicant’s academic career

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9 [2006] O.J. No. 50 (Div. Ct.).
and there are unusual circumstances; and

(iii) The decision imposes a penalty

**i. The decision is highly important to the applicant’s career**

In *Daneshvar v. National Dental Examining Board of Canada*, the applicant was a dentist qualified to practice in England. She immigrated to Canada in 1997 and began the examinations given by the Board in order to qualify to practice her profession in Canada. Ms. Daneshvar failed one of the components of the course thus preventing her from qualifying to practice in Ontario. She appealed the decision to the Appeals Committee of the National Dental Examining Board of Canada, a body created to establish national standards for the practice of dentistry. The Committee ruled against Ms. Daneshvar. No reasons were provided for their decision. Ms. Daneshvar subsequently appealed that decision to the Divisional Court. The Court held that Ms. Daneshvar’s procedural entitlements had been breached by the failure of the Committee to give reasons and emphasized the importance of the decision to the applicant who was seeking pursue her career in Canada. While the Court was clear that the reasons given need not resemble those given by the Courts or more formal bodies, a conclusion without reasons was insufficient in the circumstances of this case because of the importance of the decision to the applicant.

The reasoning in *Daneshvar* would presumably apply with equal force to other bodies dealing with the certification of professionals.

**ii. The decision will have profound impact on the applicant’s academic career and there are unusual circumstances**

In *Lerew v. St. Lawrence College of Applied Arts and Technology* the applicant was a 55 year old student with cerebral palsy that somewhat impaired her mobility and speech. She was enrolled in a clinical nursing program. Ms. Lerew was removed from one of the courses in the program because the instructor found her performance to be substandard and her behavior inappropriate. She was assigned a failing grade. Ms. Lerew appealed the decision to the College Student’s Appeal Committee which had upheld the decision and had refused a pre-hearing request to provide a Court reporter and to hear the evidence of a human rights officer (expert). The Committee provided no reasons for their decision. The Divisional Court set aside the decision of the Committee in part because of the profound impact the decision would have on Ms. Lewre’s academic career. Given the unusual circumstances of this case, the Committee was bound to provide reasons both for their decision and for their refusal to hear the expert evidence.

**iii. The decision imposes a penalty**

In *Megens v. The Ontario Racing Commission*, the applicant’s license was revoked on the grounds that he had conspired with two other men to fix a horse race. The most important

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evidence against the applicant was that provided by his co-conspirator who was party to a deal for a reduction in his own penalty. The Divisional Court concluded that the Ontario Racing Commission had breached Mr. Megen’s procedural fairness entitlements on several bases. In particular, there was a duty to provide reasons where a penalty was to be imposed.

In *Megens* the Court clarified that the obligation to provide reasons is not satisfied by merely reciting the submissions and evidence and stating a conclusion.

(c) Obligation to consider alternative penalties

In *Megens* the Divisional Court also held that the failure to consider alternative penalties amounted to a breach of procedural fairness. Although the decision of the Commission referred to the balance between protecting the public interest and the desire of individuals to participate in racing, it was devoid of any consideration of an alternate penalty for the applicant. In this regard, the Court held that the Commission’s decision fell short of the standard of fairness required of sentencing authorities.

(d) Opportunity to make oral submissions where decision turns on credibility

The scope of procedural fairness in the context of university decision-making has expanded significantly in recent years. Although such cases are outside of the practice of more formal bodies such as boards and tribunals, the Court’s treatment of these processes is arguably indicative of a shift to higher thresholds of procedural fairness. Further, it is important to recognize that the type of tribunal or board is not determinative of context nor the level of procedural fairness owed. In many cases the importance of the right affected appears to be the most important factor.

In *Khan and University of Ottawa*¹⁴, the student applicant, Ms. Khan, failed an examination in her second year of law school. Her instructor had graded her examination on the contents of three examination booklets. Ms. Khan maintained that she had handed in a fourth booklet. She appealed her failing grade to the Faculty of Law Examinations Committee and then to the Senate Committee. Both appeals were dismissed. Each committee concluded that Khan had failed to prove the existence of a fourth booklet but neither committee gave her an oral hearing. The matter was appealed to the Divisional Court which did not agree that an oral hearing was required and held that any defects in the proceedings before the first Committee were cured by the proceedings before the Senate Committee. The Ontario Court of Appeal disagreed and held that an oral hearing was required to satisfy the demands of procedural fairness where the decision turned on credibility and where the consequences to the applicant were serious.

The *Khan* decision has been criticized for setting the bar too high. David Mullan, in his article “Tribunals Imitating Courts—Foolish Flattery or Sound Policy?”¹⁵ is particularly critical of *Khan*, the result of which has been to impose formal, lengthy hearings on issues such as

plagiarism. Mullan questions whether anyone’s interests are served by the escalation and judicialization of such processes, especially where concerns over resources dominate.

(e) Reliance on mistake of fact can amount to a breach of procedural fairness

An individual cannot be heard if he or she is not in attendance for the hearing. In the recent case of Toronto Housing Co. v. Sabrie the Divisional Court held that a dismissal of proceedings that was premised on a mistake of fact was a breach of procedural fairness.

Mr. Sabrie was evicted from his low-income housing unit by the Rental Housing Tribunal for illegally subletting his apartment and falsifying financial information. He applied for a review of the eviction on the grounds that it would cause him undue hardship. Mr. Sabrie was not in attendance at the hearing. In his absence the landlord alleged that Mr. Sabrie had been arrested and was incarcerated at the time. As a result, the Tribunal dismissed the matter as abandoned. It was later learned that Mr. Sabrie had been hospitalized on the day of his hearing for mental illness. After being released from hospital, Mr. Sabrie requested a reconsideration of the decision. Despite being provided with confirmation of Mr. Sabrie’s hospitalization in the preceding period, the Tribunal denied the request and chose not to provide reasons for their decision.

Mr. Sabrie appealed that decision and argued that the Tribunal had denied him his entitlements under natural justice. The Divisional Court agreed and held that the Tribunal had the statutory power to re-open the matter and that procedural fairness required that it do so. The Court was critical that the Tribunal has sacrificed natural justice for administrative convenience: “administrative convenience, although important, should not be achieved at the potential cost of real injustice where there is independent credible evidence, as here, of a denial of natural justice”.

(f) Obligation to grant adjournments and the right to respond

In some cases, administrative bodies have acted unfairly by refusing to grant an adjournment. In particular, procedural fairness has been breached where the adjournment would have allowed time to respond.

In Spiegel v. Seneca College of Applied Arts & Technology the College notified Mr. Spiegel that he was required to withdraw from his course of studies. Spiegel sought an adjournment of the matter to allow him to prepare a defence and to respond to the investigative report. These requests were denied by the College. The unanimous Divisional Court held that the refusal to grant a short adjournment that would have allowed Spiegel to respond to the case against him was a denial of natural justice and procedural fairness.

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17 Ibid. at 32.
An adjournment was also required in *Re: Matthew Joseal Igbinosun, Appellant, and The Law Society of Upper Canada, Respondent.* Mr. Igbinosun, a lawyer, sought a stay of execution of the penalty of disbarment imposed on him by the Law Society. Mr. Igbinosun had not had not been given a full hearing on the merits of the case and was denied an adjournment that would have allowed him to have counsel present. As a result, he argued that the decision to disbar him had been procedurally unfair. The Law Society argued that the disbarment decision of the Hearing Committee had already been reviewed by the Appeal Panel on a standard of correctness and as a result there was no reasonable expectation of success for the applicant. In granting the stay (pending the decision of the Divisional Court regarding the appropriate standard of review), Lane J. clarified that the pragmatic and functional test did not apply to procedural fairness issues. In concluding that there was a serious issue of procedural fairness to be argued on appeal, Lane J. highlighted the following:

The content of the requirement for procedural fairness varies with the circumstances, but there is general agreement in the case law that proceedings involving the loss of a person’s right to earn a livelihood attract the highest level of fairness.

In this case, like many others, the character of the right at issue appears to have been the dominant factor.

**IV. CONCLUSION**

This paper has highlighted some of the recent decisions in Ontario in which the reviewing court found a violation of the right to be heard. Many of these cases will result in new hearings or processes. Cost will not only be incurred to “re do” the hearing but to incorporate the standard of fairness imposed by the reviewing court in all future cases. According to David Mullan, the result of the *Khan* decision was to require formal lengthy hearings on issues such as plagiarism.

There is no doubt that high standards of fairness may present problems for efficiency. The tension between these principles cannot adequately be discussed without considerations for and analysis of the funding and under funding of administrative bodies. Regardless, procedural fairness isn’t going anywhere. There will always be a demand for high levels of fairness where individuals’ rights and interests are affected. Further, the scope of procedural fairness will continue to grow as it remains as a powerful tool in challenging the decisions of administrative bodies, particularly as it is not subject to curial deference.

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20 Note that Divisional Court’s judicial review of the Appeal Panel’s decision has not yet been released.
21 *Supra* note 19 at para 4.
22 *Supra* note 15 at 6.