

ASPECTS OF CANADIAN ADMINISTRATIVE LAW: AUDI ALTERAM PARTEM

A number of years ago, the then leading scholar of English Administrative Law concluded: “It is often possible to comply with the audi alteram partem rule without incurring any risk of being mistaken for a participant in the proceedings before a court of Justice”. Do you agree that this is an accurate description of the working of the fairness doctrine in contemporary Canadian Administrative Law?

Audi Alteram Partem means to “hear the other side”. This is a fundamental principle of Natural Justice, which requires that persons who are aggrieved by administrative action have a right to know the allegations against them and a fair opportunity to respond before a final decision is taken. This entitlement was at one time strictly construed and classified according to functions as between judicial functions and purely administrative functions. This was because natural justice carried with it the notion to act like a judge in a court of law and the view was that those principles could not be imported into purely administrative functions. The limits of its application were thus confined to the similarity of court like procedures and came to symbolize something akin to a full-fledged hearing. As a result of this, unless the proceedings in issue involved the exercise of a judicial function then the aggrieved party was not entitled to any procedural rights. The procedures associated with this traditional

notion of natural justice would therefore conjure up images of an oral hearing which would include such things as notice of proceedings, the right to counsel who would play an active role in terms of cross-examining witnesses, the right to discovery and so on. The judicial category was later expanded to include quasi-judicial matters but for the most part the threshold remained high and was further raised when Lord Hewart^[1] added that in order to qualify for a procedural entitlement the claimant must show that the agency had a 'super added duty' to act judicially. With this dichotomy came the reality that you were either entitled to procedural protections or you were not and when you were, it was akin to a full-fledged hearing similar to that in a court of law.

All this was set to change in Canada following on what was happening in England and in particular in the case of **Ridge v. Baldwin**^[2]. In Canada, the case of Nicholson^[3] followed this approach, but dismissed the distinctions between judicial, quasi-judicial and purely administrative functions as capable of rendering unjust results which could result in much difficulty especially where the application of 'statutory decisions' had the same consequences without regard for the classification of the function in issue. The learned Justice Laskin adopted the reasoning of

Megarry J in the case of **Bates v. Lord Hailsham of St. Marylebone**

“that in the sphere of the so-called quasi-judicial the rules of natural justice run and in the administrative or executive field *there is a general duty of fairness*”(emphasis mine). It will be seen however, that although the distinctions were abolished these very same distinctions remained relevant to a determination of what is considered fair in each case so that the content of the duty to act fairly became flexible. This flexibility involved a consideration of several factors including the type of function that the tribunal was exercising whether quasi-judicial or administrative or whether it affects rights or privileges since Nicholson having introduced the concept did not establish the reach of this doctrine. The issue therefore is having crossed the threshold what is the content of those rights.

The general approach to content came to be that the farther one moves away from the judicial or quasi-judicial classifications the less is required to comply with the procedural fairness doctrine and it also seems that less is contained in those rights. A context specific approach was necessary because more agencies than hitherto became subject to scrutiny and no principle of general application could be formulated to fit the myriad of situations arising in respect of the new areas of administrative decisions under the procedural fairness doctrine. In fact, the proceedings akin to those in a court of law were inappropriate to some of these hearings.

In dealing with natural justice issues in the procedural fairness era tensions developed between the judges' interpretation of the origin of those rights and that influenced how they approached issues arising under the new regime. Madame Justice L'Heureux-Dube is of the view that natural justice is a freestanding common law right, which is in contrast to Sopinka J who is of the view that it could only be derived from statute. The Madame Justice got her way eventually in **Baker v. Canada (Minister of Citizenship and Immigration)** ^[5] where she reaffirmed her position by stating, "several factors have been recognised in jurisprudence as relevant to determining what is required by the *common law duty* of procedural fairness". I submit that construing natural justice, as a common law right is the better approach. It is much easier to justify a lower threshold thereby broadening the scope of the rights available as opposed to attempting to supply omissions in a statute or to see whether the statute has provisions capable of triggering those rights. In fact it has been suggested that the theory of the forgetful legislature is insecure especially where it is clear that the legislature had addressed the matter and decided nevertheless to place limits on procedural entitlements. It is submitted that the statement is an accurate description of the working of the doctrine of procedural fairness in contemporary Canadian

Administrative law.

In **Ridge v. Baldwin** the issue of entitlement to natural justice was raised and Lord Reid formulated three categories that are said to exist at common law but that the duty of fairness applies in only one case that is, the office from which one cannot be removed except for cause. There was no procedural fairness in respect of the other two categories namely the master and servant relationship and the office held at pleasure since in this latter case the employer can terminate for no other reason than his displeasure. It was held in this case that the relevant statute provided for dismissal on specific grounds that accorded him a degree of tenure so much so that he was entitled to procedural protection.

It is the distinctions between these categories that was dismissed in **Nicholson** and paved the way for the fairness revolution in Canada. The complainant was a probationary constable who was discharged after 15 months service without an opportunity to make submissions. The relevant statute, the Police Act grants full procedural rights where a constable is dismissed after 18 months of service. Laskin C. J. was of the opinion that the old common law rule that a person engaged in an office held at pleasure can be deprived of his office without notice or reason needed to be re-examined as having an anachronistic flavour to it. In that regard he

reasoned that: -

“although the appellant clearly cannot claim procedural protections afforded to a constable with more than 18 months service, he cannot be denied protection. *He should be treated “fairly” not arbitrarily.*(italics mine).

A great deal of emphasis was placed on the impact of the decision in terms of how serious the consequences were for the appellant and a consideration of the available choices. The learned justice dismissed the ‘super added duty’ requirement as a misinterpretation of earlier cases. It was also felt that these artificial distinctions were irrelevant since the duty to act fairly and the duty to act judicially arose out of the principles of natural justice. It is to be noted that Nicholson was a case concerning rights and in this regard the Laskin C. J. C. said that he was entitled to be given notice and an opportunity to present his case whether orally or in writing. The opportunity to be heard would have been satisfied without an oral hearing; he had an option to present his case in writing a departure from the classical conception of the audi alteram partem rule.

Written submissions were also held to fulfil the requirement for a hearing in Baker [\[6\]](#). This case was in the context of the immigration Act where humanitarian and compassionate grounds were in issue and involved the exercise of discretion. I submit further that it was concerned with the grant of a privilege. The court applied a contextual approach and

reiterated the reasoning of Madame Justice L'Heureux-Dube` in Knight.-

[7] The contextual approach involves an appreciation of the “context of the statute and the rights affected” which forms an important backdrop to a determination of the participatory rights to be granted in keeping with the procedural fairness doctrine.

In keeping with the contextual approach, Madame Justice L'Heureux-Dube' in Baker said that several factors impacted on the type of participatory rights to which Mrs. Baker was entitled including the fact that a humanitarian and compassionate decision is far removed from judicial decisions since it involved the exercise of considerable discretion and requires a consideration of multiple factors and its role in the statutory scheme. Some of these factors included the fact that there was no appeal procedure as well as the considerable impact on Ms. Baker and her children. These circumstances together were regarded as giving rise to an *extensive content* to the duty of fairness. The learned Madame justice also found that on the facts of this case considerable discretion was given to the Minister to determine the proper procedure. She then held that the circumstances of this case required a ‘full and fair consideration of the issues and others whose important interest are affected by the decision in a fundamental way must have a *meaningful opportunity to present the*

various types of evidence relevant to their case and have it fully and fairly considered.

The important consideration here is that the matter was held to be **very different** from a judicial type decision, this should signal that she would not be entitled to much but several administrative law scholars seemed surprised at and disappointed with the paucity of what in the end was considered to be sufficient to comply with her right to procedural entitlement. What is the *extensive content* of the duty of fairness?

The learned judge ruled that an oral hearing is not always necessary to ensure a fair hearing and consideration of the issues involved and, reminiscent of the decision in Knight, the claimant was given an opportunity through her lawyer to put forward her case in a written form which contained all the relevant information to guide the decision makers in coming to their decision. The learned judge then said:

Taking all the factors relevant to determining the content of the duty of fairness into account, **the lack of an oral hearing or a notice of such hearing** did not, in my opinion, constitute a violation of the requirements of procedural fairness to which Ms Baker was entitled in the circumstances particularly given the fact that several factors point toward **a more relaxed standard**. The opportunity, which was accorded for the appellant and her children to produce full and complete written documentation in relation to all aspects of her application, **satisfied the requirements of the participatory rights required by the duty of fairness in this case.**(emphasis mine).^[8]

This passage and the writer's emphases tend to show clearly the anti-

climactic nature of the procedural fairness doctrine at least when applied in the context of humanitarian and compassionate grounds. It makes clear that given that the 'threshold' rules are more relaxed then one is not to expect those rights to contain much. Here the lack of notice and oral hearing were considered sufficient compliance with procedural fairness and the 'audi alteram partem rule' – compliance was satisfied by written submissions so far removed from what one is accustomed to in "proceedings before a court of Justice".

The court is not here saying that an oral hearing will never apply in these circumstances but in keeping with the contextual approach it is saying there are some circumstances in which it may be relevant but not in this case. The learned judge did not and understandably could not set out what was required in each case.

In Knight's case, Madame Justice L'Heureux-Dube dispensed with the 'anachronistic' distinction between persons who held office at pleasure and persons who held offices from which they could only be dismissed for cause. She then held that Knight was entitled to procedural fairness and the content of that right required that he be given reasons and an opportunity to be heard the court found by majority that he was accorded fair proceedings. The reason for this was that there were negotiations

that were being conducted through his lawyer in respect of the renewal of the contract and as such he had sufficient notice of the matters in issue and was given an adequate opportunity to respond to their concern.

The Madama Justice supported her position in Knight by reiterating the three factors set out in the case of **Cardinal v. Director of Kent**

Institution [\[9\]](#) and which were adopted in the Baker case these are the nature of the decision to be made by the administrative body, the relationship existing between the body and the individual and the effect of that decision on that individual's rights.

In Baker she emphasised that the nature of the decision along with the process followed in making it were important considerations and that the closeness of the process to judicial proceedings is determinative of how much of those principles are to be imported into the decision making process by the administrative agency. This is to be understood against the background given herein that natural justice was normally restrictively construed to be akin to Court proceedings – a full-fledged hearing. She then gave as a second factor the nature of the statutory scheme and “the terms of the statute pursuant to which the body operates.” [\[10\]](#) In this context greater procedural protections are available where the statute makes no provision for an appeal so that the content of the right varies

with the finality of the decision. The third factor is “the importance of the decision to the individual or the individuals affected”.^[11] Further, the more important the decision to the persons affected the more stringent the procedural protections that will be applied. For this purpose she relied on the authority of **Kane v. Board of Governors of the University of**

British Columbia^[12]

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

This echoes the sentiments in the early post Nicholson cases where the focus was on the impact of the decision and on rights privileges and interests^[13] and that it is in these cases that we see the Courts insisting on the advancement of procedural entitlements/rights. It also meant that in terms of the dimensions of fairness a higher standard akin to judicial processes is expected. In essence it is here being emphasised that the nature of the hearing was not only based on the procedures, such as whether the matter was contentious and required cross-examination but also the nature of the issue to be determined^[14]. The fourth consideration is the legitimate expectations of the person challenging the decision. What did the person come to expect having regard to the

statute, precedents set by previous proceedings that a certain procedure will be followed or by promises made by the particular administrative agency. It was made clear though that this is a purely administrative law remedy and cannot give rise to substantive rights. Finally, the duty of fairness should have due regard to the choice of procedures made by the agency especially if the statute conferred a discretion on the agency to choose its own procedures. It is in this regard that the tribunal was deferentially treated in Baker. It is to be noted that these are the considerations, which determine in a general way the content of the audi alteram partem rule in modern administrative law in Canada. They determine the extent to which the proceedings resemble those in a court of law, as an examination of the following cases will show. It is a clear statement of the principles governing the contextual approach.

The nature of the hearing came up for consideration in the *context* of procedural entitlements involving refugee claimants and the Charter of Rights in the case of **Singh v. Canada (Minister of Employment and Immigration)**.^[15] Justice Wilson held that even where Charter rights were at issue there are some circumstances, not specified, where a “written hearing” would satisfy the requirement to know and respond although not for all purposes. However, where credibility is in issue then

'fundamental justice' requires that it be determined in an oral hearing. The requirement of an oral hearing in the context of the credibility issue was also raised in the case of **Khan v. The University of Ottawa**^[16] where the issue was whether the claimant had handed in a fourth exam booklet. In this case it was held that her credibility was adversely affected and as such the Committee ought to have granted her an in-person hearing and an opportunity to make oral representations before taking a decision. This case is also important in so far as it decided that where there are factors which impact on the mind of the decision-maker, these are to be disclosed to the complainant so that a fair opportunity for response is given.

An oral hearing, because of its association with court proceedings conjures up images of cross-examination of the witnesses similar to court type proceedings but in practice this is not necessarily so as was seen in the case of **Masters v. Ontario**^[17] a sexual harassment case. The court upheld an *investigative/recommendatory process* in which the alleged victims and perpetrators were interviewed separately on the basis that it was sufficient if the substance of the allegations were brought to the attention of the accused so that an entire hearing will not necessarily be conducted orally and in the presence of the accused. It is important to

note the stage of the proceedings in this case it was at an investigative and recommendatory stage.

One of the earliest cases involving the procedural fairness doctrine in Canada is **Re Abel and Director, Penetanguishene Mental Health**

Centre [18] a case that was dealt with in the context of a non-dispositive decision. There are two types of non-dispositive decisions, investigating and recommending. In this context, prior to the fairness revolution no hearing was required because of the classification of the functions as non-judicial. This changed in this case following Lord Denning in the Pergamon Press [19] case where he held that before making their decision the inspectors must give the party involved an opportunity to “correct or contradict” the allegations against him. To comply with the audi alteram partem principle all that was required was a mere outline of the charge. The context of the Abel case is that the advisory board makes recommendations, with a *purely advisory impact* to the Lieutenant Governor with respect to the release of patients committed to mental institutions on the grounds of insanity. The Board refused to release the patients’ files to lawyers representing the patients’ files. The court found that the Board’s recommendation was influenced by the information of the patients’ files. It was held that a *mere failure* to disclose the reports was

sufficient to vitiate the proceedings for breach of the principles of natural justice even though only a recommendation was being made. Grange J said:

The obligation to “act fairly” perhaps lacks precision of definition and doubtless involves something less than the strict application of the rules of natural justice but it may in some circumstances involve the application of all or some of those rules. Certainly in my opinion, it embraced in these circumstances the consideration upon proper principles of whether or not the reports should be disclosed to the applicants. In failing to give that question consideration, the Board, in my respectful opinion, failed to meet the legal test of fairness.

The basis for the decision was a consideration of such factors as the “the degree of proximity between the investigation and the decision and the exposure to the person investigated to harm were of paramount concern”. In the Abel case the proximity was considered great, at least one year in prison. This case illustrates the importance of the fairness doctrine in so far as it accords procedural fairness where none previously existed and in terms of what was required to satisfy procedural fairness – a mere failure to disclose a report not a full scale hearing akin to proceedings in a court of justice. Not all decisions “of a preliminary nature will trigger the duty to act fairly” [\[20\]](#) and full disclosure is not necessarily required. The level of disclosure required depends on the circumstances of the case. Abel’s case merely provides us with a functional test for identifying the

“exceptional” [\[21\]](#) cases in which the duty will be triggered and as such is not a case of general application in this area as will be seen cases involving investigative functions.

Traditionally no procedural protection was afforded in cases that involve an investigative function. This in some measure was on account of the statutory scheme of the investigative processes particularly in relation to commissions of inquiry so that the court was very deferential here. With the concern expressed in *Abel*, the proximity of the investigation, the decision and the degree of harm came an increased awareness that in certain circumstances inquiries can impact seriously on people’s reputation and career especially where the mandate of the Commission is directed at wrongdoing which can lead to a dismissal of the person involved. In the cases of *Irvine* [\[22\]](#) and *Krever* [\[23\]](#) the investigative function was in issue and the question was whether during a Commission of Inquiry there is some form of procedural rights and if so what is it. These decisions must be placed in context in terms of the statutory framework, for example the Commissions of Inquiry Act. In *Irvine* there was an investigation under the Combined Investigation Act RSC 1970 c. C-23 [\[24\]](#). The statutory scheme sets up a two-stage process. The first stage is an information gathering stage at the end of which the information

is submitted to the Commission for processing. At this stage, the court was of the view that there was no need for any procedural entitlements having regard to the scheme of the Act in that at this stage the report is held private and that the statutory scheme up to this stage compensated for the lack of an opportunity for Counsel to cross-examine on behalf of their clients. The court was very restrictive in their view of the entitlement because they did not want to impair the inquiry's ability to investigate in the manner that Parliament intended that is, fact finding. Nevertheless, even with this caveat the court was minded to grant procedural protection

Estey J noted:

“Fairness is a flexible concept and its content varies depending on the nature of the inquiry and the consequences for the individuals involved. The characteristics of the proceeding, nature of the resulting report and its circulation to the public, and the penalties which will result when events succeeding the report are put in train will determine *the extent of the right to Counsel and, where counsel is authorized by statute without further directive the role of such Counsel*. The investigating body must control its own procedure. ***When that body has determinative powers***, different considerations enter the process. ***The case against the investigated must be made known to him***. This is provided for at each of the progressive stages of the inquiry. (Emphases mine)

Here again we see varying standards the threshold was crossed and minimal rights were granted such as to have counsel but his role depends on the consequences of the report or on whether it is being made public and the complainant has a right to know. The court was very deferential

here and again this was on the basis that the statute had built-in protections and the purpose of the process was fact finding and so the degree of harm in this context was minimal.

This case is to be contrasted with the Krever case where there was an inquiry into contaminated blood in Canada. Here Krever J, the commissioner had put into place some procedural protections for the inquiry which were found to be “extensive and exemplary” to include an active role for Counsel who could be present at the inquiry and the pre-testimony interviews and could cross-examine witnesses, the report was to be made public unless an application for confidentiality was made and that although hearsay evidence would be received the Commission would be minded of the dangers of such evidence and its impact on reputation. The difference with this and the Irvine Case is that the issue in this case was more serious as were the consequences and more importantly the inquiry was public and aimed at a determination of misconduct. In respect of the complaint regarding the notices the court was of the view that the notices were sent out in adequate time and they were given a fair opportunity to respond in all the circumstances.

The Baker case was important in another respect in terms of how the decision is to be dispensed and/or handled. Prior to this case there was

no requirement for reasons unlike in a Court of Law. However, it was held that there are certain circumstances in which the duty of procedural fairness will require the provision of reasons especially where the decision is of importance to the individual and when there is a statutory right of appeal. It is interesting to note that not much was required to comply with the requirement for reasons in this case, the officer's notes were construed as sufficient reasons. It is felt that Madame Justice L'Heureux-Dube used them as a red herring to set the stage for attacking the reasons. It signals that shoddy reasons are unacceptable and in fact disciplines the process of administration so that administrators now realising that their reasons will be subject to scrutiny will be more hard pressed to be more responsible in the decision making process and produce better and substantial reasons. The qualification of when there is a statutory right of appeal suggests that there are circumstances such as where there is no appeal right where reasons may not be required. Judicial proceedings before a court of justice are normally held in public unless there are exceptional circumstances in a tribunal hearing the opposite is true except of course where there are Statutory Powers of procedure legislation so that section 9 of the Ontario Statutory Powers Procedure Act for example provides a presumption in favour of open

hearings.

It is important to note that there is operating alongside the procedural fairness doctrine some of the old rules of natural justice as where there are statutory powers of procedure in Ontario the Statutory Powers Procedure Act. This Act has codified the pre- Nicholson rules and apply in cases where powers to decide have been conferred by legislation.

Under the statute trial type hearings are contemplated as an examination of a few of its provisions and in this sense there is still scope for the audi alteram partem rule to mirror proceedings in a court of justice. The Act makes the giving of a detailed notice compulsory except where it is impracticable to give individual notices then public advertisement is acceptable. In section 10 the party has a right to Counsel who can cross-examine witnesses and present evidence and make submissions.

From the foregoing it can be seen that the general guide to the entitlement to fair procedures depends on the nature of the proceedings and a balancing of factors such as impact of the decision. The closer the decision or the proceedings resemble judicial proceedings the more the person is entitled to procedural fairness and the more the proceedings adopted are akin to that before a court of justice. In Canada a contextual approach has been taken to administrative law to take into consideration the number and diversity of agencies now subject to review. In this regard the conceiving of administrative law in terms of judicial proceedings has lost favour and there is now a more flexible approach. The move away

from the rigid distinctions has meant that the content of the rights have changed and seem less than what we are accustomed to. A right to a hearing does not automatically mean that it will be an oral hearing and neither does it mean that all the technical rules of evidence will be observed. In judicial proceedings the parties are entitled to cross-examine and to counsel but under the new dispensation of procedural fairness it is not necessarily so unless provided by statute and it has been shown that this varies with the nature of the case, the impact of the decision in terms of the consequences for the complainant whether it will result in a final determination of rights, if it will be made public or if credibility is in issue. The analysis would be incomplete without reference to the provisions and workings of the Ontario Statutory Powers Procedure Act under which trial type hearings are contemplated.

[1] R. v. Legislative Committee of the Church Assembly [1928] 1 K. B. 411

[2] [1964] A. C. 40 H. L.

[3] Nicholson v. Haldimand – Norfolk Regional Board of Commissioners of Police [1979] 1 S. C. R. 311 (Ont.)

[4] [1972] 1 W. L. R. 1373

[5] [1999] 2 S. C. R. 817

[6] [1999] 2 S. C. R. 817

[7] Board of Education of the Indian Head School Division No. 19 of Saskatchewan v. Knight [1990] 1 SCR 653 (Sask.)

[8] Baker *infra* at page 844.

[9] [1985] 2 SCR 643 (BC)

[10] Old Saint Boniface Residents Association Inc. v. Winnipeg (City) [1990] 3 S. C. R. 1191.

[11] Baker (*infra*)

[12] [1980] 1 S. C. R. 1105 at 1113:

[13] Cardinal v. Director of Kent Institution [1985] 2 SCR 643 (BC)

[14] per Sedley J(as he then was) in R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery, [1994] 1 A. E. R. 651 at 667 (Q. B.)

[15] [1985] 1 S. C. R. 311

[16] 34 O. R. (3d) 535

[17] (1994), 18 O. R. (3d) 551 (Div. Ct.)

[18] (1979) 97 D. L. R. (3d) 304 (Ont. Div. Ct.), aff'd (1981) 119 D. L. R. (3d) 101 (Ont. CA)

[19] [1971] Ch. 388 (C.A.)

[20] Per L'Heureux-Dube J in Knight - *supra*

[21] Per Evans, Janisch, Mullan and Risk 4ed, 117.

[22] Irvine v. Canada (Restrictive Trade Practices Commission) [1987] 1 S. C. R. 181 (Can.)

[23] Canada (Attorney General) v. Canada Commission of Inquiry on the Blood System in Canada – Krever Commission)

[24] Now RSC 1985, c. C-34.