Primer on Duty of Fairness

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PRIMER ON DUTY OF FAIRNESS

“Natural Justice connotes the requirement that administrative tribunals, when reaching a decision must do so with procedural fairness”.¹

The duty of fairness and the rules of natural justice focus on the process through which administrative tribunals make decisions. Where a tribunal disregards the duty of fairness or the rules of natural justice in the course of making a decision, a court may overturn that decision.

INTRODUCTION TO THE RULES OF NATURAL JUSTICE AND THE DUTY OF FAIRNESS

Historically, the rules of natural justice provided procedural protection only where an administrative tribunal was exercising a quasi-judicial function. In this old approach, courts divided the functions played by government officials into three classes:

- Quasi-judicial, where an official decided a dispute between parties (e.g. a labour relations board);
- Administrative, where an official applied general policies to a specific case (e.g. a licensing decision by a liquor control board); and
- Legislative, where an official establishes rules or policies (e.g. a municipal council making a bylaw or a Minister making a policy).

The rules of natural justice applied only if a decision maker was acting in a “quasi-judicial capacity”—like a judge. In the other functions, where the vast majority of government action occurred, there was no protection at all regardless of the impact of the decision on persons affected.

Almost forty years ago, the Supreme Court of Canada rejected that approach:

... the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question ...²

² Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 SCR 311 at 325, 117 DLR (3d) 70.
See also Martineau v Matsqui Institution, [1980] 1 SCR 602, 106 DLR (3d) 385.
The Court adopted the approach from a leading English case, *Selvarajan v Race Relations Board*[^3^]:

> The fundamental rule is that if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some way adversely affected...then he should be told the case made against him and be afforded a fair opportunity of answering it.^[4^]

Now the Supreme Court of Canada recognizes that “All administrative bodies, no matter what their function, owe a duty of fairness to the regulated parties whose interests they must determine”.[^5^] The Court has explained the basis for expanding the protection of the duty of fairness:

> ...the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure...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.^[6^]

The two key principles in the duty of fairness are:

- the right to a procedurally fair hearing; and
- the right to an unbiased decision maker.

There is no uniform set of rules for procedural fairness—the degree of procedural fairness depends on the statute and circumstances of the particular case. In a common sense approach, an English Law Lord described it as “fair play in action”.[^7^] The Supreme Court of Canada has said “The concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case”.[^8^]

The reasons for this degree of flexibility are described by the Supreme Court of Canada in *Bell Canada v Canadian Telephone Employees Association*:

> ...administrative tribunals perform a variety of functions, and "may be seen as spanning the constitutional divide between the executive and judicial branches of government" [...] Some administrative tribunals are closer to the executive end of the spectrum: their primary purpose is to develop, or supervise the implementation of, particular government policies. Such tribunals may require little by way of procedural protections. Other tribunals, however, are closer to the judicial end of the spectrum:


[^4^]: Cited in *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police*, supra at 327.


