

# THE DUTY OF FAIRNESS IN THE INVESTIGATIVE STAGE OF ADMINISTRATIVE PROCEEDINGS

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## Introduction

Administrative bodies and tribunals may be subject to procedural requirements within their statutory scheme and statutory powers procedures acts. In other respects, administrative bodies are generally found to be masters of their own procedures.<sup>1</sup> This potentially allows for wide latitude with respect to process. However, this is always subject to a requirement to ensure the common law rules of natural justice are recognized and applied at the appropriate stages of any proceeding.<sup>2</sup>

This comment will address how the courts have interpreted the duty of fairness as it relates to investigations in the context of administrative proceedings.

## At what stage does the duty of fairness arise?

The common law duty of fairness ensures correct results are reached when public authorities, regulators and tribunal members make administrative decisions affecting the rights, interests and privileges of an individual. However, the duty is more than a means of encouraging better results. In fact, it has been defined as an independent, unqualified right that any party affected by an administrative decision is entitled to.<sup>3</sup> Furthermore, the denial of a right to a fair process must always invalidate a decision, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision.<sup>4</sup> The *Baker* case has confirmed that the requirements of the duty of procedural fairness in the context of administrative proceedings are determined by a fact-specific analysis and based on a number of well-known factors, namely: the nature of the decision and the process followed in making it; the nature of the statutory scheme; the importance of the decision to the person affected by it; the legitimate expectations of the parties and the procedure chosen by the tribunal.<sup>5</sup>

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<sup>1</sup> *Prasad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 at para 16, 57 DLR (4th) 663; *TWU v Telus Corp*, 2004 CIRB 277 at paras 66–67.

<sup>2</sup> *Nova Scotia (Human Rights Commission) v Sam's Place* (2000), 185 NSR (2d) 372 at para 8, 3 CCEL (3d) 131.

<sup>3</sup> *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at para 23, 69 BCLR 255.

<sup>4</sup> *Ibid* at para 23.

But before an administrative decision is made, an investigator may be tasked with a fact-finding role, interviewing witnesses, gathering evidence and making conclusions, perhaps even recommendations to a decision-maker. While the duty of fairness may have limited application to certain non-final administrative decisions and investigations, there are compelling reasons for recognizing that in some cases, the duty of fairness should be broad. Individuals impacted by an administrative decision have the right to hear the other side and to respond to evidence and arguments of other participants and of the decision-maker. This right, an expression of *audi alteram partem*, exists at all times and is context-sensitive. In certain cases, those sensitive times occur in the investigative phase of the administrative process.

In *Irvine v Canada (Restrictive Trade Practices Commission)*, the Supreme Court of Canada found that courts should not intervene in procedural matters where an investigator is involved in the first stage of an investigation if there are sufficient safeguards later in the process to protect all of the parties involved.<sup>6</sup> In that matter, the Court was asked to decide if a party being investigated had the right to have his counsel cross-examine witnesses in the course of a hearing inquiry. The Court, per Estey J., found that there was a duty of fairness in the investigative phase, yet its extent depended on the context:

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, the 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.<sup>7</sup>

Further, the Supreme Court explained that the duty of fairness will depend on the potential consequences and outcomes:

Courts must, in the exercise of this discretion, remain alert to the danger of unduly burdening and complicating the law enforcement investigative process. Where that process is in embryonic form engaged in the gathering of the raw material for further consideration, the inclination of the courts is away from intervention. Where, on the other hand, the investigation is conducted by a body seized of powers to determine, in a final sense or in the sense that

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<sup>5</sup> *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 at paras 210–216, 174 DLR (4th) 193.

<sup>6</sup> *Irvine v Canada (Restrictive Trade Practices Commission)*, [1987] 1 SCR 181 at para 78, 41 DLR (4th) 429.

<sup>7</sup> *Ibid.*

detrimental impact may be suffered by the individual, the courts are more inclined to intervene.<sup>8</sup>

In *Ruffo v Conseil de la magistrature*, the Supreme Court confirmed that the duty to act fairly and the *audi alteram partem* rule apply to preliminary stages of administrative proceedings. The scope of the requirements varies depending on the circumstances of each case.<sup>9</sup> It also found relevant the fact that the alleged failure to ensure fairness at the preliminary stage would not have real consequences on the person, given the further steps provided in the process, including the appointment of an inquiry committee and the right to be heard from that committee.

In *Irvine*, the Supreme Court emphasized that the remaining steps in the administrative process would cure any unfairness potentially caused by the inability to cross-examine witnesses in the investigative process. In *Ruffo*, the Supreme Court rather focused on the fact that the inability to be heard at the initial examination of the complaint did not have any real consequences on the person being investigated, due to a number of circumstances specific to that case.

In *Swanson v Institute of Chartered Accountants (Professional Conduct Committee)*,<sup>10</sup> the Manitoba Court of Queen's Bench found that there was a duty of fairness owed to an accountant by a professional conduct committee. Further, it was found that the committee's decision to recommend that a disciplinary hearing be held was a decision that was subject to judicial review. The Court concluded:

In determining whether the decision of the professional conduct committee is subject to judicial review, the relevant focus is not on whether the committee has made a final determination. The focus is on the relationship between the committee and Mr. Swanson, with particular attention to whether he could be affected adversely by the committee's decision.<sup>11</sup>

Some courts still decide the scope of the duty of fairness, not by considering the potential impact and the rights at stake, but by drawing a line between the investigative stage and the adjudicative stage. A recent example is *MK Engineering v Assn of Professional Engineers and Geoscientists of Alberta*.<sup>12</sup> In that case, the Alberta Court of Appeal adjourned the appeal of the appeal board of a regulatory body as being

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<sup>8</sup> *Ibid* at para 87.

<sup>9</sup> *Ruffo v Conseil de la magistrature*, [1995] 4 SCR 267 at para 89, 130 DLR (4th) 1.

<sup>10</sup> *Swanson v Institute of Chartered Accountants (Professional Conduct Committee)*, 2007 SKQB 480, 308 Sask R 32 [*Swanson*].

<sup>11</sup> *Ibid* at para 26. Also, in *Mitten v College of Alberta Psychologists*, 2010 ABCA 159, 26 Alta LR (5th) 102, it was found that a decision by a committee not to proceed to a hearing is a just extension of the investigative process. The decision was subject to judicial review to assess its fairness.

<sup>12</sup> *MK Engineering Inc v Assn of Professional Engineers and Geoscientists of Alberta*, 2014 ABCA 58, [2014] AJ No 119 (QL).

premature because the administrative proceedings were not yet completed. On the issue of procedural irregularities, the Court stated: “It is well established that duties of fairness at the investigative stage are qualitatively lower than duties owed at the adjudicative stage ... that errors at the investigative stage can be corrected.”<sup>13</sup>

That distinction may not be appropriate since it assumes that errors in the investigative stage can be corrected. Whether procedural irregularities can be cured in the subsequent steps depends on the processes followed, which can vary significantly.

Moreover, not all investigations are alike. An investigator’s role may amount to more than accumulating evidence and therefore attract a higher duty of fairness in an investigation, for instance where conclusions and recommendations are made. This issue was addressed in *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*. In that case, the Court found that an investigator was exercising a quasi-judicial function when she investigated into a human rights complaint because she had to weigh and assess evidence as well as form an opinion on whether there had been a human rights violation.<sup>14</sup>

A contextual analysis is preferable, as was articulated in *Hawrish v Cundall* on the issue of procedural fairness in the investigative stage, where the court summarized as follows:

From my reading of all these decisions and several others I draw the following:

- (1) It is of no value to go through the process of determining whether a statutory body or tribunal is judicial, quasi-judicial or administrative in deciding if it must act with fairness;
- (2) The duty to act fairly arises whenever such body has the power to make a decision which will affect the rights of an individual;
- (3) Whether a particular body has such power or function is to be ascertained from the whole of the legislative scheme.<sup>15</sup>

### **What is the content of the duty of procedural fairness in the context of administrative investigations and non-final decisions?**

An investigation is oftentimes the foundation of an ultimate administrative decision. Cracks in the foundation can be salvaged in subsequent steps in the administrative process but there are instances where those cracks will be fatal to the outcome and render a decision invalid.

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<sup>13</sup> *Ibid* at para 18.

<sup>14</sup> *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 931, 10 BCLR (5th) 175.

<sup>15</sup> *Hawrish v Cundall* (1989), 76 Sask R 208 at para 28, 39 Admin LR 255, also cited in *Swanson, supra* note 10 at para 57.

The hallmarks of a proper investigation are thoroughness and fairness. The circumstances of each case dictate the degree of thoroughness.<sup>16</sup> A thorough investigation does not require that the investigator interview every person proposed by the complainant but the investigator must consider crucial evidence.<sup>17</sup>

In *Tahmourpour v Canada (Solicitor General)*, the question before the court was whether the Human Rights Commission had been sufficiently thorough to be procedurally fair.<sup>18</sup> The Federal Court of Appeal concluded that the Commission's investigator had failed to consider and assess relevant data and that he had failed to interview relevant witnesses. Therefore, the investigation did not meet the required thoroughness prescribed by the case law. Thus, the investigator's decision to dismiss the human rights complaint was set aside as being in breach of the duty of fairness. Another example of inadequacy in an investigation which does not meet the required fairness is the failure to advise the person affected of the case they have to meet.<sup>19</sup>

As previously stated, the content of the duty of fairness will depend on the context. In *Swanson v Institute of Chartered Accountants*, the duty of fairness at the investigative stage was described as a limited duty of fairness, not the broad duty of fairness that is typically associated with rights to complete disclosure and to a full hearing.<sup>20</sup> However, this limited duty of fairness does not lessen the duty for the affected party to be made aware of the case to meet and their right to be heard from the committee conducting the investigation.<sup>21</sup>

In *Re Abel et al and Advisory Review Board*, the Court concluded that a duty to act fairly generally arises where a tribunal's decision affects "the rights, interests, property, privileges or liberties of any person" or where an investigative board investigates and makes a report that may result in a person being subjected to "pains or penalties ... or in some such way adversely affected by the investigation and report".<sup>22</sup> The particular administrative board under consideration in that case played an advisory role regarding the adverse measures ultimately taken against a person's rights or interests. The question was whether and to what extent this role attracted a duty to act fairly. The Court found that in the reality of the operation of that board, the recommendations of the advisory board were virtually almost always

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<sup>16</sup> *Slattery v Canada (Human Rights Commission)*, [1994] 2 FCR 574 at para 55, aff'd (1996), 205 NR 383.

<sup>17</sup> *Ibid* at para 69.

<sup>18</sup> *Tahmourpour v Canada (Solicitor General)*, 2005 FCA 113, [2005] FCJ No 543.

<sup>19</sup> *Mooney v Canadian Society for Immigration Consultants*, 2011 FC 496 at para 164, 9 Imm LR (3d) 198.

<sup>20</sup> *Swanson*, *supra* note 10 at para 65.

<sup>21</sup> *Ibid* at paras 75 and 78.

<sup>22</sup> *Re Abel et al and Advisory Review Board* (1980), 119 DLR (3d) 101, 31 OR (2d) 520 (Ont CA).

accepted. Therefore, their impact was great and attracted a duty of fairness. The proximity of the investigative or recommendation stage to the final decision is relevant; the closer the proximity to the final decision, the greater the content of the duty of fairness ought to be.

It is well established that where the potential consequences of an administrative decision affects a person's livelihood, a high standard of procedural fairness exists.<sup>23</sup> Particularly, but not exclusively, in those situations, procedural unfairness in the preliminary stages may invalidate the decision. Where procedural errors occur at the preliminary stages of an administrative process, the characteristics of the remaining stages will determine whether there is a reasonable opportunity to cure the errors which were made initially. As the majority of the Court found in *Khan v Ottawa (University of)*:

Curing errors made at first instance depends on the seriousness of the initial error, the procedures followed by the appellate body, the powers of the appellate body, the way these powers were exercised and the weight the appellate body attributes to the initial decision. The closer the appeal is to a complete reconsideration, with fair procedures, by a body that does not attribute significance to the initial decision, the more likely the defects will be cured.<sup>24</sup>

While all administrative decisions will require that the individual be afforded an opportunity to be heard, it does not follow that a full oral hearing would be necessary to meet the duty of fairness. However, where there are issues of credibility to be determined by an administrative body, fundamental justice requires that credibility be determined on the basis of an oral hearing.<sup>25</sup>

Even in cases where there are no credibility issues, the absence of an oral hearing in the later stages of the administrative proceeding may impact on the extent of the duty of procedural fairness in the investigative phase. Where there is no subsequent oral hearing or opportunity to address errors made in the investigative stage, there are no safeguards in place to avoid substantive errors and omissions in the decision, which stem from an investigation. In effect, this would remove the affected party's fundamental right to be heard and to respond.

Take, for instance, the New Brunswick Court of Appeal decision in *Province of New Brunswick v Comeau*. In that case, the Court of Appeal was critical of the procedural framework followed by the Department of Social Development conducting investigations pursuant to that province's *Family Services Act*. The Department's investigative protocols did not allow the persons affected by the investigation to receive disclosure of the complete investigation conclusion report,

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<sup>23</sup> *Kane v Bd of Governors of UBC*, [1980] 1 SCR 1105, 18 BCLR 124; *Henderson v College of Physicians and Surgeons of Ontario* (2003), 65 OR (3d) 146, 228 DLR (4th) 598.

<sup>24</sup> *Khan v Ottawa (University of)* (1997), 34 OR (3d) 535, 148 DLR (4th) 577 (Ont CA).

<sup>25</sup> *Ibid*; *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177 at 213–214, 17 DLR (4th) 422.

along with witness statements, or to be heard before the decision-maker prior to a decision affecting their rights being made. The Court of Appeal, per Bell J.A. concluded:

Given that the stakes for future employment and access to programs and services offered by the Minister are so high, the Comeaus are entitled to be provided with a copy of all the evidence and an opportunity to respond fully. That response would obviously be made to the ultimate decision-maker[.]<sup>26</sup>

The Court of Appeal therefore concluded that the affected party was entitled to fulsome disclosure and an opportunity to present their response to the decision-maker. The process was contrary to the principle of *audi alteram partem*. Without these safeguards in place, there was no way to cure any substantive or procedural errors that may have occurred in the investigative stage.

Generally, where a person or a panel exercise both investigative and adjudicative functions, it will result in a reasonable apprehension of bias.<sup>27</sup> In *Aylward v McMaster University*, the court concluded that members of the deciding board or committee should not play the role of both prosecutor and decision-maker.<sup>28</sup> The division of the investigative process and the administrative process is associated with a higher degree of procedural fairness. However, in principle, an affected person is always entitled to have an impartial and independent decision-maker, regardless of the content of duty owed.

An inordinate delay in an investigation may potentially also amount to procedural failure. The administrative body may breach its own time limit, which in turn may be a sufficient ground for a court to set aside or stay the proceedings of an administrative decision. Where no time limits are set by the administrative body's procedural framework, undue delay in administrative proceedings may constitute a breach of natural justice and can warrant a stay. This was recognized by the Supreme Court of Canada in *Blencoe v British Columbia (Human Rights Commission)*.<sup>29</sup> In that case, the Supreme Court identified two types of prejudice that may flow from delay and may result in a stay of proceedings. First, there is a delay that compromises a fair hearing. Second, there is a delay, which amounts to an abuse of process in that it brings the administrative process into disrepute. Under the second type of prejudice, it has been recognized that delay, in itself, may be sufficient to warrant a stay of proceedings. The Supreme Court found that to amount to an abuse of process, the delay must be unacceptable.

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<sup>26</sup> *Province of New Brunswick v Comeau*, 2013 NBCA 41 at paras 30–32, 406 NBR (2d) 269.

<sup>27</sup> *Gardner v Ontario Civilian Commission on Police Services*, (2005) 72 OR (3d) 285, 18 Admin LR (4th) 191; *Québec Inc v Québec (Régie des permis d'alcool)*, [1996] 3 SCR 919, 140 DLR (4th) 577.

<sup>28</sup> *Aylward v McMaster University* (1991), 79 DLR (4th) 119 at para 31, 47 Admin LR 198 (Ont SCDC).

<sup>29</sup> *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307.

## Conclusion

Aside from fulfilling the duty to exercise their delegated powers in accordance with the law, why is fairness in the investigative process a concern for administrative bodies? For one, administrative bodies face a certain scope of liability for failing to meet the required standards, including regulatory negligence. In 2007, the Supreme Court of Canada recognized the tort of negligent investigation in *Hill v Hamilton*.<sup>30</sup> Participants in all stages of administrative functions may face liability.

The cases illustrate that administrative decision-making may be the result of a variety of various processes. Those processes will dictate whether it's possible to cure flaws in the investigate stage with subsequent steps. The more a subsequent stage incorporates a procedure with the broad content of procedural fairness resembling a trial *de novo*, the more likely a court will find the procedural errors in the investigation may be cured. However, as the cases demonstrate, some irregularities in investigations will not be cured, where the proximity to the decision doesn't allow for a meaningful way for the affected party to be heard before the decision-maker. To avoid injustice and a finding of procedural unfairness, it would be good practice for administrative bodies to ensure that a process is well handled from the outset by having well-trained persons in charge of the initial investigations. Further, administrative bodies should review and revise their own procedural framework, where possible, to ensure they do not systematically deprive an affected party of their rights to procedural fairness.

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<sup>30</sup> *Hill v Hamilton Wentworth Regional Police Services*, 2007 SCC 41, [2007] 3 SCR 129.